REPORTS

—OF THE—

SUPREME COURT

—OF—

CANADA.

REPORTED BY

GEORGE DUVAL, Advocate.

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1879.

JUDGES

OF THE

SUPREME COURT OF CANADA,

DURING THE PERIOD OF THESE REPORTS.

The Honorable Sir WILLIAM BUELL RICHARDS, Knight, C. J.

" " WILLIAM JOHNSTONE RITCHIE, C.J.

" " SAMUEL HENRY STRONG, J.

" " JEAN THOMAS TASCHEREAU, J.

" " TELESPHORE FOURNIER, J.

" " WILLIAM ALEXANDER HENRY, J.

" " HENRI ELZEAR TASCHEREAU, J.

" " JOHN WELLINGTON GWYNNE, J.

ATTORNEYS-GENERAL OF THE DOMINION OF CANADA:

The Honorable RODOLPHE LAFLAMME, Q. C.

" " JAMES MACDONALD, Q. C.

ERRATA.

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OF THE

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WILEY, WICKS AND WING.....APPELLANTS; 1877

AND June 7.*

ROBERT HALL SMITH .. ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Stoppage in transitu—Goods in bond.

The Appellants, merchants in *New York*, sold to *E. B. & Co.*, at *Toronto*, 250 barrels of currants on credit, and consigned the same in bond. A bill of lading thereof was duly received by *E. B. & Co.*, who paid the freight thereon and gave their acceptance for the price of the said goods, as well as for the cartage and American bonding charges. The goods, on arrival, were entered and bonded in the consignees' name, and placed in one of the Customs Bonded Warehouses subject to the payment of the duties. *E. B. & Co.* sold and delivered 150 barrels, and the remaining 100 barrels were bonded under 31 Vic., Ch. 6, D., in a portion of *E. B. & Co.'s* warehouse, partitioned off and used by the Customs authorities. Before the acceptances matured, and while the portion of goods remained in bond, *E. B. & Co.* became insolvent.

Held,—Affirming judgment of the Court of Error and Appeal, that the *transitus* was at an end, and that the Appellants had lost the right to stop the goods remaining in bond.

Howell v. *Alport* (1) and *Graham* v. *Smith* (2) over-ruled.

This was an Appeal from the judgment of the Court of Appeal for Ontario (3).

The action was brought by the Appellants (Plaintiffs) against the Respondent (Defendant), as assignee of *Bendelari & Co.*, by consent of parties, for the recovery of $1,497.88, and by such consent, and by order of *Robert G. Dalton*, Esq., dated the 26th day of May, 1876,

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

(1) 12 U. C. C. P. 375. (2) 27 U. C. C. P. 1.
(3) Reported 1 App. R. Ont. 179.

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according to the *Common Law Procedure Act*, the following case was stated for the opinion of the Court, without pleadings:

"1. The Plaintiffs, merchants in *New York*, sold to *E. Bendelari & Co.*, merchants of *Toronto*, 250 barrels of currants, on credit. On arrival of the said currants in *Toronto*, a bond was given to the Customs authorities for the same, a copy of which is hereto annexed marked "A," ordinary warehouse bond. Of the said quantity 150 barrels were sold and delivered by *E. Bendelari & Co.*, prior to the insolvency hereinafter mentioned, to a purchaser in *Hamilton*. The remainder thereof, being 100 barrels, were bonded under 31 Victoria, Cap. 6, in a portion of the warehouse of said *E. Bendelari & Co.*, for which they pay rent, partitioned off, and called and used by the Customs authorities as Her Majesty's Bonded Warehouse, No 4.

2. The said currants had been shipped by rail from *New York* on the 7th of January last, at the risk of *E. Bendelari & Co.*, and they arrived here on the 12th of said month of January. A bill of lading thereof was duly received by said *Bendelari & Co.*, *who paid the freight thereon*, and, in the usual course of business, gave their two several acceptances to the Plaintiffs (who are the unpaid holders thereof,) dated the 7th day of January last, and payable thirty days after date, for the price of the said 250 barrels of currants, and for the cartage and the American bonding charges, copies of which are hereto annexed, marked "B" and "C."

3. On the 31st of January last, the said *E. Bendelari & Co.*, held a meeting of their creditors, and at such meeting informed them of their inability to meet their engagements in full, and the creditors agreed and demanded that an assignment under the Insolvent Act of 1875 should be made by the said *E. Bendelari &*

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Co., but the Plaintiffs were neither present nor represented at said meeting.

4. On the 7th of February, the said *E. Bendelari & Co.*, in compliance with the said demand, made an assignment under the said Act to the Defendant, who accepted the same and became, and is now, the duly appointed assignee in insolvency of the said *E. Bendelari & Co.*

5. On the 8th day of March last, the Plaintiffs served on the Collector of Customs at *Toronto* a notice and demand, a copy of which is hereto annexed, marked "D."

6. On the 9th of March last, the Plaintiffs served on the said Collector two notices, copies of which are hereto annexed, marked "E" and "F," and at the same time tendered him the duties payable in respect of the said goods, and offered to indemnify him against the consequences of the delivery of the same to them.

7. The said Collector refused to consent to the deliv ery of the said goods to the Plaintiffs, on the ground that they had been claimed by the Defendant as assignee as aforesaid; and the papers hereto attached, marked from "G" to "I" inclusive, passed between the Collector and Bonding Waiter (*McCarthy*), and the Collector and the Locker (*McCaffrey*), relative to the said goods."

The bond, referred to in the first paragraph of the special case, was given by *E. Bendelari & Co.*, and contained the following recital:

"WHEREAS, the above bounden *E. Bendelari & Co.*, have lately imported into the Port of *Toronto*, in a ship or vessel called *The Great Western Railway*, from Suspension Bridge, the undermentioned goods, namely, 250 barrels currants, 2800, 73206, 17½, 490, £575 7s.

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3d., the duties in respect whereof have not been paid, and which goods we are desirous of disposing in Warehouse No. 4, at the Port of *Toronto*, under the provisions and regulations of "An Act respecting Customs, 31 Vic., Cap. 6."

The notice referred to in the fifth paragraph of the special case was as follows:

"TORONTO, March 7th, 1876.

"JAMES E. SMITH, ESQ.,
Collector of Customs, Toronto.

"SIR,—We hereby notify you not to deliver to the consignees Messrs. *E. Bendelari & Co.*, or their order, or to the assignee, one hundred barrels of currants, consigned by Messrs. *Wiley, Wicks & Wing*, of the city of *New York*, merchants, to Messrs. *E. Bendelari & Co.*, of this city, the said barrels being marked "G" or "G C," and now stored in Her Majesty's Bonded Warehouse, No. 4, in this city, the purchase money for the same not having been paid, and the said firm of *E. Bendelari & Co.* having become insolvent before the said barrels of currants had reached their hands; but you are to deliver the said barrels of currants to ourselves or to our order forthwith.

"Yours truly,

"O'DONOHOE & MEEK,
"*Attorney for Wiley, Wicks & Wing.*"

In the first instance, the case was heard before the Hon. Mr. Justice *Galt*, sitting for the full Court, who gave judgment in favor of the Respondent.

The case was reheard before the full Court of Queen's Bench, when judgment was given in favor of the said Appellants, reversing the judgment of the Hon. Mr. Justice *Galt*. From the judgment of the Court of Queen's Bench the said Respondent appealed to the

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Court of Appeal for *Ontario*. The Court of Appeal allowed the appeal with costs, reversing the judgment of the Court of Queen's Bench.

The point for decision was: "Whether, under the circumstances and facts aforesaid, the Appellants (Plaintiffs) were entitled to a delivery to them, as against the Respondent (Defendant), of the said 100 barrels of currants, as having been duly stopped *in transitu*."

Mr. *John O'Donohoe*, for Appellants:

The judgment of the Court of Appeal, now appealed from, upsets the unanimous decisions of the Courts of Queen's Bench and Common Pleas (1), and a long and distinguished line of authority, by which those decisions are supported. The goods, in this case, were taken by the forwarders to the bonded warehouse by a series of papers. The duties not having been paid, the insolvent never had actual or constructive possession of the goods and could not have put his hands on them. *Howell* v. *Alport* (2), it is admitted, is on all fours with this case. That judgment and the language of Lord *Campbell* (3), there quoted, ought not to be disturbed but upon very weighty authority and consideration.

The mere fact of giving the bond cannot affect the rights between vendor and vendee. The bond is given merely as security, and cannot affect the right of property. The bond made no difference as to the holding of the goods, as Government would hold them equally if no bond had been taken.

The last case as to stoppage *in transitu*, is *Exparte Watson* (4). In that case, although delivery by bills of lading, which give right of selling, had taken

(1) Graham v. Smith, 27 U. C. C. P. 1.

(2) 12 U. C. C. P. 375.

(3) In *Heinekey* v. *Earle*, 8 E. & B. 423.

(4) 36 L. T. N. S. 75.

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place, the right of stoppage was held to exist in favor of the unpaid vendor. Reference is made to *Northey* v. *Field* (1).

The law favors the reception of the goods at all times and places until they have actually come to the possession of the vendee, by himself or his agents. *Gibson* v. *Carruthers* (2); *Jackson* v. *Nicoll* (3).

The case first referred to by *Burton*, J., *Gibson* v. *Carruthers*, is in favor of rather than against the Appellant. There Lord *Abinger*, at p. 338, states the origin and principle upon which the right of stoppage rests; and at p. 345 says: "The law, which protects the vendor, in such a case, from the loss of his goods by delivery of them to an insolvent, may very properly be considered as proceeding on the principle that a contract to purchase goods by one who shortly afterwards becomes bankrupt or insolvent was a fraudulent contract and void as against the vendor, though not against the vendee, who could not set up his own fraud to avoid his contract."

If there is a doubt, natural justice would entitle Appellants to succeed. The goods arrived in *Toronto* on the 12th January, and it was on the 31st of the same month that *E. Bendelari & Co.*, held a meeting of their creditors. By our law, 32 and 33 Vict. ch. 16, sec. 92, a purchase made with intent to defraud is a criminal act. Under the circumstances, it cannot be said that the purchaser came into actual possession of the insolvent.

In favour of this right, *Porter*, Senator, in *Mottram* v. *Heyer* (4), says: "If this right of stoppage *in transitu* is one that deserves to be favored and encouraged; one that promotes justice and honesty; one

(1) 2 Esp. 613.
(2) 8 M. & W. 336.
(3) 5 Bing N. C. 508.
(4) 5 Denio (N. Y.) 637.

that prevents the property of the vendor from being unjustly and often fraudulently appropriated to the payment of a bankrupt's debts who fails before the goods reach him, I think we should not give a latitudinary construction to pretended or constructive acts of ownership, but that we should hold that the goods must come into the actual possession or under the control of the purchaser, his agent or servant, before the right to stoppage shall be at an end."

The above extract is quoted with approval by *Richards*, C.J., then Chief Justice of the Queen's Bench, in the case of *Lewis* v. *Mason* (1); and he himself in that case says: "I must confess it seems to me more equitable, where a person in failing circumstances has goods sent to him, in case of his making an assignment when the property has not actually come into his possession, that the unpaid vendor should be allowed to retain the goods until he is paid for them, rather than that they should be applied to pay the general debts that were contracted long before the sale of the goods intended to be retained."

The following authorities, which review a great number of decisions bearing upon this point, were relied upon by Appellant's counsel:—

Northey v. *Field* (2); *Burr* v. *Wilson* (3); *Howell* v. *Alport* (4); *Lewis* v. *Mason* (5); *Graham, et al.*, v. *Smith* (6); *Gibson* v. *Carruthers* (7); *Bolton* v. *Lancashire and Yorkshire Railway Company* (8); *Fraser* v. *Witt* (9); *Wilds, et al.*, v. *Smith* (10).

Mr. *W. A. Foster* for Respondent:—

The trouble in deciding this case was that the case

(1) 36 U. C. Q. B. 590.
(2) 2 Esp. 613.
(3) 13 U. C. Q. B. 478.
(4) 12 U. C. C. P. 375.
(5) 36 U. C. Q. B. 590.
(6) 27 U. C. C. P. 1.
(7) 8 M. & W. 336.
(8) L. R. 1 C. P. 431.
(9) L. R. 7 Eq. 64.
(10) 41 U. C. Q. B. 136.

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was not distinguishable from *Howell* v. *Alport* (1), as there was no ground upon which distinction could be drawn, and the authority of that case had to be impugned. Now the case of *Howell* v. *Alport* was decided on the authority of *Burr* v. *Wilson* (2), and that case was found to be very distinguishable from the present case.

In *Burr* v. *Wilson* (3), there was no entry or bonding by the purchaser. It was based on *Northey* v. *Field* (4), a *nisi prius* decision, which is distinguishable, as pointed out in *Haig* v. *Wallace* (5).

Prior to notice of stoppage, the transit of the goods in question had been determined, and their delivery become complete, the purchasers, *Bendelari & Co.*, having bonded them under 31 Victoria, cap. 6, sec. 55, in their own names, duly perfected the entry, and caused them to be deposited in their own bonded warehouse.

Mottram v. *Heyer* (6); *Kent's* Commentaries (7); *Strachan* v. *Knox and Company's Trustee* (8); *Bell's* Commentaries (9); *Shaw's* Digest (10); *Bell's* Illustrations of Principles (11); *Haig* v. *Wallace* (12); *Orr* v. *Murdoch* (13); *Park* v. *Byres* (14); *Lewis* v. *Mason* (15).

By 21 Vict. ch. 55, which contains the provisions for warehousing goods in bond, it is evident that the party who has bonded the goods has all the rights of a proprietor, and that they are entirely under his control.

In the case of *Lewis* v. *Mason* (16), the learned Chief

(1) 12 U. C. C. P. 375.
(2) 13 U. C. Q. B. 478.
(3) 13 U. C. Q. B. 478.
(4) 2 Esp. 613.
(5) 2 Hud. & Brooke, 671.
(6) 5 Denio (N. Y.) 629.
(7) Ed. of 1866, p. 547.
(8) 19 Faculty Coll. 253.
(9) 5th Ed., p. 173.
(10) Vol. I, p. 873.
(11) Vol. 1, p. 388.
(12) 2 Hud. & Brooke, 671.
(13) 2 Ir. C. L. R. N. S. 9.
(14) I Lowell (Mass.) 539.
(15) 36 U. C. Q. B. 590.
(16) 36 U. C. Q. B. 590.

Justice has reviewed the law on this subject, and, after referring to all the authorities, and particularly to the case of *Strachan* v. *Knox and Company's Trustee* (1), which is very similar to those now under consideration, says: "Here, however, there is an obvious distinction. The goods have never been really bonded in the name of the consignee. It may be doubted if the Crown had any remedy against him for the duties, the original bond taken in Montreal was the one, I apprehend, on which the Crown would be obliged to rely for the payment of the duties. But, under section 60 of the *Customs Act*, referred to, sub-sections 2 and 3, if the goods are transferred in the books of the Department to a purchaser, and stand there in his name, and he has given security for the payment of the duties, then, perhaps, the rule referred to in the judgment of Chancellor *Walworth*, and of the Scotch Court, might apply. But, as at present advised, it would not apply to this case, for the goods are not and were not bonded in the consignee's name."

In the present case the goods have left the possession of the carrier, and, as consignees of the goods, *Bendelari & Co.* bonded them in their own name, and *transitus* is at an end. To hold otherwise would be to lay down a rule that so long as the duties were unpaid the *transitus* continues.

As to stoppage *in transitu*, see *Lickbarrow* v. *Mason* (2); *Blackburn* on Sales (3); *Benjamin* on Sales (4); *Roger* v. *Comptoire d'Escompte de Paris* (5); *Cabeen* v. *Campbell* (6); *Covell* v. *Hitchcock* (7).

Mr. *J. O'Donohoe*, in reply.

(1) 19 Faculty Coll. 253.
(2) 1 Smith's L. C. 819.
(3) P. 224.
(4) 1st Am. Ed. 720.
(5) L. R. 2 P. C. 393;
(6) 30 Penn. 254.
(7) 23 Wend. 612.

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THE CHIEF JUSTICE:

I had occasion to consider the question of stoppage *in transitu* in cases discussed in the Court of Queen's Bench in *Ontario*, shortly before I left that Court, particularly in *Lewis* v. *Mason*, cited on the argument. I refered to many of the cases in the judgment which I delivered in that Court, and I have considered the cases reported, and referred to in the decision of *Lewis* v. *Mason*, and I do not think it necessary that we should delay giving judgment, as all my learned Brothers are agreed. I have also carefully read and considered the judgments of the learned Judges in the Court of Common Pleas of *Ontario*, in *Graham* v. *Smith*, and the learned Judges in this case in the Court of Appeals, and I have no doubt that the conclusion arrived at by the learned Judges in the Court of Appeals is correct. Further consideration has satisfied me, that when goods have reached their place of destination and have been delivered by the consignor to the consignee, who has bonded them in his own name, and who has sold and delivered part of the same consignment of goods, the *transitus* must be considered at an end. I have used the word delivered by the consignor to the consignee in the sense that the consignor has performed his contract by bringing the goods to their place of destination, and, as in this case, has been paid his freight, so that he has no lien on them.

RITCHIE, J. :—

The *transitus*, so far as the carrier was concerned, was clearly at an end, and though the consignee may not have had the actual corporal possession of the goods, I think entering the goods at the Custom House, warehousing them under the Revenue warehousing system,

and giving his bond for the duties, thereby satisfying all the requirements of the law, was an acceptance of the goods by the consignee, and equivalent to taking actual possession of them, and the warehouse became the warehouse of the vendee as between him and the vendor, and that, consequently, the *transitus*, so far as the vendor was concerned, was at an end, and his right of stoppage ceased to exist. I therefore concur with His Lordship the Chief Justice in dismissing the appeal with costs.

STRONG, J. :—

The possession by the Custom House authorities in this case was that of the vendee. The system of bonding is merely to facilitate trade, and numerous cases shew that goods in bond may be dealt with by a mere transfer of delivery orders. The Custom House officer undertook to hold, not for the vendor, but for the purchaser. The case is therefore precisely the same as if the goods had come into the actual possession of the vendee, and had then been deposited by him with a bailee. The Scotch case of *Strachan* v. *Knox and Company's Trustee* (1) is in point, and the doctrine laid down in that case is applicable to the present appeal.

TASCHEREAU and FOURNIER, J. J., concurred.

Appeal dismissed with costs.

Solicitor for Appellants: *John O'Donohoe.*

Solicitors for Respondent: *Foster, McWilliams & Clarke.*

(1) 1 *Bell's* Commentaries, 7th ed., 185; 19 Faculty Coll. 253.

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*June 8, 9.

WILLIAM KANDICK.....APPELLANT;

AND

ROBERT H. MORRISON.....RESPONDENT.

Appeal—Demurrer—Final judgment—Supreme and Exchequer Court Act.

An Order setting aside a demurrer as frivolous and irregular under the *Nova Scotia* Practice Act (1) is an Order on a matter of practice and not a final judgment appealable under the 11th section of the *Supreme and Exchequer Court Act.*

The Respondent, the Plaintiff in the Court below, recovered a judgment against the Defendant, administrator of the goods, etc., of *William Morrison*, deceased, in the Supreme Court of *Nova Scotia*, on the 25th June, 1875, for $164.28, together with $60.90 costs, upon which execution was issued to the Sheriff of *Halifax*, commanding him to make the above sums out of the goods and chattels in his county "which were of *William Morrison*, deceased, at the time of his death, in the hands of *William Kandick* to be administered, if the said *William Kandick* have so much thereof in his hands to be administered, or if not so much in his hands, then to make the costs out of the proper goods and chattels of said *William Kandick*."

To this writ the Sheriff made a return in the following words and figures only:—

"The within named *William Kandick* has no goods or chattels which were of the within named *William Morrison*, at the time of his death in his hands, to be administered in my bailiwick, whereof I can cause to be made the sum of $164.28 and interest, or any part

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(1) Revised Statutes of *Nova Scotia*, 4th Series, ch. 94.

thereof, but hath paid and satisfied the residue of this execution, being the costs within mentioned."

Upon this return being made, the Plaintiff in the Court below brought the present action, setting out in his writ and declaration the above facts, also setting out the above return of the Sheriff, as the return made to said writ. The first count of his declaration concluded as follows: "Whereby it appears that said Defendant hath eloigned, wasted and converted to his own use the goods and chattels of the said *William Morrison*, which came into his hands to be administered at the death of the said *William Morrison*."

To this count the Defendant obtained upon the usual affidavit and papers an order from Mr. Justice *McCully* for leave to plead and demur; and he demurred only.

The chief ground of demurrer was that while the action purports to be for a *devastavit*, yet no allegation of a *devastavit* is made in the declaration, the only reference to a *devastavit* being in the latter part of the count demurred to, commencing "Whereby, &c.," which does not contain any allegation of a *devastavit*, but merely alleges that it appears from the return of the Sheriff that a *devastavit* has been committed, whereas, as a fact, such does not appear at all from said return, or from any part of the declaration.

The Plaintiff, on September 18th, 1875, obtained a rule *nisi* to set aside the demurrer.

This rule, in Michaelmas Term 1876, was made absolute on the ground of the demurrer being frivolous and irregular.

In delivering the judgment of the Court, *McDonald* J. said: "Section 124 of our Practice Act (1) provides that duplicity, argumentativeness and uncertainty shall be no longer grounds of objection to a pleading unless

(1) Revised Statutes of *Nova Scotia*, 4th Series, ch. 94.

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such pleading be so framed as to embarrass the opposite party in which case application may be made to a judge to compel an amendment, and section 123 provides that except as therein provided no pleadings shall be deemed insufficient for any defect at the time of the passing thereof objectionable on special demurrer only. In this case all the grounds of demurrer stated and all the arguments used in support of them are based upon the assumed uncertainty or argumentativeness of the declaration, and I am clearly of opinion that the directions of the statute should have been followed by the defendant to compel an amendment before resorting to his demurrer if he felt at all embarrassed by the pleadings. * * * *

It is not simply that the demurrer is frivolous but that it is irregular as the defendant was precluded from demurring to this declaration, except under section 125 of the Practice Act after noncompliance on the part of the plaintiff with a judge's order to amend."

From the judgment of the Court making the rule absolute, to set aside the demurrer, the Defendant, now the Appellant, brought the present Appeal.

This appeal was inscribed *ex parte*, the Respondent not deeming it necessary to appear.

Mr. *W. H. Walker*, and Mr. *A. Ferguson* for Appellant:

The demurrer was not a frivolous demurrer, because it points out the want of a material allegation in the count demurred to, which allegation was the very gist of the whole action, and, consequently, the demurrer was not for a merely formal defect, but for a substantial defect in the frame of the action.

[THE CHIEF JUSTICE:—Under what section of the *Supreme and Exchequer Court Act* has the Court a right to review a decision in a matter of this kind ?]

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Under the 11th section the judgment in this case is final, as no other plea was made to the first count.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:

We are all of opinion that this appeal should be quashed. The rule setting aside the demurrer in this case was simply an order on a mere matter of practice and not a final judgment which is appealable under the *Supreme and Exchequer Court Act.* As the Respondent has not thought fit to appear, we cannot allow costs.

Appeal dismissed without costs.

Solicitors for Appellant: *Bligh & Longley.*

Solicitors for Respondent: *L. W. Desbarres.*

1877

June 9.

FRANCIS WEBBER ....APPELLANT;

AND

ROBERT H. COGSWELL.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Detinue, action of—Lien.

W. left with *C.* a chronometer for the purpose of its being repaired. *C.*, after taking chronometer to pieces, found detent spring much rusted, and sent it to *Boston* to have it made right. *W.* offered *C.* $25.50 for his work, but *C.* said he would not deliver the chronometer until full charges were paid, viz., $47.00. *W.* thereupon sued *C.* to recover possession and use of his chronometer. The evidence of the making of the contract

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was conflicting, and the learned Judge at the trial charged the jury, as a matter of law, that even if Defendant's version were correct as to the orders given him by Plaintiff in reference to putting the instrument in order, Plaintiff was entitled to recover, because such order or instructions would give no authority to send the instrument to a foreign country to have any portion of the work done; and that if it was so sent, no lien would exist in Defendant's favor for the value of the work without special instructions or Plaintiff's consent; that no such order or consent was shown in the evidence, and that consequently no lien existed.

The jury, however, found a verdict for Defendant, stating at the delivery of it, that they had adopted the Defendant's statement as to the authority and instructions that he had received from the Plaintiff, in regard to the instrument, when it was left with the Defendant.

Held,—Affirming the judgment of the Supreme Court of *Nova Scotia*, that the rule *nisi* for a new trial should be discharged, and, as no fault was found with the work done, the Respondent had a lien until he was paid his charges.

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, discharging a rule *nisi* for new trial in an action of trover and detinue, brought by the Appellant against the Respondent, to recover a chronometer.

Declaration: First count—That *Robert H. Cogswell* converted to his own use and wrongfully deprived the Plaintiff of the use and possession of the Plaintiff's goods, to wit: One chronometer.

There was also a second count in detinue, and the Plaintiff claimed $300 damages.

To this Defendant (Respondent) pleaded: 1st, As to first count, that he did not convert to his own use or wrongly deprive the Plaintiff (Appellant) of the use and possession of the said goods, as alleged.

2nd Plea: As to said count—Goods not the goods of Plaintiff.

3rd Plea: As to second count—Did not nor does he detain the said goods as alleged.

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4th Plea: As to second count—Goods not the Plaintiff's.

And for a fifth plea, the Defendant, as to said second count, said that at the time of the alleged detention, the Plaintiff delivered the said goods to the Defendant for the purpose of their being repaired for the Plaintiff by the Defendant in the way of his trade of a chronometer and watch maker and repairer, for reward to the Defendant, and the Defendant received and had the said goods for the purposes and on the terms aforesaid, and repaired the same and found the necessary materials in that behalf for the Plaintiff; and at the time of the alleged detention the Defendant had a lien upon the said goods for money payable to him by the Plaintiff as such reward as aforesaid, for repairing the said goods and finding the necessary materials in that behalf as aforesaid, and the said money being still due and unpaid, the Defendant detained and still detains the said goods for a lien and security for the said money, which is the alleged detention.

The Plaintiff joined issue upon the Defendant's first, second, third and fourth pleas; and, as to the Defendant's fifth plea, said that he did not deliver the said goods to the Defendant for the purpose of their being repaired, but only for the purpose of their being cleaned and polished and having a strap put thereon, and that before the detention in the declaration mentioned, the Plaintiff tendered and offered to pay to the Defendant twenty-five dollars and fifty cents in satisfaction and discharge of the alleged lien, such last mentioned sum being sufficient to satisfy and discharge the same, and the Plaintiff then requested the Defendant to deliver up to the Plaintiff the said goods, which the Defendant refused to do.

The evidence as to the making of the contract was

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conflicting. The Plaintiff stated that he placed his chronometer in the hands of the Defendant for the purpose of ascertaining the condition of the instrument, and left it with him in order that he might clean the box and put a new strap on. The Defendant, on the contrary, on being examined as a witness, said that the chronometer was left with him to be put in order and to polish up the brass bands. That on taking the chronometer to pieces, he found the detent spring very much rusted, and was obliged to send to *Boston* to have it made right.

The instrument was put into perfect order, and Defendant became responsible for its working well for a year. There was no fault found with the work, and the charge for the work done was not exorbitant.

The Plaintiff tendered $25.50 to Defendant and demanded the instrument, which Defendant refused to deliver.

The case was tried at *Halifax*, before Mr. Justice *Wilkins* and a jury, in November, 1875, and a verdict was rendered for Defendant.

On 1st December, 1875, a rule *nisi* was taken out to set aside verdict and for new trial.

On 13th December, 1876, a rule was made discharging the rule *nisi* with costs.

On 23rd December, 1876, an order was made allowing an appeal to the Supreme Court of *Canada*, and giving the Plaintiff until the 10th January, 1877, to file bond required for appeal.

The bond was allowed on the 6th January, A. D., 1877.

The appeal was from the judgment of the Court discharging the rule *nisi* to set aside verdict and for new trial, and the question to be determined was, whether the Respondent, having sent the chronometer to the

United States and had a part of the repairs done there by another person, had a lien on the chronometer for that work.

Mr. *Cockburn*, Q.C. for Appellant:—

The Defendant's fifth or special plea was the only one that could avail him on the trial of this cause: Sec. 152, cap 94, *Revised Statutes of Nova Scotia.*

The Defendant had no lien on the instrument for what was charged him in *Boston*, because, according to his own statement, the instrument was delivered to Defendant to be repaired by him in the way of his trade of a chronometer and watchmaker and repairer, and for no other purpose, and Defendant did not make the necessary repairs and confessed his inability to make them. A workman has a lien only for the work done, in the way of his trade, by himself and the workmen in his employ (1).

[RITCHIE, J: Was not the question here, whether the Defendant had a lien for work done by another than himself, who lives out of his shop ?]

It is a question of contract. There was no contract express or implied, that Defendant should employ the foreign workman, and his employment by Defendant was purely gratuitous and voluntary. Moreover, if such an important part of the instrument as the detent spring required to be repaired, increasing thereby the price one-third, this surely could not be done without first having notified the owner. The Defendant gave himself out as a skilled artisan.

[RITCHIE, J: Has the work been properly done, if so, why should you not pay for it ?]

The contract was with the Defendant, and that con-

(1) *Roscoe*, N. P. Ev. 13th Ed. pp. 958 to 961.

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tract with him alone is to be looked at. See *Ess* v. *Truscott* (1).

The learned counsel then cited the following authorities :—*Story* on Bailments (2) ; *Robson* v. *Drummond* (3) ; *Addison* on Contracts (4) ; *Harmer* v. *Cornelius* (5).

Mr. *W. H. Walker* and Mr. *A. Ferguson* for Respondent, were not called upon.

The judgment of the Court was delivered by
THE CHIEF JUSTICE :—

We do not think it necessary to call on the Respondent. There can be no doubt about this case, and the reasons given by the learned Judges of the Court below for the discharging of the rule *nisi* are sufficient. No fault was found with the work done, and the charge for it was not exorbitant.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for Appellant : *Cockburn & Wright.*

Solicitors for Respondent : *Walker, McIntyre & Ferguson.*

(1) 2 M. & W. 385.
(2) P. 366, 8th Ed.
(3) 2 B. & A. 308.
(4) P. 398, 6th Ed.
(5) 28 L. J. C. P. N. S. 85.

THE BOWMANVILLE MACHINE COMPANY ..... } APPELLANTS; 1877 June 9.*

AND

JAMES DEMPSTER ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Goods sold by Agent as Principal.—Right of set off.

The *B. M. Co.* (Plaintiffs) sued *D.* (Defendant) for goods sold and delivered. *D.* pleaded that the goods were sold to him by one *A.*, whom the Defendant believed to be the Principal, and that before the Defendant knew that the Plaintiffs were the Principals, the said *A.* became indebted to the Defendant in a sum of $400, which he, the Defendant, was willing to set-off against the Plaintiff's claim. The Jury found a verdict for the Defendant on this plea:—

Held,—That the Defendant, having purchased the goods without notice of *A's* being an agent, and *A.* having sold them in his own name, could set off the debt due to him from *A.* personally, in the same way as if *A.* had been the Principal; and that the verdict should be sustained.

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, discharging the rule *nisi* taken out on the part of the Appellants to set aside the verdict and obtain a new trial.

The action was brought for goods sold and delivered, work and materials, money lent, laid out and out and expended, for money received, money due on account stated, and for interest on moneys of the Plaintiffs held by the Defendants.

The pleas were—

1st. Never indebted;

2nd. Payment before action;

*PRESENT:—Richards, C. J., and Ritchie, Strong, Taschereau and Fournier, J. J.

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3rd. Special plea of set-off that the goods so sold and delivered, and the work and materials, and moneys paid, &c., were sold to Defendant, and provided and paid by one *Alexander B. Almour*; that the said *Almour* sold the said goods, &c., &c., in his own name, and as his own goods, &c., &c., with the consent of the Plaintiffs, and that the Defendant believed the said *Almour* to be the Principal, and did not know the Plaintiffs in the matter, and that before the Defendant knew that the Plaintiffs were the Principals, the said *Almour* became indebted to the Defendant in an amount greater than the Plaintiff's claim, upon his (*Almour's*) promissory note then overdue, and for money lent and advanced, and $400 of which moneys, he, the Defendant, was willing to set off against the Plaintiffs' claim.

The case came on for trial at *Halifax* on the 31st March, 1876.

There was conflicting evidence as to whom the goods were purchased from. The Respondent positively stated that he bought the goods from *Almour*, not knowing him to be Appellants' agent, and that he would not have bought them if *Almour* had not been indebted to him. This statement was disputed and contradicted by *Almour* and the witness *Cutlip*, his clerk. The following order taken from the order book and admitted to have been signed by the Defendant was put in evidence in support of their version of the contract:

"*Halifax, N. S.*, 13th March, 1875

ORDERED FOR BOWMANVILLE MACHINE COMPANY.

From *James Dempster*:

Terms—$400 cash on arrival *Halifax*, balance 4 months."

A red line here divides these entries from the list of articles ordered, and Defendant's signature is appended. The Respondent positively denied that the words above

the red line, viz.: "Bowmanville Machine Company—*James Dempster*—$400 cash on arrival *Halifax*, balance 4 months" were present when he signed the order. *Almour* refused to produce his books at the trial, which, as testified to by his clerk, would have shewn an entry of the machine. The Appellants were not examined as to the nature of *Almour's* agency.

The Judge in his charge to the Jury amongst other things, stated that if they thought that all the writing above the red lines was inserted in the order after the Defendant signed it, then Defendant might very well consider it as an order to *Almour*, and that he was dealing with him as a Principal and not as an agent of the Plaintiffs, a fact which was not, but might and ought to have been, disclosed at the time, and, in that case, he thought the debt claimed to be due to Defendant by *Almour* might be set off against the debt claimed by Plaintiffs from Defendant in this suit.

They found a verdict for Defendant for $75.

On the 12th day of April, A. D. 1876, a rule *nisi* was taken out on the part of the Appellants to set aside the verdict, and to obtain a new trial on the grounds, amongst others:—

1. Because the verdict was against law and evidence.
2. Because the verdict was against the weight of evidence.
3. Because the verdict was against the direction of the Judge who tried the case.
4. For excessive damages.

On the 11th September following, the Defendant entered a *remittitur* in favor of the Plaintiffs, as to the the amount of the verdict rendered in his favour, viz.: the sum of $75.00.

On the fifth day of February, A.D. 1877, an order was made by the Court discharging the rule *nisi*, granted to set aside the verdict, and for a new trial as above stated.

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Mr. *A. F. McIntyre* for Appellant :—

To entitle the Respondent to set off a debt due him from *Almour* against the claim of the Appellants, he should have averred and *proved* that the sale was made by a person whom the Appellant had intrusted with the possession of the goods. *Almour* sold them as his own goods, in his own name, as Principal, with the authority of the Plaintiff. The Respondent dealt with him as, and believed him to be, the Principal in the transaction, and before the Defendant was undeceived in that respect the set-off accrued.

And there is a total absence of evidence to establish the fact that at the time of the sale *Almour* had in any wise the possession of the goods.

Fish v. *Kempton* (1) ; *George* v. *Claggitt* (2) ; *Hall* v. *Hamilton* (3).

In the case of *Semenza and others* v. *Brinsley* (4), the plea was held bad, for not averring that the Defendants did not know and had not the means of knowing that *Moll* at the time he sold the goods to them was a mere agent. In this case *Almour* was not entrusted with the possession of the goods.

[RITCHIE, J. :—*Exparte Dixon* (5) is the latest case.]

A factor generally sells in his own name, but a broker cannot sell in his own name. The order which Respondent signed proves that *Almour* was acting for others.

The Appellants also contend that the Respondent could not cure a verdict bad for excess save on motion and by order of the Court, and that it is not shewn that the *remittitur* was entered by virtue of any order of the Court. *Usher* v. *Dansey* (6).

(1) 7 C. B. 694.
(2) 2 *Smith's* L.C., 6th Am. ed., 198-9.
(3) 24 U. C. C. P. 305.
(4) 18 C. B. N. S. 467.
(5) L. R. 4 Ch. D. 133.
(6) 4 M. & S. 94.

Mr. *Cockburn*, Q. C., for Respondent, was not called upon.

The judgment of the Court was delivered by THE CHIEF JUSTICE:

We are all of opinion that the judgment of the Court below is right. From the evidence, so far as it goes, the jury, it is clear, decided on all the facts. There is no evidence of any sort, or affidavit, to show that the Appellants were prejudiced. They rested their case on the evidence adduced, and we think the reasons given by the Court below on discharging the rule are sufficient to sustain the verdict, and that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for Appellants: *Walker*, *McIntyre* and *Ferguson.*

Solicitor for Respondent: *W. F. McCoy.*

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WILLIAM DARLING AND OTHERS.....APPELLANTS;

AND

ROBERT BROWN AND OTHERS.....RESPONDENTS.

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

Executors, liability of—Débat de compte — Interest—Prescription.

Respondents, representing one of the universal residuary legatees of one *W. D. Sen.*, sued Appellants as joint testamentary executors of the said *W. D. Sen.*, to render an account and pay over the balance of the estate in their hands.

On a *débat de compte* the total value of the estate was proved to be worth $44,525.65. Of this amount Appellants in their said capacity, as appeared by an account rendered by them, took possession of $14,510.33. The balance of $30,015.33 appeared by the books of *W. D. & Co.* to be due to the estate of *W. D. Sen.*, by *W. D. Jun.*, one of the executors, and to have never come into the possession of the other executors.

Held,—That under Art. 913, *Civil Code L. C.*, Appellants were jointly and severally responsible only for the amount they took possession of in their joint capacity, and, therefore, that *W. D. Jun.* alone was responsible for the amount of such balance. [*Taschereau*, J. dissenting].

2. That testamentary executors cannot legally be charged with more than *six per cent.* interest on the moneys collected by them, after their account has been demanded, in the absence of proof that they realized a greater rate of interest by the use of such moneys.

3. That entries in merchants books, regularly kept and unchanged during a term of years, with an annual rendering of accounts conforming to such entries to creditors, make proof against such merchants, particularly after the death of the creditors.

4. That an action against executors for an account of their administration, and of the moneys they have received, or ought to have received in their said capacity, cannot be prescribed otherwise than by the long prescription of 30 years.

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

THE Judgment appealed from was rendered by the Court of Queen's Bench of the Province of *Quebec*, (Appeal side) on the 18th of December, 1876, and confirmed the Judgment rendered by the Superior Court at *Montreal* (*Mackay*, J.) on the 22nd day of January, 1876.

The Plaintiffs, as the executors of the will of the late *George Templeton*, sued the Defendants, executors of the late *William Darling*, for an account, and for $6,360.80, the amount of the share (one-seventh) in the succession of the late *William Darling* that belonged to the late *Isabella Darling*, *Mrs. Templeton*. She died in 1871, leaving her share to her husband. He died in 1875, leaving all to the Plaintiffs in trust.

William, *Thomas* and *Henry Darling* produced an account, and by this account the value of the estate was reduced from $44,525.65 to about $2,017.18.

The Plaintiffs thereupon contested the account produced and filed in the case, and by their *débat de compte* they alleged that, "the Defendants wholly neglected to make any legal inventory of the estate and succession of the said testator, *William Darling*, and suffered the Defendants *William Darling* and *Thomas Darling* alone to manage and administer such estate, and to take possession of all the property of said estate, and of all books and papers connected therewith, and especially of all the said accounts current rendered yearly by *Wm. Darling & Co.*, since the year 1862, and did, to all intents and purposes, constitute the said Defendants, *William Darling* and *Thomas Darling*, their agents and attorneys, with respect to all matters connected with said estate and succession, and the management and administration thereof, by reason whereof they, the said Defendants, became, and were, and are jointly and severally, responsible and liable to the said

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several universal legatees of the said testator, *William Darling*, in the Plaintiff's declaration in this cause fyled mentioned, and to the said Plaintiffs, in their aforesaid capacity, for their several and respective shares in the aforesaid estate and succession."

That *Wm. Darling & Co.* rendered yearly accounts to the late *William Darling Sen.*, during seventeen years before his death, by all of which they admitted to owe him, as the Plaintiffs claim, the statement for the term of the last year of the life of the testator showing $44,525.64 due to his estate.

There was an answer to the *débat de compte*, and a demurrer to the conclusions in the said *débat de compte* for, among others, the following reasons :—

First,—Because said allegations refer exclusively to questions between the Defendant *William Darling* and the firm of *Wm. Darling & Co.*, therein mentioned as composed of the Defendants, *William Darling* and *Thomas Darling* and the late *William Darling Sen.*, and as to whether said *William Darling* and *Wm. Darling & Co.*, were or were not the debtors of the late *William Darling Sen.*, and not whether the Defendants, as executors, were accountable in the premises ;

Second,—Because it is not shown by said allegations, or either of them, that the Defendants, as executors, recovered, or became possessed of, or accountable for anything whatever which may have been in the hands of the said *William Darling* or *Wm. Darling & Co.*, due to the said late *William Darling Sen.*

Third,—Because it is not shown that either the said *William Darling* or *Wm. Darling & Co.* owed any debt to the said late *William Darling Sen.*, which they, or either of them, had acknowledged to owe, or had undertaken to pay within the time allowed by

law for the recovery of the like indebtedness; or that the Defendants were bound and liable to have proceeded at law for the recovery of such indebtedness, and had failed in their duty in that behalf.

Besides the general issue Appellants pleaded that the ultimate result of the transactions between *William Darling Sen.* and *William Darling Jun.*, made *William Darling Sen.* not a creditor but a debtor.

That if *William Darling Jun.* had been a debtor, which was denied, he never paid nor would pay the executors, and they never did nor could recover anything from him. Besides, being a commercial matter, the claim was barred and prescribed by the lapse of more than five years, and also more than six years before action brought.

They also denied the alleged agency for the other executors, and denied any negligence as to inventory, which they say was made in the only manner *George Templeton* or his wife would permit.

The case came up for trial before His Honor Mr. Justice *Mackay* on the 3rd December, 1875, and on the 22nd February, 1876, the Superior Court rendered judgment in favor of Respondents, maintaining the *débat de compte* fyled by the Respondents, and condemning the Appellants, jointly and severally, to pay to the Respondents the sum of $6,360.80 currency, besides interest at seven per cent. This judgment was confirmed by the Court of Queen's Bench of the Province of *Quebec* (appeal side).

On this appeal the principal questions to be determined were:

1st. Whether, at the time of the institution of this action, the Appellant, *William Darling* individually, or as having carried on business under the firm of *Wm. Darling & Co.*, or as successor to the firm of

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Wm. Darling & Co., composed of said Appellants, *William Darling*, and *Thomas Davidson*, owed the estate of the said late *William Darling Sen.* any, and if any, what sum.

2nd. Whether the Appellants were liable in the present action to account for more than they had actually recovered and got into their possession.

3rd. Whether the Respondents were entitled to raise the question of the indebtedness of the said firms of *Wm. Darling & Co.*, or of either of them, or of the Appellant *William Darling*, or of the Appellants *William Darling* and *Thomas Darling*, to the said late *William Darling Sen.*

4th. Whether, if liable, the Appellants should have been condemned jointly and severally, and whether *Adam Darling* should not have been included in the judgment, or each condemned only for what he received, or for his share of what came into their united possession.

5th. Whether any, and if any, what part of the amount claimed by said *débat de compte* was barred and prescribed, either by the prescription of five years or by that of six years.

6th. Whether the judgment against the executors for seven per cent. interest from the date of the decease of *William Darling Sen.* is well founded and can be sustained.

From the evidence it appears that *Adam Darling*, one of the Plaintiffs, wrote a letter to the Respondents on the 11th August, 1871, asking them to render an account. It was only on the 1st day of May, 1875, that the Appellants, after being sued, rendered their account, and by that account they admit their joint indebtedness as executors to the estate of *William Darling Sen.* in a sum of $15,938.01. On a *débat de compte*, it was

proved by the books of *Wm. Darling & Co.*, that *William Darling Jun.* was indebted to the estate of his father in a further sum of $30,015.33. This indebtedness arose in the following manner: In 1853 *William Darling Jun.*, purchased for £4,000 the stock in trade of *David Darling*, and having valued the goods, he placed the value over and above what he paid for them, viz.: £2,837 1s. 11d. to his father's credit, he being interested in the estate of *David Darling*, representing *D. & C. Darling*. From that time until after the death of *William Darling Sen.* in 1871, *William Darling Jun.* continued this credit, paid interest on it, and rendered an annual statement to *William Darling Sen.*

It was also proved that $6,360.80, the amount claimed by Respondents, was paid to other legatees by *William Darling Jun.* as their share in the estate (one seventh).

Mr. *Cross*, Q.C., for Appellants:—

Executors are not, in the Province of *Quebec*, as under other systems, representatives of the deceased generally. They have only such special powers as are given them by the law, or by the testament; they are like mere attorneys, with the powers, and the special powers only, conferred on them and no other.

Furgole, Traité des Testaments (1); *Toullier* (2); *Nouveau Furgole* (3).

Testamentary executors *for the purpose of the execution of the will, are seized as legal depostiaries.* When his duties are at an end, the testamentary executor must render an account to the heir or legatee who receives the succession, *and pay him over the balance remaining in his hands.—Civil Code, L.C.*, Art. 918. He pays the debts and discharges the particular legacies, with the consent of the heir or of the legatee who

(1) T. 4, Cap. 10, sec. 4, Nos. 12 & 16. (2) T. 5, Nos. 577 & 578.
(3) T. 2, p. 469.

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receives the succession ; or, after calling in such heir or legatee, with the authorization of the Court. In the case of insufficiency of monies for the execution of the will, he may, with the same consent or with the same authorization, sell movable property of the succession to the amount required. The heir or legatee may, however, prevent such sale by tendering the amount required for the execution of the will. The testamentary executor may receive the debts due, and may sue for their recovery.—*Civil Code, L. C.*, Art 919.

His seizin is not a true possession, but a mere detention for the heir or universal legatee, who can cause it to cease at any time, by furnishing the necessary funds to pay the particular legacies. *Demolombe* (1) ; *Bourjon* (2) ; *Coutume de Paris* (3) ; *Toullier* (4) ; *Civil Code, L. C.* (5).

Before the Superior Court the question tried was whether *Wm. Darling & Co* were debtors of *William Darling Sen.* Now, if *William Darling Jun.* is indebted to the estate, and if he be at the same time an executor, he is liable, the proper course to recover would be on an issue raised with *William Darling Jun.* alone.

[HENRY, J. : Why did he pay three legatees and refuse to pay Respondents ?]

Any money paid to the other universal legatees proceeded from *William Darling Jun.*, who had a right to pay it, without involving the executors in a liability.

No executors account was at any time made, save the one produced in this cause. There was no obligation on their part to collect debts. All they were required to do was to pay debts.

(1) Don. t. 5, No. 57.
(2) T. 2, Partie 5, Ed'n. 1747, C. 11, sec. 2, Nos. 14, 15, 19 & 20.
(3) Art. 297.
(4) T. 5, Nos. 581, 582 & 585.
(5) Art. 919, 1027.

See *Furgole* (1); *Sirey*, Recueil Gen. (2); *Coutume de Paris par Ferriere* (3); *Bourjon* (4); *Nouv. Deniz* (5); *Toullier* (6); *Ricard*, Don. (7).

The claim passed to the universal legatees, in whom it became vested in undivided shares; there is nothing to prevent the representatives of *Isabella Darling* from suing the universal legatees for her share of this debt.

Legatees are, by the death of the testator or by the event which gives effect to the legacy, seized of the right to the thing bequeathed, in the condition in which it then is, together with all its necessary dependencies, and the right to obtain payment, and to prosecute all claims resulting from the legacy, without being obliged to obtain legal delivery.—*Civil Code, L. C.*, Art. 891.

Now, as a matter of accounts between *William Darling Sen.*, and the different firms of *Wm. Darling & Co.* the only firm whose accounts shewed a balance in favour of *William Darling Sen.* was that in which *William Darling Jun.* was the sole partner, terminating 31st December, 1864, at which time the true balance was $1,660.94.

This being a commercial account, all remedy against *William Darling Jun.* for its recovery is prescribed before the acceptance of the executors.

Moreover, the judgment complained of condemns, jointly and severally, the executors who defended themselves, and rendered an account; and exonerates the executor *Adam Darling*, who allowed the case to

(1) T. 4, c. 10, sec. 4, Nos. 34 & 36.

(2) T. 2, *Verbo* Ex. Test., No. 37.

(3) T. 4, p. 284.

(4) Test. T. 2, C. 11, sec. 4, Nos. 34 & 35, p. 378.

(5) *Verbo* Ex. Test., p. 217 No. 6, p. 227 No. 12, p. 228 No. 16, and p. 230 No. 8.

(6) T. 5, No. 591

(7) T. 1; Partie 2me., C 2, p. 409, Nos. 84 & 81, and p. 410, No. 84.

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go by default, and rendered no accounts, although he admits, in his evidence, that he joined in the administration, and strains his statements to make them as prejudicial as possible to the executors.

Henry William lived at *Toronto*, and actually took no part in the administration; he is condemned, jointly and severally, with the other Appellants. As one who acted and was present is not condemned, this cannot be according to law or justice, and should be reformed in accordance with the distinct language of the *Code*.

On this point reference was made to the following authorities:—

Bourjon (1); *Repertoire de Merlin* (2); Art. 913 and 2230 *Civil Code, L. C.*, and Art. 1033 of *Code Nap.*

There remains for discussion the question of interest. Appellants are condemned to pay $6,360.30, with interest at 7 per cent. from the 19th January, 1871. It is difficult to conceive how executors can, in any case, render themselves liable for interest at the rate of 7 per cent.; if it be on the convention, or course of dealing of *Wm. Darling & Co.*, it clearly shows that it is still an affair between *Wm. Darling & Co.* and the estate; that the amount has not come into the hands of the executors, but is in the hands of *Wm. Darling & Co.*; and that the condemnation in this case, is that of *Wm. Darling & Co.* through the executors, or of the executors in the place of *Wm. Darling & Co.*. Executors are only liable in case of default for interest at the legal rate, and it does not accrue until judicial demand or formal default made (3). It is not their right even to make a convention for more, and there is no question of that here.

Mr. *Edward Martin*, Q. C., for Appellants, followed:

There is also evidence in support of Appellant's con-

(1) T. 2, Part. 5, C. 11, sec. 4, No. 39. (2) *Vo.* Ex. Test. T. 4, sec. 9, p. 817.
(3) *Civil Code L. C.*, Art. 871.

tention that there were errors in the accounts of *William Darling Sen.*, and the various firms of *Wm. Darling & Co.* of *Montreal*. *William Darling Jun.* never got any value for an item of £2,837 1s. 11d ; but estimating that he would be able to make a profit to that extent out of the stock in trade of the insolvent estate of *D. & C. Darling*, which he had purchased from *David Darling*, and his father being at the time insolvent and in distressed circumstances, this credit was meant as a provision for him in the meantime, subject, as he, *William Darling Jun.* considered, to his own control,and conditional always on a profit being made out of the goods, for which he paid full value ; viz., 13s. 4d. in the £ on the original cost and charges ; the difference between his purchase and the original cost and charges formed the basis of the estimated profit that might be obtained.

Mr. *Strachan Bethune*, Q.C., for Respondents :

The only points which need be discussed before this Court are, whether Respondents were entitled to 7 per cent. interest ; whether the executors ought to be jointly severally condemned ; and whether the debt was prescribed.

There can be no doubt that the executors, by the will, were directed to pay to each of *William Darling Sen.'s* universal legatees and devisees their respective shares in the estate. But as Appellants suffered *William Darling Jun.* and *Thomas Darling* alone to manage and administer the estate, and did, to all intents and purposes, constitute them their agents and attorneys, Respondents, I contend, are entitled to recover against Appellants, jointly and severally, the amount which has been provedby the books of *Wm. Darling & Co.* and by the yearly accountings, statements and acts of *Wm. Darling & Co.* to be in their possession, as forming part of the estate of the

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testator. *Pothier* on Obligations (1); *Dantil* de la Preuve (2); *Dixon* on Evidence (3).

As to *Adam Darling* (also a Defendant in the cause), all I have to say is, there is no issue between Respondents and him; the litigation which is now before the Court is upon a *débat de compte* with which *Adam Darling* had nothing to do.

Respondents are entitled to the same amount and to the same interest as the other legatees, *H. W. Darling*, *Mrs. Grace Lyell*, *Adam Darling*, *Thomas Darling*, and *William*. These legatees have each received from *William Darling Jun.* the sum now claimed by Respondents with interest at seven per cent.

There can be no question as to what prescription should effect this debt. The Court below was unanimous that the only prescription applicable is that of 30 years. Supposing even the debt were of a commercial nature, there is no clearer principle of law than that yearly payments of interest (as were made in this case) would interrupt the prescription: *Dunod* de la Prescription (4).

The only point on which there can be any doubt is whether *Henry William* and *Thomas Darling* should be condemned, as well as *William Darling Jun.* Respondents based their claim on the fact that these two left the moneys in the hands of *William Darling Jun.* and are therefore responsible for his indebtedness. However, Respondent would be satisfied with a judgment condemning *William Darling Jun.* alone.

Mr. *Cross*, Q. C., in reply.

TASCHEREAU, J.:—

This is an appeal by *William Darling*, *Thomas Dar-*

(1) No. 757.
(2) P. 551. Nos. 26, 27.
(3) Sec. 1183.
(4) Nos. 171, 172.

ling and *Henry Darling*, under their qualities as executors of the last will and testament of the late *William Darling Sen.*, from a judgment condemning them jointly and severally to pay to the Respondents, in their qualities of executors and trustees under the last will and testament and codicils of the late *George Templeton*, the sum of $6,360.80, balance of their gestion and administration, as being the share of said *George Templeton* as representative of his late wife *Isabella Darling*, who was one of the seven universal legatees of the late *William Darling Sen.* The Appellants rendered an account, which was contested by the Respondents, who succeeded in the Superior Court, and in the Court of Queen's Bench, at *Montreal*, the condemnation being for $6,360.80, with interest at 7 per cent. from 19th January, 1871. The principal difficulty in the case was as to the debt of $30,015.83, which, on the first day of January, 1871, appeared to have been due by the firm of *Wm. Darling & Co.* to the said late *William Darling Sen.*, and which was in the hands of the said *William Darling Jun.* He, *William Darling Jun.*, denied the debt and pleaded prescription of five and six years against the same. It was satisfactorily proved that all accounts between the late *William Darling Sen.* and *Wm. Darling & Co.* were settled yearly for seventeen years up to the 1st January, 1871, and that there was a balance of account at this last date, of $30,028.85, with the interest thereon, in favour of *William Darling Sen.* But it is contended by the Appellants, that though this balance appears in the books of *Wm. Darling & Co.* still this was not sufficient acknowledgment of the debt, inasmuch as this entry was not signed by the parties thereto, and besides that this debt was prescribed by five and six years. I differ from these pretentions of the Appellants, for it is admitted that entries in a trader's books made regularly are a complete proof against

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him, unless an error has been proved; no such error has been proved, and I say that it would be a singular circumstance if, after 17 years continuous acknowledgment, an error had been discovered for the first time by the debtor, and the amount appearing to be due only repudiated after the death of the creditor. Moreover, the fact that the Appellants have settled with the other legatees of *William Darling Sen.* on the same basis affords a very strong presumption in favour of the legitimate existence of the debt.

The Appellants, I have said, contend also that this claim is prescribed by either five or six years. This prescription cannot apply, as the transaction was not of a commercial nature, the loan by a non-trader to a trader not being a commercial transaction and not subject to the limitation of six years, as decided in the case of *Whishaw* v. *Gilmour* (1). The following authorities also favour of this decision; viz., *Pardessus* (2); *Goujet et Merger* (3), and many others. Even admitting for the sake of argument that the claim in question could be regarded as one of a commercial nature, chap. 67 of the *Consolidated Statutes of Lower Canada*, on which the Appellants rely to maintain their six years' prescription, does not apply, inasmuch as the entries in the books of *Wm. Darling & Co.* up to the 30th September, 1871, take the case out of the statute of limitations. The prescription of five years being a new prescription introduced by the *Civil Code* cannot be invoked, as under article 2,270 of the same *Code* prescriptions begun before the promulgation of that *Code* must be governed by the former law. Moreover, the Appellants, since the opening of the succession in January, 1871, came into possession of the moneys, not as contracting parties,

(1) 15 L. C. R. 177. (2) Droit Commercial T. 1, pp. 5 to 89.
(3) 1 Dict de Drt. Com., *Vo.* Acte de Commerce, p. 24, 25.

but as trustees or executors, and in such quality they could not prescribe the claim by such short prescription. Their relations with the estate of *William Darling Jun.* were not of a commercial nature, and, therefore, the only prescription which could apply would be that of thirty years, which this case has not yet reached.

The most serious objection of the Appellants is that they were jointly and severally condemned to pay the sum in question—that there is error so far as to a joint and several condemnation. The matter is regulated by article 913 of the *Civil Code L. C.*, which is in these words:

> Executors exercising joint powers are jointly and severally bound to render one and the same account, unless the testator has divided their functions and each of them has kept within the scope assigned to him. They are responsible only each for his share for the property of which they took possession in their joint capacity, and for the payment of the balance due, saving the distinct liability of such as are authorized to act separately.

There may be some ambiguity in that article but it seems to us that though the article 913 of the *Civil Code* obliges the executors to render jointly and severally an account of their gestion and administration, it does not condemn them to pay the balance jointly and severally, but merely make each of them responsible for his share of the property of which they have taken possession in their joint quality. This is in conformity also with article 1105 of the same *Code*, which says that in purely civil cases an obligation is not presumed to be joint and several, it requires express terms to make it such, but in commercial cases the joint and several liability is presumed.

We are all of opinion that there is error:

1. In the part of the judgment appealed from condemning the Defendants jointly and severally.

2. In relation to the rate of interest at 7 per cent

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We do not see our way clearly enough to say that the executors have undertaken to pay the 7 per cent. It should be reduced to 6 per cent.

3. That the date from which the interest is allowed by the judgment to run, should be altered from the 19th January, 1871, to 11th August, 1871, when the executors were *mis en demeure* to render an account.

The judgment will therefore be confirmed, with costs, save and except the above modifications.

As to that part of the judgment now being about to be pronounced, which declares that the three Appellants, *William Darling*, *Thomas Darling* and *Henry William Darling* shall be condemned each in different sums of money, I must here enter my dissent. I think that this is against, not only the spirit, but the letter of the 913th article of the *Civil Code*, which says the executors are each responsible only for his share of the balance of the account, saving the distinct responsibility of those authorized to act separately (which is not the case in this instance.) For I say they took the whole estate under their common charge, allowed *William Darling Jun.* who was a debtor of the estate, to keep a large sum of money in his hands, and though they had, under article 919 of the *Civil Code*, the right to sue him for that sum, they allow him to keep it, and this contrary to that article. In this way they had a certain discretion to exercise, and if, with the view of favouring their brother *William* they did not force him to settle that part of the assets of the estate, which the law invests them with as executors, they become answerable for the consequences of a possible loss for their allowing their brother *William* to keep that sum ; in fact, he became their joint depositary for that amount. It is with the view of avoiding a loss somewhere that the *Code* says that an executor will be answerable for his

share of the balance of account. With the distinction made by the judgment of this Court, should *William Darling Jun.* become insolvent, a great portion of the assets would be lost, inasmuch as the two others are only condemned to pay comparatively a very small sum. As I interpret the law, each executor, unless his duty is distinctly pointed out by the will, is bound to see that his co-executors do their duty, and though he may rely on them for the administration, he is still answerable for his share in common with the other executors. It would be, in my opinion, opening the way to fraud, and endangering the condition of children and heirs in general to allow the executors to claim an exemption of their joint liability for the balance due in their administration. I, therefore, differ from that part of the judgment to be rendered.

FOURNIER, J. :—

Poursuivis en reddition de compte comme exécuteurs du testament de feu *William Darling* leur père, les Appelants ont conjointement rendu compte de la somme de $15,938.01, reconnaissant ainsi l'avoir en leur possession ou du moins à leur disposition.

Les Intimés ont répondu à ce compte par des *débats* contestant l'item de $10,620.48 porté en dépenses, pour prétendus frais de commission, intérêts, etc., réclamés par *Wm. Darling et Cie.* contre la succession de leur père ; et alléguant que les Appelants sont en outre tenus comptables de la somme de $30,015.33 due à la dite succession par *William Darling Jun.* Ces *débats* se terminent par une conclusion demandant que les dits exécuteurs testamentaires soient conjointement et solidairement condamnés à payer la somme de $6,360.80, étant un septième de la somme de $44,525.54 qui doit

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être partagée entre les sept légataires de *William Darling Sen.*

Par la réponse aux *débats de compte William Darling Jun.* a nié devoir la somme de $30,015.33 à la succession de son père.

Ce plaidoyer était accompagné d'une défense en droit (*special demurrer*) par tous les Appelants, alléguant qu'il n'apparaissait pas par les *débats de compte* que les exécuteurs testamentaires ni aucun d'eux, n'eussent recouvré, ou ne fussent devenus en possession et comptables d'aucune somme qui pouvait être due par *William Darling Jun.* ou *Wm. Darling et Cie.* à la succession de feu *William Darling Sen.*; qu'il n'apparaissait pas non plus par les dits *débats* que, comme exécuteurs testamentaires, ils fussent obligés en loi de prendre des procédés pour le recouvrement de cette somme, ni qu'ils eussent manqué à leur devoir sous ce rapport.

Du consentement des parties, l'audition de cette défense en droit fut remise à l'audition finale au mérite.

Appréciant la preuve en cette cause de la même manière que l'ont fait les Juges en Cour de première instance et en Cour d'Appel, je suis comme eux et pour les mêmes motifs, arrivé à la conclusion que la valeur totale de la succession est de $44,525.64 dont un septième, savoir: $6,360.80 doit revenir à chacun des sept légataires de *William Darling Sen.* mais je ne concours pas dans cette partie du jugement prononçant contre les Appelants une condamnation solidaire pour ce montant avec intérêt à 7 p. cent. C'est à ces deux derniers points que je bornerai mes observations sur le jugement soumis à notre révision.

La question soulevée par le *demurrer* des Appelants sur la question de la responsabilité des exécuteurs testamentaires conjoints ne manque pas d'importance et n'est pas non plus sans difficulté. La Cour du Banc

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de la Reine a admis le principe de la solidarité et les a condamnés en conséquence. Sur quoi s'est-elle fondée pour en arriver là ? Est-ce parce que les faits de la cause établissaient contre eux quelques actes de mal administration ou de négligence grossière, commis en leur qualité d'exécuteurs conjoints, et qui seraient de nature à entraîner la solidarité comme conséquence ? Ou bien encore, est-ce en invoquant l'Art. 913 du *Code Civil* que la Cour d'Appel s'est crue justifiable de déclarer que les Appelants étaient solidairement responsables du montant de la condamnation? Aucun de ces deux motifs ne me paraît suffisant. D'abord la solidarité ne peut résulter de leur mauvaise gestion, car il n'est ni prouvé ni allégué qu'il y a eu malversation, et même en semblable cas, chacun ne serait responsable que des conséquences de ses propres actes.

La solidarité entre exécuteurs testamentaires, il est vrai, peut exister, lorsqu'ils se sont constitués mandataires les uns des autres; mais dans ce cas elle ne résulte pas de leur qualité d'exécuteurs testamentaires, mais bien du contrat de mandat qu'ils ont fait entre eux relativement à leur administration, suivant l'Art. 1712 du *Code Civil* qui établit la solidarité entre mandataires. Comme il n'y a dans cette cause aucune preuve que les exécuteurs testamentaires ont agi comme procureurs les uns des autres, il n'y a par conséquent aucune raison de leur faire l'application de cet article.

Les exécuteurs testamentaires n'ayant point fait inventaire, on ne peut pas dire qu'ils se sont mis de cette manière en possession de toute la succession. Leur reddition de compte est la seule preuve qu'ils soient devenus conjointement en possession d'une partie des biens qui la composait, savoir: au montant de $15,938.01 pour lequel ils ont admis leur comptabilité. Quant au surplus, consistant dans la somme de $30,015.33, due

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par *William Darling Jun.* qui nie la devoir, elle n'a jamais passé en la possession des autres exécuteurs. *William Darling Jun.* chez qui s'est opéré la confusion de ses qualités de débiteur et d'exécuteur testamemtaire, en est toujours demeuré seul en possession, et doit en être tenu seul responsable en sa qualité d'exécuteur testamentaire. D'après ce qui précède on ne peut certainement pas conclure que les exécuteurs testamentaires sont devenus solidairement responsables.

Ce n'est pas non plus en vertu de l'Art 913 du *Code Civil*, que l'on peut les déclarer tenus solidairement de payer le reliquat du compte. Le 3ème paragraphe de cet article s'exprime ainsi:

> Les exécuteurs qui exercent les pouvoirs conjoints sont tenus solidairement de rendre un seul et même compte.

La solidarité établie ici ne porte évidemment que sur l'obligation de rendre *un seul et même compte.*

S'il y avait eu intention de l'étendre au paiement du reliquat du compte, les codificateurs n'auraient pas manqué de l'exprimer formellement, parceque c'eût été introduire une importante dérogation à l'ancien droit, qu'il était de leur devoir de signaler.

Comme il est de principe que la solidarité ne peut point, par analogie, être étendue d'un cas à un autre, les codificateurs ne l'ayant appliquée qu'à l'obligation de *rendre un seul et même compte*, on ne peut pas en conclure par induction qu'ils ont voulu l'étendre au paiement du reliquat de compte. Il me semble que par cet article, loin de prononcer la solidarité, le 4ème paragraphe dit positivement le contraire Il y est déclaré en ces termes:

> Il (les exécuteurs) ne sont déclarés responsables que chacun pour leur part de biens *dont ils ont pris possession en leur qualité conjointe, et du paiement du reliquat de compte.*

Suivant ma manière de lire l'Art. 913, le paragraphe 3ème oblige solidairement les exécuteurs conjoints, seu-

lement à rendre un seul et même compte. Ce qui serait plus correctement exprimé, en disant que cette obligation de rendre compte est indivisible ; et le 4ème paragraphe définit et limite leur responsabilité à la part des biens dont chacun d'eux a pris possession. Cette conclusion paraît surtout raisonnable lorsque l'on réfléchit que les fonctions des exécuteurs testamentaires sont gratuites et toutes de confiance. On comprend plus facilement alors le motif du législateur en n'y attachant pas la rigoureuse condition de la solidarité, condition qui serait de nature, dans bien des cas, à faire refuser ces fonctions.

Dans leur rapport sur cet article les codificateurs déclarent qu'il est suivant les autorités tant françaises qu'anglaises. Ni dans l'un ni dans l'autre de ces deux systèmes, les exécuteurs testamentaires ne sont tenus solidairement des actes les uns des autres.

L'Art 1033 du *Code Civil* français dit :

S'il y a plusieurs exécuteurs testamentaires, * * * ils seront solidairement responsables du *compte du mobilier* qui leur a été confié, à moins que le testateur n'ait divisé leur fonctions.

Suivant *Demolombe* plusieurs commentateurs ont donné une trop grande étendue à cette solidarité qui, suivant son avis, doit être limitée à l'obligation de ne rendre qu'un seul compte et ne s'étend pas jusqu'à les rendre solidaires du paiement du reliquat de compte. Voici comment il s'exprime à ce sujet (1) :

S'agit-il de la responsabilité des faits relatifs à l'exécution testamentaire ? Chacun répond de soi sans doute pour le tout; mais chacun ne répond que de soi et n'est pas solidaire des autres.

On a enseigné, toutefois, la doctrine contraire, et que l'article 1033, dérogeant à l'article 1995, établissait la solidarité des exécuteurs testamentaires, relativement aux actes de leur gestion (Comp. *Delvincour*, t. 11, p. 95, note 8 ; *Coin-Delisle*, art. 1033 ; *Marcadé*, art. 1033, No. 1).

Mais l'article 1033 ne nous paraît dire rien de pareil ; ce qui en

(1) Vol. 22, Nos. 39 et 40.

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résulte seulement, c'est que les exécuteurs testamentaires seront solidairement responsables *du compte du mobilier qui leur a été confié;* donc, il n'établit pas la solidarité pour les faits de l'exécution testamentaire, mais seulement *pour le compte du mobilier.*

De là deux conséquences :—

1°. En aucun cas, lors même que le mobilier leur a été confié, les exécuteurs ne sont solidaires de leur gestion réciproque ; et cela est très juste, puisque chacun d'eux peut agir seul, sans le concours des autres. Nous savons bien que l'on a répondu que, si cette solidarité les effraye, ils peuvent refuser ! Oh ! certainement ! et ils n'y manqueraient pas sans doute, si telle était la condition qu'ils dussent subir ! mais apparemment, on ne nomme pas des exécuteurs testamentaires pour qu'ils refusent ; et la loi n'a pas dû leur faire en conséquence une situation inacceptable.

2°. Ils ne sont solidairement responsables du compte du mobilier, que dans le cas où *il leur a été confié*, c'est-à-dire seulement lorsque le testateur leur en a donné la saisine. (Comp. *Duranton*, t. 9, No. 423 ; *Demante*, t. 4, No. 178 ; *Bayle-Mouillard sur Grenier*, t. 3, No. 329, note 6 ; *Troplony*, t. 4, No. 2041).

40.—Et même, en ce qui concerne la responsabilité solidaire du compte du mobilier, la manière, dont on l'explique généralement, nous porte à croire qu'elle a été étendue au-delà de ces véritables termes.

La conclusion, que l'on déduit, en générale, de l'article 1033, paraît bien être en effet, que les exécuteurs testamentaires, dont les fonctions n'ont pas été divisées, et auxquels le testateur a donné la saisine du mobilier, sont solidairement responsables du mobilier lui-même, c'est-à-dire de la représentation effective de ce mobilier ou de sa valeur. (Comp. les *citations supra* No. 38).

Mais il nous semble que telle n'est pas la portée de l'article 1033, lorsqu'il déclare que les exécuteurs testamentaires sont solidairement responsables *du compte du mobilier* ; il ne dit pas, en effet, *solidairement responsables du mobilier* ; et ces deux formules sont certainement différentes.

L'un des exécuteurs, par exemple, a disparu, emportant une partie des valeurs mobilières de la succession ; les autres sont-ils solidairement responsables de ces valeurs, en ce sens qu'ils sont tenus de les payer eux-mêmes de leurs propres deniers ?

Nous ne les croirions pas ; obligés qu'ils sont de rendre compte du mobilier, il faudra sans doute qu'ils prouvent que ce détournement a été commis par l'un des exécuteurs ; mais une fois cette preuve faite, est-ce qu'il ne leur suffira pas de porter, en compte, cette valeur perdue sans aucun fait, qui leur soit imputable ? il faut, suivant

nous répondre affirmativement; sans quoi, on arriverait à établir une vraie solidarité entre les exécuteurs, qui se trouveraient responsables les uns de la faute des autres (voyez article 1205); il y aurait là, en outre une contradiction dans l'article 1033, lui-même, qui, tout en déclarant que chacun des exécuteurs ne répond que de ses faits, le rendrait en même temps, responsable des détournements commis par les autres!

Duranton, [vol. 9, No. 423, p. 394,] développe la même doctrine.

Poujol, [Donations et Testaments, vol. 2, p. 356,] s'exprime ainsi sur la même question:

Cette responsabilité est au surplus limitée au compte du mobilier qui leur a été confié.

Troplong, [des Donations et Testaments, No. 2041,] dit:

Qu'en principe les exécuteurs testamentaires, même dans le cas où leurs fonctions ne sont pas divisées, ne sont pas responsables solidairement les uns des autres.

Grenier: [des Donations, vol. 3, p. 8, Note de *Bayle-Mouillard*;]

Mais il faut se garder d'ajouter à la rigeur de cette responsabilité.

De Laporte [9, *Pandectes* Françaises, p. 190, sur l'art. 1033,] dit que,—

Tous les auteurs enseignent que chacun des exécuteurs testamentaires n'est responsable que pour sa part du reliquat, en convenant que l'obligation de rendre le compte est solidaire pour éviter la multiplication des contestations.

C'est évidemment cette doctrine que les codificateurs ont adopté dans l'article 913. La solidarité se bornerait donc à l'obligation de rendre compte, et quant au paiement du reliquat chacun en paiera sa part suivant la proportion des biens dont il est devenu en possession.

Faisant application de cette doctrine aux faits de cette cause, je suis d'avis que les trois exécuteurs testamentaires Appelants en cette cause et rendant compte, devraient être conjointement condamnés à payer un septième de la somme de $14,510.33, et *William Darling Jun.*, comme étant et ayant toujours été seul en possession de la somme de $30,015.33, condamné seul à en payer un septième. Ces montants réunis

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forment la somme de $6,360.80 revenant à chacun des légataires sur la valeur totale de la succession. L'intérêt doit être réduit à 6 par cent parcequ'il n'a été fait aucune preuve d'une convention le fixant à un taux plus élevé.

THE CHIEF JUSTICE, AND RITCHIE, STRONG & HENRY J. J., concurred.

Appeal dismissed with costs, with certain variations in the judgment of the court below as to joint liability of executors and as to interest.

Solicitors for Appellants: *Cross, Lunn & Davidson.*

Solicitors for Respondents: *Bethune & Bethune.*

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June 11,28.*

THOMAS W. CHESLEY.....APPELLANT;

AND

ALBERT MURDOCH AND TREMAIN RUMSEY, } .....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Construction of 41st sec., ch. 96, Rev. Stats. N.S. 4th Series—Actions against Administrators—Evidence of Plaintiff not admissible.

C. sued *M & R.*, *M.* accepted service and acknowledged amount due, but *R.* pleaded to the action. Before trial both defendants died. Then *C. R. & R. R.*, as administrators of *R.*, were, before trial, made parties to the action. At the trial *C.* was examined as a witness in support of his own case, and when asked what had taken place between him and the deceased *M. & R.*, the learned Judge ruled that the evidence was inadmissible under sec. 41, ch. 96 of the *Revised Statutes of Nova Scotia*, 4th series. (1)

(1) SEC. 41. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any Court of justice, or before any person having by law or by consent of parties authority to hear, receive and

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

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Held (affirming the judgment of the Court below):—That under said section, in an action against administrators made parties to an action after issue joined, but *before* trial, the Plaintiff cannot give any evidence in his own favor of dealings with a deceased Defendant. [*Henry*, J. dissenting.]

THIS was an appeal to the Supreme Court of *Canada* from the judgment of the Supreme Court of *Nova Scotia*, discharging a rule *nisi* for a new trial, granted by the said last mentioned Court to the Appellant herein.

The action was brought by Appellant against the Respondents to recover $395.91 for orchard produce, and also for money due on an account stated, and for interest on money forborne to the Defendants.

The Defendant *Murdoch* accepted service of the writ, and confessed his indebtedness to the Plaintiff to the amount of $375.71.

examine evidence, the parties thereto, and the person in whose behalf any such suit, action, or other proceeding, may be brought or defended and the husbands and wives of the parties thereto, and the person in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed or defended, including the reputed father in bastardy cases, and the defendant in cases of petty trespass and assault, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce*, or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the suit, action or other proceeding.

Provided, that on the trial of any issue joined or of any matter or question or on any inquiry arising in any suit, action, or other proceeding in any Court of justice, or before any person having by law or by consent of parties, authority to hear, receive and examine evidence brought by or against the executor or administrator of a deceased person, it shall not be competent hereafter for any other of the parties to such action, or the wife of any such party to give evidence on behalf of such party of any dealings, transactions or agreements with the deceased, or of any statements or acknowledgments made or words spoken by him, or of any conversations with him; provided that any such party or his wife shall be competent and compellable to give evidence on behalf of any such executor or administrator.

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In the year 1874 the Defendant *Tremain Rumsey* pleaded to said action, denying indebtedness, and also denying contract.

Prior to the year 1876, both of the persons named as Respondents herein died—*Murdoch* died first.

In the year 1876 the Appellants suggested the death of *Tremain Rumsey*, and the fact that *Charles Rumsey* and *Kinsman Rumsey* were the administrators of the estate of *Tremain Rumsey*, and that the said *Murdoch* confessed the action.

No suggestion of the death of *Murdoch* appears in the proceedings, and no judgment appears to have been entered against him.

The action was thereafter carried on against *Charles Rumsey* and *Kinsman Rumsey*, and the issues between the Appellant and the said *Charles Rumsey* and *Kinsman Rumsey* were tried before a Jury, at *Bridgetown*, on the 21st June, 1876. At the trial Plaintiff was examined as a witness in support of his own case, and when asked what had taken place between him and the deceased defendants, the evidence, under sec. 41 ch. 96 *Rev. Stat. N.S.*, 4th Series, was declared to be inadmissible. A verdict was found for the Defendants.

The Appellant obtained a rule *nisi* for a new trial on the ground that the learned Judge who presided at the trial of the issues improperly rejected the evidence of the Plaintiff.

The Court below discharged the rule.

The Appellant thereupon brought this appeal against the said judgment of the Court below discharging the rule.

Mr. *Cockburn*, Q. C., for Appellant:—

The question here is a question of evidence: Whether the evidence of a party to an original contract is admissible when the action is brought against the executors?

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The evidence of the Plaintiff was rejected on the trial as against the administrators of the surviving debtor. The proviso in section 41, ch. 96, *Rev. Stat. N. S.*, 4th Series, must be strictly construed. The Court cannot supply any omission.

[HENRY, J. :—The great object of the section was to prevent a living person giving evidence against a dead person. The question is whether the words used in the Statute can apply to administrators made parties to suit before trial ?]

The action was brought before the death of these parties and at that time Plaintiff was entitled to give his evidence. Can this vested right be suddenly taken away from him by no act of his own, unless expressly provided for by the Statute ? The Legislature has not foreseen a case of this kind.

It is a case of omission and it is not unreasonable to contend that this Court will not provide for what the Legislature has not provided.

This Statute, if construed as the Court has construed it, would be retroactive in its effect, and would defeat an action already begun on the faith of a different state of things : *Couch* v. *Jeffries* (1) ; *Wood* v. *Oakley*, (2) ; *Sedgwick* on the Construction of Statutes and Constitutional law (3).

On the point that the proviso, limiting the prior enactment in the same clause, can receive no effect beyond its words, the learned Counsel referred to *Jones* v. *Walcott* (4) ; *Bigelow* v. *Heyer* (5) ; Mass. General Stats. (6).

Mr. *Gormully* for Respondents :—

This is an appeal to ascertain the value of the word

(1) 4 Burr. 2460.
(2) 11 Paige (N. Y.) 400.
(3) Pp. 161-2-3-4, *et seq.*
(4) 15 Gray (Mass.) 541.
(5) 3 Allen (Mass.) 243-4.
(6) C. 131, sec. 4.

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"brought." The proviso in section 41, ch. 96, was first introduced in 22 Vic. ch. 2, section 7. The policy of the Act was to prevent a living person giving evidence against a deceased party. The word "brought" must therefore mean when the evidence can be taken, viz.: the moment of trial.

In any case the word "brought" does not necessarily mean "originally brought;" so soon as the administrators of a deceased Defendant are brought before the Court by way of suggestion, the action then is brought against them.

See *Revised Statutes N. S.* (1); *R.* v. *Hants* (2); *R.* v. *Pembridge* (3).

This last case is in point, and on all fours with the present case.

THE CHIEF JUSTICE:—

Both of the Defendants died after the action was brought. *Murdoch* suffered judgment and *Rumsey* pleaded.

After issue joined, *Tremain Rumsey* died, and his death is suggested, and that *Charles Rumsey* and *Kinsman Rumsey* had become Administrators of his estate. At the trial, therefore, *Rumsey* and *Murdoch* were both dead. The learned Judge ruled that the testimony of *Mr. Chesley* as to what took place when he sold the apples, could not be received. The Jury having found for the Defendants, the question was raised before the Supreme Court of *Nova Scotia*, whether the provisions of the Statute of *Nova Scotia* as to parties not being excluded from giving evidence in civil suits, on the ground of interest, allowed the Plaintiff to give evi-

(1) 4th series, ch. 94, sec. 104. (2) 1 B & Ad. 654.
(3) 3 Q. B. 901.

dence in this case, the action having been commenced when both Defendants were living, and *Rumsey's* administrators having been made parties to the suit, after issue joined, but before trial.

The Supreme Court held that the Plaintiff was not allowed to give evidence in his own favor under the proviso of the Statute, Mr. Justice *Wilkins* dissenting.

The 41st section of the *Revised Statutes*, ch. 96, declares parties to suits, their husbands and wives, competent and compellable to give evidence, except as thereafter excepted. Then comes the proviso:

> That on the trial of any issue joined, or of any matter or question, or on any enquiry arising in any suit, action or other proceeding in any Court of Justice, or before any person having, by law, or consent of parties, authority to hear, receive or examine evidence brought by or against the executor or administrator of a deceased person, it shall not be competent for any of the other or opposite parties to give evidence of any dealings with, or of any acknowledgments made, or words spoken by the deceased.

For all the purposes of this enactment, I think going on with the action against the administrators in this suit "is an action or proceeding brought against them."

They are made parties to the proceeding; they are brought into Court; the judgment will be against them, and, for all practical purposes, it is as if the action had been in the first instance commenced against them. The allowing of proceedings to be taken against administrators in this way was to avoid the necessity of commencing a new action, when under the old practice the suit would abate by the death of the Defendant. The Plaintiff "is entitled to the like judgment as in an action originally commenced against the executor or administrator." (1)

I have no doubt the proper view to take of the proviso in the Statute is to construe it

(1) Imp. Stat. 15 and 16 Vic., Ch. 94, Sec. 105; *Benge* v. *Swane*, ch. 76, sec. 138; Rev. Stat. N. S., 15 C. B. 791.

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when the trial takes place after the executors or administrators are made parties to the suit just as if the action had been brought against them originally. This carries out what is the unmistakable intention of the Legislature, viz.: That the surviving party should be allowed to give evidence as to transactions occurring personally with the deceased party. If both parties were living at the trial, both could be heard, and the jury, after hearing both, would decide, but, when one of the parties is dead, it would seem unfair to allow the survivor to give his own version of transactions and conversations which took place when only the two were present and when no one could be called to contradict him.

I think the appeal should be dismissed with costs.

RITCHIE, J.:—

I think the grammatical construction put forward by Judge *Wilkins* that the word "brought" refers to the action, not to the evidence, is correct; but I differ from him in thinking the evidence receivable. I think this would not only be contrary to the object and intention of the Act, but at variance with the fair construction of its language; and I think that when the executors were made parties to the suit, it was then an action brought against them, on which action judgment might be given for or against them; that, at any rate, it was a proceeding against them, before a Court; and to allow the opposite party to give evidence in such an action or proceeding would be both against the letter and spirit of the proviso.

STRONG, TASCHEREAU and FOURNIER, J. J. concurred.

HENRY, J :—

The question, and the only one, in this case, arises

upon the proviso to section 41 of chap. 96 of the *Revised Statutes of Nova Scotia*, 4th Series, which provides:

That on the trial of any issue joined, or of any matter or question, or on any inquiry, arising in any *suit, action*, or other *proceeding*, in any Court of Justice, or before any person, having by law, or by consent of parties, authority to hear, receive and examine evidence brought by or against the Executor or Administrator of a deceased person, it shall not be competent hereafter for any other of the parties, to *such action*, or the wife of any such party, to give evidence on behalf of such party, of any dealings, transactions or agreements with the deceased, or of any statements or acknowledgements made, or words spoken by him, or of any conversations with him, &c.

The action in this case was not "brought" against the present Respondents as Administrators, but against two parties, who died after action, and the cause was at issue, under pleas pleaded by one of the Defendants, the other confessing judgment. The Defendants both having died subsequently, the action—still pending by force of the *Revised Statutes* and unabated—was *continued* by a suggestion, under the Statute, of the death of the Defendant in question, and that the now Defendants were Administrators of the estate. The law applicable to this branch of the case is in section 105, chap. 94, *Rev. Stat. N. S.*, 4th Series (1).

Under it the Administrator, where the cause was at issue before the death of the intestate, can plead to the suggestion only by way of denial, or such plea as may be appropriate and rendered necessary by his character of Executor or Administrator, unless by leave of the Court, or a Judge, he should be permitted to plead fresh matter in answer to the declaration. The question, therefore, is as to the effect of the proviso, where, as in this case, the suit was *brought* in the lifetime of the original Defendants and pleas pleaded by one, and the cause thereupon at issue.

(1) Pp. 460, 461.

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In construing this proviso, the first legislation upon the point, and the legal rights of the parties as they then stood, is important to be considered. I find that by the Statute law of *Nova Scotia* for many years previous to 1869, parties to suits with Executors or Administrators were competent witnesses in every respect. In that year the Legislature of *Nova Scotia*, with the laudable intention of preventing injustice by testimony incapable of contradiction, in consequence of the death of parties, passed an Act identical in language with the proviso in question (1).

We have, therefore to consider: 1. What the law was before the last mentioned Act was passed; 2. What was the mischief or defect for which the law had not provided; 3. What remedy has been provided, and to what extent, and; 4. The reason of the remedy (2).

1st. What was the law previously?—

The law previously, as I have stated, made the party a competent witness, and his statutable right, as such, is restrained by the Act, but no further than the words of it reasonably go.

2nd. What was the mischief for which the law had not provided?

The mischief, or defect, consisted in allowing parties to bring actions to recover money not due them by the party's own evidence of transactions, etc., with the deceased when *he knew* he could not be confronted—in allowing parties, in a word, to trump up false claims against the estate of a deceased person, which they would not have attempted to do were he alive; and further, in allowing parties, by their own testimony, to avoid payment of honest claims due to the estates of deceased persons. These I take to be the "mischief or defects" in the legislative mind, sought to be provided against.

(1) *Stat. of N. S.* 1869, chap. 7. (2) *Maxwell* on Int. of Stats. 18.

3rd. The remedy provided ?—

The Statute undoubtedly provides a remedy for the cases I have just put, and I cannot think that at the time the Act passed (1869) the case of a sole or surviving Defendant dying after issue joined, as in this case, was ever considered or thought of; it being a contingency likely but seldom to arise. I am free to admit the sound policy of the contention, that the party in a case like this ought not to be permitted to give evidence, but, at the same time, the reasons for excluding such evidence are not nearly so strong as in the cases clearly covered by the Act. Here the Appellant brings his suit, knowing that his testimony may be contradicted by both Defendants, and thereby establishes the fact that (unlike the other cases) he is not afraid of the testimony of his opponents. The "mischief" is likely to arise in only rare cases, and therefore does not necessarily call for the same legislative checks; and the principles for excluding the testimony in the one case, do not hold good in regard to, or, in fact, at all apply to, the other. I am the more convinced that the Legislature did not mean the Act to apply to cases like the present, or other words would have been employed,and the word "brought" would not have been used, but the word "pending"—or would have been added to by such words as "or pending" The provision, too, is that it shall not be competent hereafter for any other of the parties to *such action*—so that the prohibition only applies where there is an action, and that "brought by or against an executor or administrator," and although the word "proceeding" is used in a previous part of the section, it cannot mean that where an action is once commenced or "brought" the word "or" couples "proceeding" with it, and makes the latter a joint object with it, and gives force and applicability to the Act which it otherwise could not have. The ac-

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tion is one position by itself, so is "proceeding," and if the former has been "brought" the position is attained where the evidence is to be rejected, and I cannot, therefore, think the Legislature meant to make any and every step afterwards a "proceeding."

But the words of the enactment themselves provide a limitation. It does not say "in any proceeding," but "on any inquiry arising in any *suit, action* or other proceeding." The "proceeding" here after issue joined, *so far as the Defendants were concerned* in their representative capacity, must, under the circumstances, have been limited not to an "inquiry" at all, but to the "trial" of the issues joined and *the truth of the suggestion.* There are only two positions referred to in the Statute, and to which its restrictions apply, first, the position of the case as in an action "brought," and still unabated and at issue for trial; and that of a case where an "inquiry" is to be had in case of a default or otherwise. "Inquiry" has a technical meaning, known to all lawyers and others who are accustomed to draft Acts, and as no "inquiry," in its technical sense, was to be held in this case, the subordinate word "proceeding" has no application; besides, "proceedings *taken*," would be the usual and proper expression, and "brought" not only inapplicable to it as in general parlance, but the proper term to be applied to an "action." It is, therefore, plain that the Statute only applied where an action was "brought," and without an action first "brought," it could not be held applicable to a "proceeding." The latter word is, therefore, only available to characterize something done in a suit after being "brought."

Section 102 chap. 94, *Rev. Stat. N. S.*, 4th Series, provides that

The death of a Plaintiff or Defendant shall not cause the action to

abate, but it may be *continued* in manner and under the restrictions hereinafter mentioned.

We are now asked to say that the Legislature meant the Act to apply to cases like the present; but, with all due deference to other views and opinions, I cannot arrive at that conclusion. The Plaintiff, during the pendency of his suit, and up to the death of the Defendants, had a statutable right to sustain his case by his own testimony, and, unless he has clearly been deprived of that right by legislation, the evidence should have been received, and, having been rejected at the trial, I think it was improperly rejected. I think it is a case not foreseen or provided for by legislation, and I have not the power to remedy a legislative defect in a Statute, but to measure the extent to which the enactment restrains the right of the Plaintiff, and in doing so not to strain language beyond its ordinary meaning. If a clear case of omission is presented, and I think this is one, it is the prerogative and duty of the Legislature, and not ours, to remedy the mishief or defect. We have given judgment this term in a case where, by our unanimous decision, there was an insufficiency of legislation on the point in question in that case to sustain the contention of one of the parties. The Judges of another Court, sought by forcing language beyond its ordinary meaning to supply the defect, but we felt bound to decide against them, and we have now the fact before us, that legislation within the past few months, and since the argument of the case, has remedied the mischief. So, I say, should all cases of uncertain legislation calculated to interfere with the acknowledged legal right of parties be dealt with in Courts of Justice. This case, I think, is one of that class, and should be treated accordingly.

We have several well understood principles to aid us in the proper construction and application of Satutes :

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It is the duty of all Courts to confine themselves to the words of the Legislature—*nothing adding thereto, nothing diminishing.* We must not import into an Act a condition or qualification not found there (1).

In construing the words of an Act of Parliament and collecting from them the intentions of the Legislature, the terms are always to be understood as having a regard *to the subject-matter*, for that, it is to be remembered, will always be in the eye of the framer of the law and all his expressions directed to that end (2).

It is said in words of authority, to be a sound general principle in the exposition of Statutes, that less regard is to be paid *to the words that are used* than *to the policy* which dictated the Act (3).

I therefore (and I regretfully do so against the majority of the Court) can come to no other conclusion than that already intimated, that the "mischief" of allowing the Plaintiff's evidence in cases like the present, was one not thought of by the Legislature, and not by the words of the Statute provided against. I think, therefore, the testimony of the Plaintiff was improperly rejected and that there should be a new trial.

Appeal dismissed with costs.

Solicitor for Appellant : *T. W. Chesley.*

Solicitor for Respondents : *T. D. Ruggles.*

(1) Per *Tindal*, C.J., in *Everett* v. *Mills*, 4 Scott, N. C. 531.

(2) *Potter's Dwarris* Statutes 201.

(3) *Potter's Dwarris*, p. 214, citing *The King* v. *Hale*, Cro. Car. 330; 3 Lev. 82; *The King* v. *The Mayor of Liverpool*, 1 A. & E. 176; and *Hine* v. *Reynolds*, 2 Scott, N. C., 419.

ANDREW T. DRUMMOND.....APPELLANT; 1877

AND June 13, 28.*

JAMES BAYLIS.....RESPONDENT.

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

Bonds—Collateral security—Replevin.

B., as trustee for *H. C. & Co.*, deposited with *D.* twelve bonds of the *M. C. & S. Railway Company*, as collateral security, to be availed of only subsequent to the failure of the Government to pay $10,000 subsidy previously transferred to *D.*, and obtained a receipt from *D.* that on the subsidy being paid *D.* would return these bonds to *B.* The subsidy was paid and *B.* sued *D.* to recover back the twelve bonds. *H. C. & Co.* did not intervene.

Held: That *B.*, being a party personally liable on the bills held by D, which the Government subsidy of $10,000 transferred was intended to pay, and having complied with all the conditions mentioned in the receipt entitling him to recover possession of the bonds, was, as against *D.*, the legal owner of the bonds.

THIS was an action to recover back twelve bonds delivered by Respondent to Appellant under the conditions set forth in the following receipt:—

"MONTREAL, September 4, 1874.

"Received of *James Baylis*, Esq., twelve bonds of the *Montreal, Chambly and Sorel Railway Company*, for $1,000 each, Nos. 0,316 to 0,327 consecutive and inclusive, say 0,316, 0,317, 0,318, 0,319, 0,320, 0,321, 0,322, 0,323, 0,324, 0,325, 0,326, 0,327, held in trust by me for him for Messrs. *Hibbard, Cameron & Co.*, in accordance with letter 30th May last, which bonds I agree

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

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to deposit with the *Ontario Bank*, until arrangements for traffic guaranty have been completed or the Government subsidy transferred to me is paid, and upon payment of said subsidy I agree to return these bonds to said *J. Baylis*. They are to be regarded as security to be availed of only subsequent to the failure of the Government $10,000, transferred to me in March last, being paid by 1st January next, or there being a definite agreement to pay it. It being understood that these arrangements for traffic guarantee are now in progress, and will be completed in a reasonable time.

"(Signed)," "A. T. DRUMMOND."

The declaration alleged in effect:

That prior to the 31st March, 1874, the Defendant, *Drummond*, at the request and on the credit of the Plaintiff, undertook to buy, and did buy on commission, large quantities of iron girders, and iron rails, &c., for the *Montreal, Chambly & Sorel Railway Company*, of which *Hibbard, Cameron & Co.* were the contractors, and furnished invoices to Plaintiff for the goods so purchased, charging them against Plaintiff, and undertook to receive payment by means of drafts of *Hibbard, Cameron & Co.* indorsed by *Baylis*.

That a transfer to Defendant was passed before *Lighthall*, N. P. of date the 31st March, 1874, made by the contractors, declared to be represented by *Baylis*, as their Attorney. The thing transferred, and the consideration and objects of the transfer are in the transfer stated in the following terms as being "a transfer of the sums of ten thousand dollars currency of Canada, of the Government subsidy, funds, or debentures, to be had and taken by the transferee out of the first, or by preference out of such subsidy, funds, or debentures granted by the Provincial Government of

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Quebec, and by the Legislature, in favor of the *Montreal, Chambly & Sorel Railway Company*, which this Company is obliged to pay to the said *Ashley Hibbard*, under contract and agreement passed before the undersigned Notary, this 31st day of March, 1874, which is additional and supplementary to that between said *Hibbard, Cameron & Co.*, passed before *J. S. Hunter*, Notary Public, of *Montreal*, the 16th day of October, 1872. This transfer is thus made in consideration and in payment of certain drafts or bills granted by the said *Hibbard, Cameron & Co.* upon said *James Baylis*, and accepted by him, payable to the order of the said *Andrew T. Drummond*, dated the 26th (should be the 28th) day of March inst, 1874, payable two months after date thereof, as follows, to wit: First, one for fourteen hundred dollars; a second, for twenty-two hundred and sixty-nine dollars and thirty-nine cents; a third, for forty-two hundred and twenty-five dollars fifteen cents; and a fourth for twenty-one hundred and four dollars and twelve cents, thus forming the sum of nine thousand nine hundred and ninety-eight dollars and sixty-six cents currency in all, it being understood, that should the drawers or acceptors take up or pay any or any part of said drafts, or any of them, before or after falling due, said *Andrew T. Drummond*, his heirs or assigns shall be bound to retransfer sufficient of said sum so transferred as shall repay such amount or amounts as may be so paid."

That this sum of $9998.66 was the amount due the Defendant on the said iron, &c., so purchased, and for all interest and commission to the date of the drafts.

That the Railway Company intervened and became parties to the transfer; that the four drafts mentioned in the transfer were all renewed by four other drafts payable at *four* months, dated 31st May, 1874, for a like amount of $9998.66, all falling due on the 4th Sept.,

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1874; also the payment by Plaintiff to the Defendant of all the interest charges, stamps, &c., on the renewals of the drafts, namely, $266.74 and $235.30.

That on the 4th September, 1874, the Plaintiff, in order further to secure payment of the drafts so renewed, delivered to the Plaintiff, twelve bonds or debentures of the said Railway Company on the terms set forth in the above receipt.

The declaration also sets up Defendant's undertaking and liability in law to return to the Plaintiff the four paid drafts or Bills to secure the payment of which the Government subsidy of $10,000 had been tranferred, and the 12 debentures delivered to Defendant; also defendants refusal to return either the bonds or bills. Conclusion, that Defendant be condemned so to do, or to pay $15,000.

Defendant pleaded that the twelve bonds or debentures of the *Montreal, Chambly and Sorel Railway Company*, referred to in Plaintiffs declaration, are not now, and never were the property of the said Plaintiff, and the Plaintiff had not, at the time of the institution of this action, any interest in said bonds or any right of action to recover the same from the Defendant.

That the said bonds were received by Defendant from the said *Hibbard, Cameron & Co.*, mentioned in the Plaintiff's declaration, through the hands of the Plaintiff, who only had them in his possession as Attorney of said *Hibbard, Cameron & Co.*

That said Plaintiff, previous to the institution of this action, became insolvent, and was not then, and had long ceased to be, Attorney of the said *Hibbard, Cameron & Co.*

That the said bonds were so received from the said *Hibbard, Cameron & Co.*, as collateral security for the payment of the drafts of said *Hibbard, Cameron*

& Co., mentioned in Plaintiff's declaration, and all renewals thereof, and the costs and charges in connection with said drafts due the defendant by said *Hibbard, Cameron & Co.*, and as security for Defendant's charges as a commission merchant in buying the goods mentioned in Plaintiff's declaration, and for commissions in renewing said drafts, and for interest on the same, and for monies paid and expended in and about the same.

That the Defendant, as such commission merchant, had a *lien* on the said bonds for the payment of his said charges, amounting to $1,599.80, as per detailed statement thereof, fyled as Defendant's exhibit number one, and had a right to retain the same until payment of said sum.

The judgment of the Superior Court dismissed Plaintiff's action upon the ground that "in the dealings and transactions mentioned in his declaration, he acted in the capacity of Attorney of *Hibbard, Cameron & Co.*, who paid the drafts and bills, and who were owners of the bonds claimed by said Plaintiff, and that said Plaintiff hath no right to recover the same from Defendant."

The judgment of the Court of Queen's Bench reversed the judgment of the Superior Court.

The question submitted to the Supreme Court was whether the Plaintiff *Baylis* had a right to the twelve bonds referred to ?

Mr. *John L. Morris* for the Appellant :—

These bonds did not belong to Respondent, but to *Hibbard, Cameron & Co.*

The receipt discloses the fact that *Baylis* received and delivered the bonds to *Drummond*, in his *then* capacity of agent for *Hibbard, Cameron & Co.*, and *Drummond* only agrees to hand them back to *Baylis* in that capacity. This is the only fair and reasonable way in which

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to read the receipt. It must be taken as a whole in order to get at its signification.

The agreement is one with the principal and not with the agent.

There is no proof that there was ever any money due by *Hibbard, Cameron & Co.* to *Baylis*, for his evidence is not admissible under Article 251, *Code of Civil Proc. L. C.*

The action should have been instituted by *Baylis* as agent, and not otherwise. But *Baylis* admits that he had ceased to be the agent of *Hibbard, Cameron & Co.* long before he brought this action.

The powers of factors or agents is determined by their revocation. *Vide Story* on agency (1). The judgment of the Superior Court was in accordance with the evidence, and well founded in law.

Mr. *A. Robertson*, Q.C., for Respondent:—

The first dealing was between *Baylis* and *Drummond.* The payment, given at first in the shape of notes, was endorsed by him, and afterwards bills were accepted by him. *Baylis* had a possession, presumably legal, of the bonds in question, and by the receipt *Drummond* is justified in returning the bonds. *Hibbard, Cameron & Co.* have not intervened, nor has Appellant called them into the case to protect any rights they had.

The extent of *Baylis'* interest in the bonds, or his right as against the contractors, not being in issue, it was not necessary for *Baylis* to prove what these rights were, or the agreements under which *Baylis* bought the iron, and became liable for so large sums for the contractors. *Vide Pothier* Nantissement (2); *Story* on Bailments (3); *Jarvis* v. *Rodger* (4); *Addison* on contracts (5).

(1) Nos. 470, 473, and also No. 225.
(2) No. 7.
(3) No. 291, p. 250
(4) 13 Mass. Rep. 105.
(5) 4th edtn., p. 467.

THE CHIEF JUSTICE:—

The Defendant *Drummond*, by the agreement and receipt, undertook to deposit the bonds sued for with the *Ontario Bank*, until * * * * the Government subsidy transferred to him was paid, and upon payment of said subsidy, he agreed to return these bonds to said *Baylis*, the Plaintiff. This further statement was also included in the memorandum signed by the Defendant:

> They are to be regarded as a security to be availed of only subsequent to the failure of the Government subsidy of $10,000, transferred to me in March last, being paid by January next, or there being a definite agreement of the Government to pay it.

The bonds were deposited with Defendant and were to be returned to Plaintiff on payment of the subsidy. It is admitted the subsidy was paid, and, therefore, the Plaintiff has made out a *primâ facie* case to have the bonds returned to him. The Defendant contends that the Plaintiff was acting as agent for *Hibbard, Cameron & Co.*, that they owned the bonds, and that he is not bound to return to Plaintiff, but holds them as the property of *Hibbard, Cameron & Co.*, who alone can sue him for them.

If *Baylis* were the mere agent or servant of *Hibbard, Cameron & Co.*, and the contract was in truth their contract, and the agreement to return to him was meant and understood only as an agreement to return to them through *Baylis* as their servant or agent, there might be some force in their contention. But it appears that *Baylis* was a party personally liable on the bills or notes which the Government subsidy of $10,000 transferred to *Drummond* was intended to pay, and these bonds were deposited to secure payment of that subsidy. They came from *Baylis'* possession, and the reasonable inference from the evidence is, that he had a lien on them to

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guarantee the payment of his own liabilities for *Hibbard, Cameron & Co.*, which were very large. If he *paid* he was entitled to their possession, even against *Hibbard, Cameron & Co.* But if he held them as a trustee for *Hibbard, Cameron & Co.* only, and stipulated they should be returned to him on the payment of the $10,000 subsidy, he, as against this Defendant, would have the right to recover them from him.

If *Hibbard, Cameron & Co.* had notified Defendant that the bonds were theirs and not to return them to Plaintiff, then Plaintiff might have been called on to shew that he had a right to them against *Hibbard, Cameron & Co.*, but in the absence of any such claim on the part of *Hibbard, Cameron & Co.*, there can be no right in Defendant to retain them. If he anticipated difficulty because, as he says, *Baylis* ceased to be *Hibbard, Cameron & Co.'s* Agent, he could have notified them of the claim of *Baylis* to the possession of the bonds and called on them to intervene, but in the absence of any such proceedings I fail to see what right Defendant has to keep these bonds. If *Hibbard, Cameron & Co.* are content to let *Baylis* have them and set up no claim or right to keep them from him, I fail to see what right the Defendant has to set up a claim on their behalf, which they do not desire to advance, and which, as between them, they are satisfied it would be unjust for them to set up.

TASCHEREAU, J. :—

By the action in this cause the Appellant was called upon to return to the Respondent twelve bonds of the *Montreal, Sorel and Chambly Railroad Company*, transferred to him and held by him as collateral security for drafts accepted by the Respondent for *Hibbard, Cameron & Co.*, contractors for the building of the said Rail-

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road, and which, according to the Respondent, he undertook to return to him, as well as the paid drafts (four in number) accepted by Respondent.

In the Superior Court of the District of *Montreal*, where the action originated, the Respondent's action was dismissed on the ground that he had not shewn an interest in the bonds or in the drafts, and that he acted simply as the Attorney of *Hibbard, Cameron & Co.*, owners of the bonds. But in appeal, in the Court of Queen's Bench at *Montreal*, the judgment was reversed, and hence the present appeal by *A. T. Drummond.*

It is evident, from the whole transaction, that the Appellant's contract and undertaking was purely with the Respondent to restore to the latter the bonds in question, or pay him $10,000, as soon as a certain condition should have been fulfilled, to wit: the payment of the Government subsidy, and certain arrangements for traffic guarantee. The condition has been fulfilled in its entirety, and therefore the Appellant is bound to restore bonds given as security only till the performance of the condition.

Appellant contends also, that he has a right to retain these bonds as a security for certain commissions due him for *Hibbard, Cameron & Co.* by Respondent. He has, in my opinion, no such right, for his contract with the Respondent was, that he should return the bonds on a certain and specific condition, which has been complied with, and no mention of such a thing as commission was made so as to give him a lien on the bonds.

I think the appeal should be dismissed with costs.

RITCHIE, STRONG, FOURNIER, and HENRY, J. J., concurred.

Appeal dismissed with costs.

Solicitor for Appellant: *John L. Morris.*

Solicitors for Respondent: *A. & W. Robertson.*

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JOHN SEVERN.....APPELLANT;

AND

THE QUEEN.....RESPONDENT.

ON APPEAL FROM A JUDGMENT OF THE COURT OF QUEEN'S BENCH FOR ONTARIO.

Sale of Liquor—37 Vic., Ch. 32 O.—British North America Act 1867, secs. 91, 92.—Brewer, trade of—Licenses, powers of Dominion and Provincial Legislatures to impose.

S., after the passing of the Act 37 Vic., ch. 32, *O.*, intituled "An Act to amend and consolidate the law for the sale of fermented or spirituous liquors," then being a brewer licensed by the Government of *Canada* under 31 Vic., ch. 8, *D.*, for the manufacture of fermented, spirituous and other liquors, did manufacture large quantities of beer and did sell by wholesale for consumption within the Province of *Ontario* a large quantity of said fermented liquors so manufactured by him, without first obtaining a license as required by the said Act of the Legislative Assembly of *Ontario*. The Attorney General thereupon filed an information for penalties against *S.* On demurrer to the information the special matter for argument was that the Legislature of the Province of *Ontario* had no power to pass the statute under which the penalties were sought to be recovered, or to require brewers to take out any license whatever for selling fermented or malt liquors by *wholesale*, as stated in the information.

Held,—On appeal, that the Act of the Provincial Legislature of *Ontario*, 37 Vic. ch. 32, is not within the legislative capacity of that Legislature.

2. That the power to tax and regulate the trade of a brewer, being a restraint, and regulation of trade and commerce, falls within the class of subjects reserved by the 91st sec. of the *British*

* PRESENT:—Sir William Buell Richards, Knight, C.J., and Ritchie, Strong, Taschereau, Fournier and Henry, JJ.

North America Act for the exclusive legislative authority of the Parliament of *Canada*; and that the license imposed was a restraint and regulation of trade and commerce and not the exercise of a police power.

3. That the right conferred on the *Ontario* Legislature by sub-sec. 9, sec. 92 of the said Act, to deal exclusively with shop, saloon, tavern, auctioneer and "other licenses," does not extend to licenses on brewers or "other licenses" which are not of a local or municipal character.

Regina vs. Taylor, 36 U. C. Q. B. 218, over-ruled.

[*Ritchie* and *Strong*, JJ., dissenting.]

APPEAL from a judgment of the Court of Queen's Bench for *Ontario*, over-ruling the demurrer of the defendant, *John Severn*, to the criminal information filed against him by the Attorney General of the said Province on behalf of Her Majesty the Queen, in the said Court, on the 23rd day of January 1877.

This appeal was brought directly to the Supreme Court, by consent of parties, under sec. 27 of *the Supreme and Exchequer Court Act.*

The information was for the contravention by the defendant of the provisions of the Act of the Legislature of *Ontario*, 37 Vict. ch. 32, respecting the sale of fermented or spirituous liquors, in that the defendant "on the nineteenth day of January, in the year of our Lord aforesaid, at the Town of *Yorkville*, in the County of *York* aforesaid, after the passage of a certain Act of the Legislature of the Province of *Ontario*, made and passed in the thirty-seventh year of the reign of our Sovereign Lady the present Queen, intituled 'An Act to amend and consolidate the law for the sale of fermented and spirituous liquors,' then being a brewer licensed by the Government of *Canada* for the manufacture of fermented, spirituous and other liquors, did manufacture a large quantity of fermented liquors, to wit., one thousand gallons of beer, and afterwards, to

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wit, on the twentieth day of January, in the year of our Lord one thousand eight hundred and seventy-seven, at the Town of *Yorkville* aforesaid, in the County of *York* aforesaid, unlawfully and wilfully and in contravention of the said Act of the Legislature of the Province of *Ontario*, did sell by wholesale a large quantity of the said fermented liquor so manufactured by the said *John Severn* as aforesaid, to wit., five hundred gallons of beer, for consumption within the Province of *Ontario*, to wit., at the Town of *Yorkville* aforesaid, in the County of *York* aforesaid, without first obtaining a license, as required by the said Act of the Legislative Assembly of the Province of *Ontario*, to sell by wholesale, under the said Act, liquors so manufactured by him the said *John Severn* as aforesaid, for consumption within the said Province of *Ontario*, and without having obtained any shop license or any other license under the said Act, or under the Act passed by the said Legislature of *Ontario*, in the thirty-ninth year of the reign of our Sovereign Lady the present Queen, intituled 'An Act to amend the law respecting the sale of fermented or spirituous liquors,' to sell wholesale, as a brewer, liquor, in wilful contravention of the said Act of the Legislature of the Province of *Ontario*, passed and made as aforesaid, and in contempt of our Sovereign Lady the Queen and her laws, and to the evil example of all others in the like case offending, and contrary to the form of the Statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity."

On the 25th January, 1877, the said *John Severn* by his attorney *F. Osler*, having heard the information read, said: that the information and the matters therein contained are not sufficient in law, and that the defendant is not bound to answer the same.

One of the points to be argued was that the Legis-

lature of the Province of *Ontario* had no power to pass the Statute under which the said penalties were sought to be recovered, or to require brewers to take out any license whatever for selling fermented or malt liquors by wholesale, as stated in the information.

The Attorney General joined in demurrer.

In a case of a similar information, *The Queen* v. *James Taylor* (1), the Court of Queen's Bench gave judgment for the defendant on the demurrer to the information. The Court of Error and Appeal for the Province of *Ontario* reversed the judgment of the Court of Queen's Bench and overruled the demurrer of *James Taylor*.

An appeal was subsequently prosecuted by the said *James Taylor* to the Supreme Court of *Canada*, when, after argument, the Supreme Court decided (2) that it had no jurisdiction to entertain the said appeal, inasmuch as the judgment appealed against was prior to the organization of such Court.

In consequence of this decision, *Harrison*, C. J., delivered the judgment of the Court of Queen's Bench as follows:

"We have read the decision of the Court of Appeal in *Regina* v. *Taylor*, 36 U. C. Q. B. 218, reversing the decision of this Court, reported at p. 183 of the same volume.

"If the Court of Appeal were a Court of final resort, we should, in the present case, follow the decision of the Court of Appeal without observation of any kind. But as the Court of Appeal is not a Court of final resort, and as we are informed that it is the intention of the defendant in this case, with the consent of the Crown under section twenty-seven of the Supreme Court Act, at once to carry this case to the Supreme Court; and so, if possible, have *Regina* v. *Taylor*, 36

(1) 36 U. C. Q. B. 218. (2) 1 S. C. Can. R. 65.

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U. C. Q. B. 218, reversed; we, in deference to the existing decisions of the Court of Appeal, and not from any actual conviction that it is correct, follow it, and give judgment for the Queen."

The Act in dispute under this appeal is the 37 Vic., chap 32, of the *Ontario* Legislature.

The clauses considered were the following:

"Section 24. No person shall sell by wholesale or retail, any spirituous, fermented or other manufactured liquors within the Province of *Ontario*, without having first obtained a license under this Act, authorizing him so to do. Provided that this section shall not apply to sales under legal process, or for distress, or sales by assignees in insolvency."

"25. No person shall keep or have in any house, building, shop, eating-house, saloon or house of public entertainment, or in any room or place whatsoever, any spirituous, fermented, or other manufactured liquors, for the purpose of selling, bartering or trading therein, unless duly licensed thereto, under the provisions of this Act."

The two preceding sections, by sect. 26, not to prevent a brewer or distiller duly licensed by the Dominion of *Canada* from keeping, having, or selling any liquor manufactured by him. Provided that such brewer, distiller, &c., is further required to first obtain a license to sell by wholesale under that Act the liquor so manufactured by him when sold for consumption within this Province, but not in quantities less than prescribed by section 4 of the Act.

Section 22 enacts: "There shall be paid * * * for each license by wholesale a duty of fifty dollars." All the duties under this section are for the purposes of Provincial revenue.

Section 4. "A license by wholesale" shall be construed to mean a license for selling, bartering or traffick-

ing, by wholesale only, in such liquors in warehouses, stores, shops, or places other than inns, wine, ale or beer houses, or other houses of public entertainment, in quantities not less than five gallons in each cask or vessel, at any one time; and in case where such selling by wholesale is in respect of bottled ale, porter, beer, wine or other fermented or spirituous liquor, "each such sale shall be in quantities not less than one dozen bottles of at least three half pints each, or two dozen bottles of at least three-fourths of one pint each, at any one time."

Mr. *J. Bethune*, Q.C., for Appellant :—

The Statute in question, 37 Vic., ch. 32, *O.*, was passed to consolidate the license laws of the Province, but it not only consolidates but amends these laws.

In the consolidated Act there is no special amendment so far as brewers are concerned. Section 4 defines license by "wholesale." The effect of which seems to compel brewers to take out a license at an expense of $50 before selling by wholesale. Now, the Dominion Government derives its income from customs and excise, which are regulated by 31 Vic., ch. 8 *D.* By the 2nd section of that Act the word "brewer" is defined, and by the 3rd it is stated that no other person than a licensed brewer can carry on business or trade, &c. The Dominion Government thereby assumed jurisdiction of this matter. The point of importance is, what are the relative rights and relative jurisdiction of the Dominion Parliament and Provincial Legislatures over this subject-matter?

The only authority under which the Provincial Legislature claims the power of making laws in relation to matters relating to *trade* and *commerce* is under sec. 92, sub-sec. 9, of *B. N. A. Act.* But the whole of that section must be governed by sec. 91, and under sub-sec. 2, sect.

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91, the regulation of trade and commerce belongs exclusively to the Dominion Parliament. The fair construction of the words *trade* and *commerce* includes both internal and external trade.

The Dominion Government derives its income from customs and excise, which are regulated by 31 Vict., ch. 8, *D.* Under sec. 91, sub-secs. 2 and 3, the Dominion Parliament has the power to pass laws for "the regulation of trade and commerce" and "the raising of money by any mode or system of taxation."

Now, the right of the *Ontario* Legislature to pass and maintain the provisions of this Act must rest either upon its power to impose direct taxation within the Province, in order to the raising of a revenue for provincial purposes, or upon its power to legislate upon matters relating to licenses and municipal institutions. It cannot be denied that the whole *British North America Act* shews that it was intended to divide the jurisdiction between the two Legislative bodies, the jurisdiction of each being complete as to cases within its power. See upon this point the judgment of the Court of Appeal for *Lower Canada* in *Ex parte Dansereau* (1); *Dow* v. *Black* (2); *L'Union St. Jacques de Montreal* v. *Belisle* (3).

Then, can this Act be sustained under sec. 92, subsec. 2 of the *B. N. A. Act*; in other words, is this charge or duty imposed upon brewers a direct or indirect tax? Appellant contends that it is an indirect tax, the effect of which is to raise the price and value of the beer by at least the amount of the tax. Imposing a tax upon the steamboat instead of the passengers which it carries, is an indirect tax: *Gibbons* v *Ogden* (4). The Imperial Parliament treat this as an indirect tax,

(1) 19. L. C. Jur. 210.
(2) L. R. 6 P. C. App. 280.
(3) L. R. 6 P. C. App. 34.
(4) 9 Wheaton 231.

because they would not have given the power by sub-section 9 if it was direct. The judgments of the Court of Queen's Bench and the Court of Appeal in *Queen* v. *Taylor* agree as to this. But it is contended that the *Ontario* Legislature possess the right of imposing this tax under sub-sec. 9 of sec. 92 of the *B. N. A. Act.* Now, this sub-section must be looked upon as giving an exceptional right, limited in its character, to impose indirect taxation. You must either restrict this power of granting "other licenses" or give the Local Legislature a jurisdiction as complete and as full as that of the Dominion Legislature. Now, the trade of a brewer is one regulated exclusively by the laws of the Dominion of *Canada*, and the history of trade and distilling shows that brewing was always regarded as coming under the Excise Laws.

Reg. v. *Justices of Surrey* (1); *Burns's* Justice of the Peace (2); *Con. Stats. of Canada*, cap. 19; *Con. Stats. of Lower Canada*, cap. 6, sec. 1; cap. 24, sec. 26, sub-sec. 10; 27 and 28 Vic. cap. 3; 29 Vic. cap. 3; *Revised Stats. of Nova Scotia*, cap. 17 and 19; *Revised Stats. of New Brunswick*, vol. 1, cap. 18; *Crabbe's* History of English Law (3); Temperance Act of 1864, of the Province of *Canada*; *Quebec* Resolutions, which constituted the foundation of the Imperial Act; Journals Legislative Assembly of the Province of *Canada* (4); Journals of same Assembly (5); 29th Resolution sub-sect. 4; Lord *Carnarvon's* explanation, on the second reading of the Bill in the House of Lords, shows that these resolutions were the basis of the Statute (6).

The jurisdiction as to excise was intended to be in the Dominion Parliament, and would therefore be

(1) 2 T. R. 504.
(2) Vol. 2, p. 190.
(3) Pp. 477, 482.
(4) Vol. 24, Pp.203, 209.
(5) Vol. 26, p. 362.
(6) Hansard, Vol. 185, p. 563.

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exclusive. One method of regulating excise is by taxation : *Story* on the Constitution (1). The only head of concurrent jurisdiction is under section 95, and even then Provincial Legislatures must yield to Dominion when they conflict.

Either the words "other licenses" must be construed to be of the same class as those mentioned in the preceding part of the sub-section : *East London Water Works* v. *Mile End Old Town* (2) ; *Reed* v. *Ingham* (3) ; *Williams* v. *Golding* (4) ; this is also the view taken by *Torrance*, J., in the case of *Angers* v. *The Queen Insurance Co.*, decided at *Montreal*, in April 1877 (5) ; —or must be held to mean such licenses as were before the passing of the Imperial Act under municipal or local control : *Maxwell* on Statutes (6).

If the term "other licenses" be not thus limited, the Legislature may require anything to be licensed, for instance, may require a license to be taken out by a captain of a vessel, or by a banker, or official assignee.

There are a large class of local licenses of minor importance than those enumerated in this sub-section, such as those enumerated in the Municipal Act of 1866.

As to the argument put forward on behalf of the Crown, in support of the judgment in this case, that the Act is not *ultra vires*, because it has reference to a subject-matter over which its powers are as full and complete as those of the Dominion Parliament as a matter of police, Appellant contends that power is a grant from the Dominion Government, a branch of criminal law over which the Dominion has entire control.

What is known in the *United States* as police power

(1) Section 971.
(2) 17 Q. B. 512.
(3) 3 E. & B. 889.
(4) L. R. 1 C. P. 69.
(5) 21 L. C. Jur. 81.
(6) Page 308.

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in the States is founded upon the right which exists on the part of the State Legislatures to make laws for the good government of the State in all cases in which jurisdiction is not given to the Congress.

The jurisdiction to enact Criminal Laws, except for offences committed on the high seas and offences committed against the *United States* Government, exists on the part of the State Legislatures. The basis of the right to make laws of police is Criminal Law. *License Cases* (1).

The cases decided by the *United States* Courts as to laws on the nature of police do not apply with equal force to *Canada*, because the Provincial Legislatures have jurisdiction only in such matters as are expressly mentioned in section 92.

This is plain from section 91.

The *Quebec* resolutions numbered 29, 43 and 45 shew that this was what was intended.

As to the power of disallowance, that power belongs to only one branch of the Dominion Parliament and can be exercised in different ways. In the *United States* it is held that the moment Congress exercises its power over a subject-matter the State has no control, provided that Congress was first to exercise it.

It is further contended on the part of the respondent, that the power to sell in *Ontario* must come from the *Ontario* Government and that under the Act it can be called a shop license.

The answer to this will be found in *Brown* v. *State of Maryland* (2). It is as much a part of the trade of the brewer to sell as to manufacture.

(1) 5 Howard, at pages 590, 591, 592, and 625; Story on the Constitution, 4th edtion, sect. 1954; Cooley on Const. Limitations, 483; Dwarris on Stats. by Potter, p. 450, and subsequent pages; Blackstone's Coms., vol. 4, page 113.

(2) 12 Wheaton, pp. 442, 443, 446.

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It would be mockery to say: I will give you the right to manufacture, but the Provincial Legislature says you must get a shop license before you can sell. See also *Kent's* Commentaries (1).

If this sub-section 9 of section 92 gives power to require a license to be taken out by a brewer, the Legislature has power also to require the license to be obtained from the municipality or from the Provincial Government, or from both. This would very much embarrass this branch of trade, and might so fetter it as to destroy it.

Mr. *Mowat*, Q. C., Attorney General for *Ontario*, (Mr. *Crooks*, Q.C., with him) for the Respondent:

I claim for the Provinces the largest power which they can be given: it is the spirit of the *B. N. A. Act*, and it is the spirit under which Confederation was agreed to. If there was one point which all parties agreed upon, it was that all local powers should be left to the Provinces and that all powers previously possessed by the Local Legislatures should be continued unless expressly repealed by the *B. N. A. Act*. The larger powers given to the Dominion were for the purposes of nationality, so that in construing the *B. N. A. Act*, the intention was not to take from Provincial authorities any more than what was necessary. Take, for instance, the Administration of Justice; nothing in the Act says to whom belong the executive powers of the Administration of Justice, yet from the very beginning it was assumed that the local authorities have the same powers as before Confederation. We find that express power was given by ch. 128, 14 and 15 Vict., to the City of *Montreal* to tax brewers. The same power may surely be trusted to a Provincial Government. Another point of great importance is the provision in the Act

(1) 12 Ed. vol. 1, p. 439.

(sect. 90) by which legislation of the Local Legislatures can be vetoed. The relations of the Provinces here is different from that which the States bear to the *United States*. There Courts alone have power to declare when the States have usurped the higher powers of Congress, whilst here ample power is given to the Dominion Parliament of protecting itself.

This Act has now been in operation for several years. It has been contended that it is only one branch of the Parliament that has the right of disallowing the Provincial Acts. I think it will be admitted by all parties here that the Governor General must take the advice of his council when vetoing local Acts.

This power of disallowance should be taken into consideration when the policy of the Act is urged against us.

The regulation of the sale of all liquor for consumption in the Province, whether manufactured in the Province or not, is of Provincial concern, and the immunity of the person manufacturing in the Province, as part of the Dominion, under the excise regulation of the Inland Revenue Department, no more makes him free of provincial regulations than the person importing liquor under the Customs regulations of another Department.

Section 92 of the *B. N. A. Act*, 1867, confers upon the Legislature of each Province the jurisdiction of making laws so as to exclude the authority of the Parliament of *Canada* in relation to matters coming within the classes of subjects enumerated in that section, and where the Legislature possesses jurisdiction the Court has no power to review the exercise of it.

Where there is jurisdiction the will of the Legislature is omnipotent according to British theory, and knows no superior law in the sense in which the American Courts are accustomed to adjudicate upon constitutional questions.

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See *Blackstone* (1); *Sedgwick* Statutory and Constitutional Law (2); *De Tocqueville's* Democracy in America, Cap. 6; *Broom's* Constitutional Law (3); *Pomeroy's* Constitutional Law (4); *Story* on the Constitution of the *U. S.* (5); *Cooley's* Constitutional Limitations (6); and cases commented on in these authorities.

The requirement of the license is neither obnoxious as being an indirect mode of taxation, nor as being repugnant to the jurisdiction of the Dominion in the regulation of trade and commerce.

The tax here is direct upon the person, and not upon the commodity, with the view of enhancing the selling price thereof to the extent of the tax imposed.

See as to nature of tax, *Fawcett's* Political Economy (7); *Baxter* on Taxation (8); *Bowen's* Political Economy (Mass.) (9).

The taxing power is also commensurate with, and essential to, the existence of the Government, and this mode of its exercise is not excluded from Provincial jurisdiction.

See *Marshall*, C. J., in *Providence Bank and Billings*, (10); *McCulloch and State of Maryland* (11); *In re Slavin* and *The Corporation of Orillia* (12); *Marshall*, C. J., in *Gibbons* v. *Ogden* (13); *Story* on the Constitution of the *U. S.* (14).

Now, amongst the matters in which the Provincial Legislature has this exclusive jurisdiction under class 9 are included "shop, saloon, tavern, auctioneer, and other licenses in order to the raising of revenue for provincial, local, or municipal purposes."

(1) Blackstone's Comm. by Kerr, Vol. I, p. 36.
(2) Pomeroy's Ed. 1874, and cases in note Pp. 404-5.
(3) P. 795.
(4) Secs. 142, 143, 306 and *post.*
(5) Ed. 1873 Book 3, ch. 3.
(6) Ed. 1871, pp. 2, 4 and 86.
(7) Book 4, ch. 3, p. 477.
(8) Pp. 15, 20 and 21.
(9) P. 436.
(10) 4 Peters 541, 561-3.
(11) 4 Wheaton 316, 428.
(12) 36 U. C. Q. B. 172.
(13) 9 Wheaton 203.
(14) Sec. 1068.

(*a*). The term "shop" may as well cover the license to a brewer when selling for consumption in *Ontario* as any other seller by wholesale or retail. The brewer, *quoad hoc*, is in the like position. The same policy, whether of police or revenue, would also equally apply.

(*b*). The term "licenses" is most general, and would include as a subject-matter not only all dealers in any commodity, but trades, professions and occupations.

See *Baxter* on Taxation (1).

(*c*). The Rule of *ejusdem generis* is inapplicable here —first, in there being no controlling or particular classes to refer to in order to determine the like classes, to which the word "other" might be referred with any definiteness; and, secondly, because the latter words enlarge "other Licenses" into all such as the Legislative authority may consider necessary to the raising of a Provincial revenue.

The learned Counsel referred to the cases cited in the judgment of *Draper*, C. J., in the Court of Appeal, in the *Queen* v. *Taylor* (2); in addition to which he cited: *Fleury* v. *Moore et al.* (3); *Regina* v. *Boardman* (4); *Canada Central Railway* v. *Regina* (5); *Regina* v. *Longee* (6); *Sanson* v. *Bell* (7); *Oswald* v. *Berwick-on-Tweed* (8); *Reed* v. *Ingham* (9); *Martin* v. *Hemming* (10); *In re Mew* (11); *License Case* (12); *Ward* v. *Maryland* (13); *The License Taxes Cases* (14); *Cooley* v. *Board of Wardens* (15); *Board of Excise* v. *Barrie* (16); *Bode* v. *Maryland* (17); *Nathan* v. *Louisiana* (18); *Com-*

(1) Pp. 34, 35.
(2) 36 U. C. Q. B. 218.
(3) 34 U. C. Q. B. 319.
(4) 30 U. C. Q. B. 553.
(5) 20 Grant 273.
(6) 10 C. L. J. N. S. 135.
(7) 2 Camp. 39.
(8) 5 H. L. 856.
(9) 3 E & B. 889.
(10) 18 Jur. 1002.
(11) 31 L. J. N. S. Bkptcy, 89.
(12) 5 Howard 504.
(13) 1 American R. 50.
(14) 5 Wallace 463.
(15) 12 Howard R. 509.
(16) 34 N. Y. R. 657.
(17) 7 Gill 326.
(18) 8 Howard 73.

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monwealth v. *Hoothooke* (1); *Illinois* v. *Thurber* (2); *Brown* v. *State of Maryland* (3).

Supposing, now, this Act is viewed as an Imperial Act the word "other" must be accepted in its broadest sense ; 2 *Burns's* Justice of the Peace, (4) ; *Baxter* on Taxation (5); *Peto* on Taxation (6); *Broom's* Maxims (7).

The practice of the *United States* also may be referred to. How was this word accepted there. See *Hilliard* on Taxation (8); *Strong* on Constitutional Law, 1,053 ; *Rev. Stats. U. S.* (9).

The Provincial jurisdiction over licenses is not confined to shops and places where the sale is by retail, and the true construction to be given to sub-section 9 of sec. 92, is that the words "and other licenses" include the superior as well as the inferior grade of licenses.

Mr. Crooks, Q. C., followed on the part of the Respondent :—

By the *British North America Act* we are given a constitution similar to the English constitution. In each Province a *plenum imperium* was constituted and not a subordinate authority, or one with only such powers as were specifically conferred. Once jurisdiction is given over a subject matter, the power is absolute. The case of *L'Union St. Jacques de Montreal* v. *Belisle* (10), seems to support this view.

The only question before the Court is whether the enacting body acted *ultra vires.*

By the *British North America Act* two sovereign bodies

(1) 10 Allen 200.
(2) 13 Illinois 554.
(3) 12 Wheaton 419.
(4) 30th ed., 193, 194.
(5) Pp. 34 and 35.
(6) P. 170.
(7) Pp. 585, 588.
(8) P. 49, sec. 9.
(9) P. 625, sec. 3,243.
(10) L. R. 6 P. C. App. 35.

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were created, viz: the Dominion Parliament, and the Local Legislatures. There is no question of the one being subordinate to the other. The Act has to be construed as an Imperial Act and the jurisdiction given to the Local Legislatures must be absolute and complete. Assuming this, Respondent contends that this Statute was enacted by the *Ontario* Legislature in the exercise of that sovereignty.

The Provincial Legislature possesses inherent constitutional power to enact all such laws as it thinks best for the welfare of the people of the Province, and to secure this end to prohibit the sale, traffic, or disposal of spirituous liquor or other commodities which the Legislature may deem injurious. With respect to such matters its powers are as full and complete as those of the Dominion and Imperial Parliaments in relation to matters Canadian and Imperial respectively.

The principle of the maxim *salus populi suprema lex* is strictly applicable, and sustains the Provincial jurisdiction.

See *Lieber's* Legal Hermeneutics (1); *Sedgwick* on Stat. and Constit. Law (2).

Lord *Selborne*, in the case of *L'Union St. Jacques* v. *Belisle* (3), puts it thus:—

"The scheme of the 91st and 92nd sections is this: By the 91st some matters—and their Lordships may do well to assume, for the argument's sake, that they are all matters except those afterwards dealt with by the 92nd section; their Lordships do not decide it, but for the argument's sake they will assume it—certain matters, being upon that assumption all those which are not mentioned in the 92nd section, are reserved for

(1) Chap. 6., sec. x.
(2) C. 10 p. 404 (Pomeroy's ed. 1874) and cases in note.
(3) L. R. 6 P. C. App. 35.

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the exclusive legislation of the Parliament of *Canada*, called the Dominion; but, beyond controversy, there are certain other matters, not only not reserved for the Dominion Parliament, but assigned to the exclusive power and competency of the Provincial Legislature in each Province,—among those the last is thus expressed: 'Generally all matters of a mere local or private nature in the Province.'"

The aim of the Statute here was not to interfere with the general jurisdiction of the Dominion Government.

It is not an absolute prohibition for sale generally, but only a charge when sold for consumption within the Province of *Ontario*. It is only when the brewer ceases to be a manufacturer and becomes a trader. If the contention of the Appellant was correct, the consequence would be that the brewer could not sell by retail. See *Cooley* at p. 581, see also *Pomeroy's* Const. Law, 285 to 297, 332.

The expression "license" has not a limited application in our Statutes, and wholesale traders have been obliged to take out licenses for municipal revenue (1).

The argument of the Appellant to be consistent would have to exclude pedlers and hawkers:—see *In re Duncan* (2).

This case came under the *Dunkin* Act, which is still in force. If municipalities have this power surely the Provincial Parliament cannot be denied it. Licenses of any description cannot be limited by any power held by the Dominion Government. There may be here, as in the *United States*, two powers that may tax the same subject. See also *Broom's* Maxims (3), *Maxwell* on Statutes (4).

(1) 29 and 30 Vic. ch. 51, sec. 250; C. S. U. C., 22 Vic., ch. 54, sec. 246; 43 Geo. III. ch. 14 secs. 2 & 7; 43 Geo. III. ch. 9; 58 Geo. III. ch. 6.

(2) 4 Revue Leg. 228.

(3) Pp. 585, 588.

(4) Pp. 292, 303.

Mr. *Bethune*, Q.C., in reply :— 1878

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At the time of Confederation all *wholesale* licenses had been abolished. As to the power of disallowance by sec. 56, it has principally reference to the disallowance of valid laws for political reasons.

The *Dunkin* Act never touched the wholesale trade of brewers, but only prevents them from selling by the glass, and this Act could not be repealed by the Local Government.

The tax is imposed upon the brewer in *Ontario*, and is therefore a tax upon the sale of his goods and merchandise in *Ontario*, which can affect the trade of the other Provinces.

THE CHIEF JUSTICE: 1878

Jan'y. 28.

In deciding important questions arising under the Act passed by the Imperial Parliament for federally uniting the Provinces of *Canada*, *Nova Scotia* and *New Brunswick*, and forming the Dominion of *Canada*, we must consider the circumstances under which that Statute was passed, the condition of the different Provinces themselves, their relation to one another, to the Mother Country, and the state of things existing in the great country adjoining *Canada*, as well as the systems of government which prevailed in these Provinces and countries. The framers of the Statute knew the difficulties which had arisen in the great Federal Republic, and no doubt wished to avoid them in the new government which it was intended to create under that Statute. They knew that the question of State rights as opposed to the authority of the General Goverment under their constitution was frequently raised, aggravating, if not causing, the difficulties arising out of their system of government, and they evidently wished to avoid these evils, under the new state of

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things about to be created here by the Confederation of the Provinces.

In distributing the Legislative powers, the *British North America Act* declares the Parliament of *Canada* shall, or, as the 91st section reads,

> It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws, for the peace, order and good government of *Canada*, in relation to all matters not coming within the classes of subjects assigned *exclusively* to the Legislatures of the Provinces.

And then, for greater certainty, that section defines certain subjects to which the exclusive legislative authority of the Parliament extends. Amongst other things are mentioned :

> 2. The regulation of trade and commerce.
> 3. The raising of money by any mode or system of taxation.

Certain other subjects of a general and quasi-national character are then referred to and mentioned, as coming within the powers of the Dominion Parliament.

The causing a *Brewer* to take out a license and pay a certain sum of money therefor, as required by the *Ontario* Statutes, is a means of raising money, and it, of course, is a tax? And there can be no doubt it is an indirect tax; and it is equally beyond a doubt that it is a means which may be resorted to by the Dominion Parliament for the raising of money. When, then, it is mentioned in the Statute under consideration that the Dominion Parliament may raise money under any mode or system of taxation, and when, in the same Act, the taxing power of the Provincial Legislature is confined to *direct taxation* within the Province, in order to the raising of a revenue for provincial purposes, it seems to me beyond all doubt (except so far as the same may be qualified by No. 9 of section 92) that it was introduced not to allow the Provincial Legislature the right to impose indirect taxes for provincial or local purposes.

The fact, that in most European Countries, as well as in the *United States* and in the North American Provinces, by far the larger portion of the ordinary revenue was raised by indirect taxes, seems to indicate that the framers of the *British North America Act* considered this so important a power that it was not intended to intrust it to the Local Legislatures. The power of taxation, being so essential to the maintenance of a Government, must necessarily be viewed as of the greatest importance to every Government, and it is mentioned as No. 3 of the powers of the Dominion Parliament, and No. 2 of the Provincial Legislatures.

Looking, then, at these provisions as they stand thus far, it would be reasonable to hold, in the absence of any other provision, that the framers of the Statute did not intend that the Provincial Legislatures should have any but the power of direct taxation for raising a revenue for provincial purposes.

It is not necessary to say much as to the effect of raising money by direct and indirect taxation. When each inhabitant is compelled to pay a sum of money to a tax-gatherer he knows and understands what he pays, and will no doubt look sharply after the expenditure of money so extorted from him. But when the tax is indirectly imposed, and the payer recoups himself by an extra charge for the commodity he deals in, the purchaser may buy the article or not as he pleases: the money he pays is more like a voluntary payment for what may, perhaps, be considered a luxury, and when paid he does not look so sharply into the matter as he does in the payment of a direct tax. It is therefore obvious, that the Provincial Legislatures would be much more likely to exercise prudence in the character of the expenditure of money if they are compelled to raise it by direct taxation.

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Besides this, the taxation for purely local purposes before Confederation was mostly direct, whilst that for the general purposes of the Provincial Government was indirect, and generally from customs and excise. In most of the Provinces, a large portion of the indirect taxes, which might be considered as arising in the particular localities and were collected through the medium of licenses, was applied to local and not general or provincial purposes. We must assume this was known to the framers of the *British North America Act*, and that, whilst they were in effect prohibiting the Local Legislatures from levying indirect taxes, they did not wish to deprive these Provinces or localities of the revenue which the local or municipal authorities had been for many years receiving and applying to purely local purposes. In that view, then, when framing sec. 92 of the Statute, and by No. 8 providing for making laws for "municipal institutions in the Provinces," attention would be naturally drawn to the powers conferred on those bodies in the several Provinces, and the means which they had of raising money, and they would find, that in most, if not all, of the Provinces, the amount to be paid for tavern licenses was fixed by the local or municipal authorities, and the larger portion of the money arising from that tax was applied to the municipal or local purposes in contra-distinction to provincial or general purposes. If that system was to be continued it would be necessary to make special provision therefor, inasmuch as the tax by license was an indirect mode of taxation, and the Dominion Parliament was intended alone to possess it. Giving power to the Local Legislature to legislate as to "shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes," was certainly one mode of doing this. Suppose the word "provincial" had not been there, would

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not the fair meaning be that it was intended to be confined to licenses which were of a local character, and when it appears that part of the revenue derived from the tavern and shop licenses, as in *Canada*, had gone into the provincial chest, an obvious reason existed for adding provincial to the local or municipal purposes. In the Province where the most complete system of municipal institutions existed (and which is now the Province of *Ontario*), the shop and tavern licenses were issued on the certificates granted under the authority of by-laws passed by the municipalities, or in cities by the Police Commissioners, and the monies received therefor, except the amount payable to the Provincial Government by way of duty, belonged to the corporation of the municipality in which they were issued. The revenue from auctioneers licenses was applicable to local objects. There were issued under municipal authority a great number of other licenses, including auctioneer, which were specially named and referred to in the *Municipal Institutions Act* applicable to *Upper Canada* then in force, to name which minutely would have been pursuing a course not desirable or convenient to adopt in an Act of Parliament of the character of the one under consideration, but very proper in a Statute establishing municipal institutions and defining their powers.

Mr. Justice *Wilson*, in his very elaborate judgment in the *Queen* v. *Taylor* (1), refers to the class of licenses which seem to have

> a proper connection with and affinity to those licenses which are commonly mentioned and found along with shop, saloon, tavern and auctioneer licenses,

and then mentions licenses on billiard tables, victualling houses, ordinaries, houses where fruit, &c., are sold, hawkers, pedlers, transient traders, livery stables, intelligence offices, &c.

(1) 36 U. C. Q. B. 183.

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In some of the Provinces a portion of the monies from shop, saloon and tavern licenses (and perhaps also auctioneers licenses) formed part of the Provincial revenue. The mentioning of these by name shews that the power to legislate as to them was intended to be given to the Local Legislatures, and thus to interfere with what would otherwise have been the exclusive right of the Dominion Parliament to legislate on the subject. These were matters in which the municipalities were peculiarly interested, and as to which the local authorities would be much more likely to work out the law in a satisfactory manner. In fact, as to the "other licenses" the Dominion Parliament would be meddling with parish business if they undertook to legislate about them. We can, therefore, see very good reasons why these licenses as to local and municipal matters should be under the control of the Local Legislatures, and equally good reasons why, as regards licenses for such matters as would be likely to affect trade and commerce and the revenue derivable from the excise and customs, these latter affecting great and paramount interests, no express power was given to the Local Legislatures.

It seems to me, in naming "shop, saloon and auctioneer" licenses the intention was to shew that, as these licenses might possibly be considered applying to objects from which the Dominion revenue was likely to be derived, though really matters of local concernment, it would be better to name them and leave the other unimportant licenses to be covered by the words "and other licenses."

If it had been intended to allow the Local Legislatures to tax manufactures, and particularly the manufactures of malt and alcoholic liquors, from which so large a part of the public revenues had been, and was likely to be, raised, it would have been mentioned, and mentioned in other terms than "and other licenses."

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The Province of *Canada*, before Confederation, being the largest territorially, having a greater population and raising a larger revenue than either of the other Provinces, and being formed by the union of two Provinces having different laws and to some extent different interests, would naturally attract attention as the portion of the country where some of the objects of Confederation had been practically worked out. The legislation which had prevailed there would naturally be referred to, and would probably have its effect in moulding the measure which was to effect the destinies of so important a member of the new Confederacy, and which was to be worked out there in common with the other Provinces. I think we may, without violating any of the rules for construing Statutes, look to the legislation which prevailed in any or all of the Provinces, in order to enable us to be put in the position of those who framed the Laws and give assistance in interpreting the words used and the object to which they were directed.

Now, in considering the meaning to be attached to the words "shop licenses"—(I am not aware that they were used as applicable to licenses in any other of the Provinces)—we find in referring to the *Municipal Institutions Act of Upper Canada* then in force, 29 and 30 Vic., cap. 51, "shop licenses" are said to be licenses for the retail of spirituous, fermented or other manufactured liquors in quantities not less than one quart in shops, stores or places other than inns, ale houses or places of public entertainment. "Tavern licenses" is a term of more general use, and probably had substantially the same meaning throughout all the Provinces, and that class of license is referred to in the same Statute and section as licenses for the retail of the same description of liquors to be drunk in an inn, alehouse, beer-house, or any other house of public entertainment in which the same is sold.

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The anomaly of allowing the Local Legislatures to compel a manufacturer to take out a license from the Local Government to sell an article which has already paid a heavy excise duty to the Dominion Government, and after he has paid for and obtained a license from the Dominion Government to do the very same thing, is obvious to every one. It is not doubted that the Dominion Legislature had a right to lay on this excise tax and to grant this license, and the act of the Local Legislature forbids and punishes the brewer for doing that which the Dominion Statute permits and allows. Here surely is *what seems* a direct conflict and interference with the act of the Dominion Legislature, and such a conflict as the framers of the *British North America Act* never contemplated or intended.

I should be very much surprised to learn that any gentleman concerned in preparing or revising the *British North America Act* ever supposed that under the term "and other licenses" it was intended to confer on the Local Legislatures the power of interfering with every Statute passed by the Dominion Parliament for regulating trade and commerce, or for raising money under customs and excise laws. If it be decided that the words used confer the power in the broad sense contended for, there can hardly be an occupation or a business carried on which may not need a license from the Local Legislature, and if they have the right to impose that kind of taxation why should they be restricted from doing so?

I have already intimated that the largest portion of the revenues of *Canada* will probably be derived from duties raised under customs and excise laws, and that the power of direct taxation will seldom be resorted to; but that it was undoubtedly necessary, to guard against all possible contingencies as to a deficient revenue, to give to the Dominion Parliament the power of direct taxation.

It may be urged that in this way a conflict may arise between the two authorities. When a tax is directly imposed the power imposing it authorises its own officers to collect it, but when the conflict arises from a license the party who is required to take out the license may or may not do so as he pleases, and he may cease to carry on the business, and in that way deprive the Government of the revenue it would otherwise have received.

I do not think it necessary for the elucidation of my views to reiterate the arguments contained in the very elaborate judgment of Mr. Justice *Wilson*, in the case of the *Queen* v. *Taylor*. That judgment was prepared when I was a member of that Court, after a most careful consideration and consultation with all the Judges of the Court.

The fact, that that judgment was reversed in the Court of Error and Appeal of *Ontario*, and that so many of my learned Brothers in this Court dissent from the views there expressed, of course, naturally creates in my mind some distrust as to the correctness of my own conclusions. It may be that I do not take a sufficiently technical view of the matter, that I look too much to the surrounding circumstances and the legislation which I consider applicable to the subject, and that my mind is too much influenced by those circumstances But I consider the question to be decided is of the very greatest importance to the well working of the system of Government under which we now live. I consider the power now claimed to interfere with the paramount authority of the Dominion Parliament in matters of trade and commerce and indirect taxation, so pregnant with evil, and so contrary to what appears to me to be the manifest intention of the framers of the *British North America Act*, that I cannot come to the conclusion that it is conferred by the language cited as giving that power.

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By the interpretation I give to the words, limiting them to the "other licenses" which are of a local and municipal character, and giving full force to the words "shop, saloon, tavern and auctioneer licenses," I think I carry out the intention of the *British North America Act*, and make all the powers harmonise. Those of the Dominion Parliament to regulate trade and commerce and to exercise the power of indirect taxation, except the shop, tavern, saloon and auctioneer licenses, and those of a purely local and municipal character; and the Local Legislature has the powers so excepted out of the exclusive powers of the Dominion Parliament, together with the right of direct taxation.

It is suggested that, as under section 90 of the Statute the Governor General may disallow any Act of a Local Legislature likely to cause a conflict with Statutes of the Dominion Parliament, any apprehended difficulty or inconvenience might be avoided by the exercise of that power.

Under our system of Government, the disallowing of Statutes passed by a Local Legislature after due deliberation, asserting a right to exercise powers which they claim to possess under the *British North America Act*, will always be considered a harsh exercise of power, unless in cases of great and manifest necessity, or where the Act is so clearly beyond the powers of the Local Legislature that the propriety of interfering would at once be recognised.

My views may be briefly summed up thus:—

I consider, under the *British North America Act*, the power to regulate trade and commerce rests exclusively with the Dominion Parliament, as also the right to raise money by the mode of indirect taxation, except so far as the same may be expressly given to the Local Legislatures.

Making it necessary to take out and pay for a license

to sell by wholesale or retail, spirituous, fermented or other manufactured liquors, is raising money by the indirect mode of taxation.

I think all the authority given to the Local Legislatures to exercise the power of raising money by the indirect mode of taxation is contained in sec. 92 of the *British North America Act*, which gives power to legislate on the subject of

8. Municipal institutions in the Province.

9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising a revenue for provincial, local or municipal purposes.

Looking at the state of things existing in the Provinces at the time of passing the *British North America Act*, and the legislation then in force in the different Provinces on the subject, and the general scope and object of Confederation then about to take place, I think it was not intended by the words "other licenses" to enlarge the powers referred to beyond shop saloon and tavern licenses in the direction of licenses to affect the general purposes of trade and commerce and the levying of indirect taxes, but rather to limit them to the licenses which might be required for objects which were merely municipal or local in their character.

If the power can be properly exercised by the Local Legislatures to raise money by this indirect mode of taxation, I cannot doubt it will be largely exercised, and probably without reference to the effect it may have on the means which the Dominion Parliament may resort to for the purpose of raising a revenue. It is a significant fact that since the passing of the Act requiring manufacturers of spirituous, malt, or other manufactured liquors to take out a license to sell by wholesale, the Legislature of *Ontario* has increased the sum payable for such licenses from fifty dollars to one hundred and fifty dollars.

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I think the appeal should be allowed with costs, and judgment in the Court below entered for the Defendant on the demurrer to the information with costs.

RITCHIE, J.:—

The only question raised in this case is: Has the Legislature of *Ontario* authority to raise a revenue from brewers by requiring them to take out licenses to enable them to carry on their business and dispose of their beer within the Province of *Ontario?*

This I should feel no difficulty in answering in the negative, but for sub-section 9 of section 92 of the *British North America Act*, 1867.

No doubt this is an indirect tax, and Local Legislatures are, by the *British North America Act*, confined in their power of raising money to direct taxation within the Province, in order to the raising of a revenue for provincial purposes, except so far as their power is extended by section 92, which authorizes the Legislature in each Province exclusively to make laws in relation to matters coming within the classes of subjects next thereinafter enumerated, of which sub-section 9 specifies:

> Shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local or municipal purposes.

This brings up the question on which, I humbly think, this case turns, viz., what licenses did the Legislature intend to cover by the words, "and other licenses?" Had the licenses specified in this section been *ejusdem generis;* had they been confined to those which, throughout the Dominion, previously to Confederation, had been granted only by municipal authorities; and had the revenue authorized to be raised been for municipal purposes alone, I should have thought there was much force in the contention that the words "and other licenses" should be read in a restricted

sense. We are not, in my opinion, to look to the state of the law at the time of Confederation in the adjoining Republic, or the difficulties there experienced, as affording any guide to the construction of the *British North America Act*; nor, with all respect for the Province of *Ontario*, do I think the Act should be read by the light of an *Ontario* candle alone, that is, by the state of the law at the time of Confederation in that Province, without reference to what the law was in other parts of the Dominion. If the law at the time of Confederation is to be looked at as affording a key to the construction of the Statute, then the state of the law throughout the Dominion must, I think, be looked at, and not that of any individual Province; as I think it clear that the Statute was to have a uniform construction throughout the whole Dominion, and the powers of all the Local Legislatures were to be alike. But, as the case stands, I can see no reason why the golden rule,as it has been often called, by which Judges are to be guided in the construction of Acts of Parliament, should be departed from, viz., to read the words of an Act of Parliament in their natural, ordinary and grammatical sense, giving them a meaning to their full extent and capacity, there being nothing to be discovered on the face of the Statute to show that they were not intended to bear that construction, nor anything in the Act inconsistent with the declared intention of the Legislature.

I cannot think it was intended to confine the powers of the Local Legislature, for the raising of a revenue for provincial purposes, to licenses of a purely municipal character granted, most frequently, rather with a view to police regulations than for purposes of revenue, and which, when granted for the latter object, could hardly be supposed to be more than adequate for local and municipal purposes. I think the power given under sub-section 9 should be construed as intended to

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furnish the Local Legislature with the means of raising a substantial revenue for provincial purposes from all such licenses as at the time of Confederation were granted in the now Dominion, either by provincial or municipal authority.

I have said before, the licenses named are not *ejusdem generis*, for certainly auctioneer licenses are not *ejusdem generis* with tavern licenses, nor always granted by the same authority; for in *New Brunswick*, while tavern licenses were granted by the municipal authority, auctioneer licenses were granted by the Lieutenant-Governor; and so with respect to distillers, an annual license had to be obtained from the Provincial Treasurer; so also formerly with respect to hawkers, pedlers and petty chapmen, a provincial duty was imposed, and they were required to take a license from the Treasurer of the Province (1); and again, in *New Brunswick*, licenses, other than those of a police or municipal character, were granted by municipal authority as licenses for the sale of liquors by wholesale, no person being allowed to sell any liquor by wholesale without license, which liquors the Statute declared *inter alia* to be:

Ale, porter, strong beer, or any other fermented or intoxicating liquor.

From this brewers were not exempt, there being no exception in their favor. And by the 6 Vic. ch. 35 it was enacted:

Sec. 3. That it shall and may be lawful for the mayor of the said city (*St. John*), and he is hereby authorized to license persons being natural born British subjects, or such as shall become naturalized or be made denizens, to use any art, trade, mystery or occupation, or carry on any business in merchandize or otherwise, within the said city, on paying yearly, such sum not exceeding five pounds, nor less than five shillings, to be fixed and determined by an ordinance of

(1) See 9 & 10 Geo. IV. c. 27.

the corporation, for the use of the mayor, aldermen and commonalty of the said city of *St. John*, together with the fees of office, and be subject also to the payment of all other charges, taxes, rates, or assessments as any freeman or other inhabitant of the said city may, by law, be liable to or chargeable with.

Sec. 4. And that aliens, the subjects of any other country at peace with *Great Britain*, may be licensed, by the mayor of the said city, to use any art, trade, mystery or occupation, or to carry on any business in merchandise or otherwise, within the said city, on paying annually for the use of the mayor, aldermen and commonalty of the said city, a sum not exceeding twenty-five pounds, nor less than five pounds, together with fees of office to be regulated by an ordinance of the corporation, and be subject also to the payment of all other charges, taxes, rates or assessments as any freeman or any other inhabitant of the said city may, by law, be liable to or chargeable with.

Therefore, I think the rule *noscitur a sociis* cannot apply in this case.

It is said this construction conflicts with the power of the Dominion Government to regulate trade and commerce, and the raising of money by any mode or system of taxation. All I can say in answer to that is, that so far, and so far only, as the raising of a revenue for provincial, municipal and local purposes is concerned, the *British North America Act*, in my opinion, gives to the Local Legislatures not an inconsistent but a concurrent power of taxation, and I fail to see any necessary conflict; certainly, no other or greater than would necessarily arise from the exercise of the power of direct taxation and the granting of shop and auctioneer licenses specially vested in the local legislatures. It cannot be doubted, I apprehend, that both the Local Legislatures and Dominion Parliament may raise a revenue by direct taxation, and, if so, why may not both raise a revenue by means of licenses? There need be no more conflict in the one case than in the other. The granting of shop and auctioneer licenses necessarily interferes with trade and commerce, the former with

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retail trade, the latter with both wholesale and retail trade; for, in large business centres, auctioneers' sales on a wholesale scale are of daily occurrence.

Should at any time the burthen imposed by the Local Legislature, under this power, in fact conflict injuriously with the Dominion power to regulate trade and commerce, or with the Dominion power to raise money by any mode or system of taxation, the power vested in the Governor General of disallowing any such legislation, practically affords the means by which serious difficulty may be prevented. But I do not think we have any right to suppose for a moment that the Local Legislatures would legislate save for the legitimate purpose of raising a revenue, and not so as to interfere unnecessarily or injuriously with the legislation of the Dominion Parliament, still less, so as to destroy the very business from which the revenue is to be derived.

I think the construction I have indicated of the words "and other licenses" is not only in accordance with the literal interpretation of the language, but is consistent with the policy and purview of the Statute, which, as I said before, in my opinion, was to give to the Local Legislatures the rights and power, in addition to direct taxation, to raise a substantial revenue, for provincial, as well as for municipal, purposes, by means of licenses such as were and might have been granted at the time of Confederation by the several Provincial Governments and municipal authorities, and is not confined to licenses which are of a purely municipal character, and from which I do not think a brewer is any more exempt than a shop-keeper or auctioneer. He could not sell by wholesale in *New Brunswick* at the time of Confederation without a license, and I do not think he can do so now in *Ontario*.

It may be right for me to say that it is only under

the words "and other licenses," and solely in order to the raising of a revenue for the purpose named in sub-section 9, that, in my opinion, the Local Legislatures have the right of imposing this burthen or tax on brewers.

STRONG, J.:—

I am of opinion that the judgment of the Court below ought to be affirmed.

As this Court is now, for the first time, dealing with a question involving the construction of that provision of the *British North America Act* which prescribes the powers of the Provincial Legislatures, I do not consider it out of place to state a general principle, which, in my opinion, should be applied in determining questions relating to the constitutional validity of Provincial Statutes. It is, I consider, our duty to make every possible presumption in favor of such Legislative Acts, and to endeavor to discover a construction of the *British North America Act* which will enable us to attribute an impeached Statute to a due exercise of constitutional authority, before taking upon ourselves to declare that, in assuming to pass it, the Provincial Legislature usurped powers which did not legally belong to it; and in doing this, we are to bear in mind "that it does not belong to Courts of Justice to interpolate constitutional restrictions; their duty being to apply the law, not to make it."

It must, therefore, before we can determine that the Legislature of the Province of *Ontario* have exceeded their powers in passing this Act, be conclusively shown that it cannot be classed under any of the subjects of legislation enumerated in section 92 of the *British North America Act*, which is to be read as an exception to the preceding section.

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The provision contained in the 26th section of the *Ontario* Act, 37 Vic., cap. 32, does not require all brewers to obtain licenses to enable them to sell the beer manufactured by them; but the restriction against selling without license is confined to the sale by wholesale of beer sold for consumption within the Province. I cannot well see with what object the distinction was made between beer to be consumed in, and that to be consumed without, the Province, unless it was either upon the assumption, that the right exclusively conferred upon the Parliament of the Dominion to regulate trade and commerce did not extend to the internal trade of the Provinces; or upon the supposition, that the law would be authorized by the right to legislate in exercise of what was designated in the argument of this case as the police power, which, it was contended, the Provinces possess. Neither of these grounds constituted valid reasons for making this discrimination.

That the regulation of trade and commerce in the Provinces, domestic and internal, as well as foreign and external, is, by the *British North America Act*, exclusively conferred upon the Parliament of the Dominion, calls for no demonstration, for the language of the Act is explicit.

With reference to the police power, I am of opinion also, for a reason which I will state hereafter, that the distinction could have no legal effect.

I regard the Act, therefore, as one, the validity of which is to be tested precisely in the same manner as if it had required all persons carrying on the trade of brewing in the Province of *Ontario* to qualify themselves by taking out licenses.

It was argued for the Crown, and particularly pressed by one of the learned counsel, Mr. *Crooks*, that the fee payable for this license was a direct tax, or in the

nature of a direct tax, and so authorized by section 92, sub-section 9.

I do not think this argument well founded. It might not be easy to specify *a priori* what is meant by a direct tax under that sub-section. One species of tax which would be a direct tax suggests itself at once,—a capitation tax; but it is not material to pursue the enquiry, as it is evident that, accepting the meaning given to the term "indirect tax" by political economists, a tax on manufactures by means of a license is within the definition, since the payment of it ultimately falls upon the consumer. Licenses are always classed by economists with excise taxes. The authorities referred to in the judgment of the late Chief Justice of the Court of Appeal in *The Queen* v. *Taylor* seem conclusive as to this.

It was also contended by counsel for the Respondent, that under the words "Municipal Institutions in the Province," which constitute sub-section 9 of sec. 92, or under sub-section 16 of the same section, which gives legislative power in "all matters of a merely local or private nature in the Province," the Provincial Legislatures possess authority to legislate in exercise of what American authorities have conveniently termed the "Police Power"—meaning a power to legislate respecting ferries, markets, fares to be charged for vehicles let for hire, the regulation of the retail sale of spirits and liquors, and on a number of other cognate but indefinite subjects, which, in all countries where the English municipal system, or anything resembling it, prevails, have been generally regarded and dealt with as subjects of municipal regulation (1).

Without expressing any opinion as to the soundness

(1) See *Munn* v. *Illinois*, 4 Otto, 125 et seq.; Potters Dwarris p. 462; Dillon on Municipal Corporations, sec. 93.

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of this argument, I am of opinion, that, even if it was entitled to prevail, it could not warrant the imposition of a license tax upon the manufacture or wholesale sale of beer, any more than it would authorize a similar tax upon any other manufacture or commerce by wholesale.

I think, however, that in ascribing the power of the Legislature to pass this Statute to sub-section 9 of section 92, the learned counsel for the Crown put their case upon the true ground. That provision is in the following words:

> Shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes.

In the *Queen* v. *Taylor* (1), the Court of Appeal of *Ontario*, adjudicating upon the question now before this Court, determined that the words "other licenses," as used in this section, gave power to impose licenses upon persons carrying on the trade of brewers.

This conclusion was reached by the consideration that all powers conferred in section 92 were to be read and regarded as exceptions to those enumerated in section 91, and by that section given to Parliament. That section 92 was, therefore, to be construed as if it had been contained in an Act of the Imperial Parliament, separate and apart from section 91, and is, therefore, to be read independently of that section. The rule applied in the construction of Statutes, which restrains general words following specific words to subjects *ejusdem generis* with those specifically mentioned, was thought not to be applicable, inasmuch as the specific words were not *ejusdem generis* with each other, and it was, therefore, impossible to say with which class of the specific classes mentioned the general words should be associated; in short, it was held to be impossible to apply to this clause the well known maxim of interpretation *noscitur a sociis*.

(1) 36 U. C. Q. B. 218.

The words "other licenses" were therefore held to be susceptible of only one construction, that which attributed to them the same meaning as if the expression in the Act had been "any licenses," or "all licenses," standing alone, unconnected with any specific words.

I was a party to the judgment in *The Queen* v. *Taylor*, and a careful consideration since has not only not led me to discover any error in it, but has brought to my notice authorities not quoted to the Court of Appeal, as well as some additional reasons for adhering to the decision.

In *Regina vs. Payne* (1) this principle of construction was applied. A recent text writer (2), gives a succint statement of this case and of the principle involved in it which I adopt, and which is contained in the following quotation :

> Further, the principle in question applies only where the specific words are all of the same nature. When they are of a different nature, the meaning of the general word remains unaffected by its connection with them. Thus, where an Act made it penal to convey to a prisoner, in order to facilitate his escape, "any mask, dress or disguise, or any letter, or any other article, or thing," it was held that the last terms were to be understood in their primary and wide meaning, and as including any article or thing whatsoever, which could in any manner facilitate the escape of a prisoner, such as a crowbar. Here, the several particular words "disguise" and "letter," exhausted whole genera, and the last general words must be understood, therefore, as referred to other genera (3).

It is scarcely possible to suppose an authority more exactly in point than that just cited. The only difference in principle between the two cases being, that, in the instance quoted, this rule of construction was applied in a criminal case and against the prisoner ; here, it was applied by the Court of Appeal in support of a pre-

(1) L. R. 1 C. C. 27.
(2) Maxwell on Statutes, p. 303.
(3) *R.* v. *Edmundson*, 2 E. & E. 77 ; *Young* v. *Grattridge*, L. R. 4 Q. B. 166 ; *Harris* v. *Jenns*, 9 C. B. N. S. 152 ; *Pearson* v. *Hull Local Board of Health*, 3. H. & C. 921.

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sumption which the highest authorities, and which reason, if there was no authority, tell us ought always to be made in favor of the constitutional validity of a Legislative Act.

But without any reference to authority, the impossibility of saying by which of the particular expressions "shop, saloon, tavern or auctioneers," the general words were to be restrained ought, I venture to say, with deference to those who differ from me, to force the broad construction of the words "other licenses" upon a court called upon to construe this clause, as a necessary and unavoidable interpretation (1).

Then, the attribution of this meaning to the clause under consideration does not lead to any harsh or unreasonable consequences. The result of it is, that the people of the Provinces have the power, through their representatives, to tax themselves for Provincial, local or municipal purposes, by means of licenses, to any extent they may choose; which may, perhaps, not be considered to be an extravagant power, when it is remembered that the license tax is the only source of Provincial Revenue other than the Public Lands, the subsidy from the general government, and money raised by direct taxation, which, however ample in this particular Province, and at the present time, may not, in other Provinces, or in this, at some future time, be productive of sufficient income to meet the expenditure required for carrying on the Provincial Government.

The imposition of licenses authorized by this subsection 9, is, it will be observed, confined to licenses for the purposes of revenue, and it is not to be assumed that the Provincial Legislatures will abuse the power,

(1) See *Cadett* v. *Earle*, L. R. 5 Ch. Div. 710, per Sir George Jessell, Master of the Rolls, decided since this judgment was delivered.

or exercise it in such a way as to destroy any trade or occupation. Should it appear explicitly on the face of any Legislative Act that a license tax was imposed with such an object, it would not be a tax authorized by this section, and it might be liable to be judicially pronounced *extra vires*. And however carefully the purpose or object of such an enactment might be veiled, the foresight of those who framed our constitutional Act led them to provide a remedy in the 90th section of the Act, by vesting the power of disallowance of Provincial Acts in the Executive Power of the Dominion, the Governor General in Council. There is, therefore, no room for the application of any argument *ab inconvenienti* sufficient to neutralize the rule of verbal construction already referred to.

I have considered, with all the attention in my power, the reasoning which the Chief Justice has enunciated in his judgment to day, as well as in his former judgment in the case of *Slavin* v. *Orillia* (1); but I am unable to accede to the doctrine that we are to attribute to the words "other licenses" the same meaning as though the expression had been "such other licenses as were formerly imposed in the Province," or equivalent words.

The result of such a construction would be, that the same words would have a different meaning in different Provinces, and that the several Provincial Legislatures would have different powers of taxation, though the power is included in the same grant. This, it appears to me, would be in direct contravention of the principle which forbids a different interpretation being given to a general law in different localities, however much local laws or usages may favor such diverse interpretations (2).

(1) 36 U. C. Q. B. 172.

(2) *R.* v. *Hogg*, 1 T. R. 721; *R.* v. *Saltren*, Cald. 444.

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However, apart from authority, I cannot think this was the intention of the Imperial Parliament. I think everything indicates that co-equal and co-ordinate legislative powers in every particular were conferred by the Act on the Provinces, and I know of no principle of interpretation which would authorize such a reading of the *British North America Act* as that proposed. Had such been the design of the framers of the Act, the meaning of which I can only discover from the words in which it is expressed, we should have found the case provided for.

The objection, that the wider construction which I have attributed to sub-section 9 brings that provision into collision with sub-section 2 of section 91, which confers the power of regulating trade and commerce on the Parliament of the Dominion, is, I think, fully answered by reading the subjects enumerated in section 92 as excepted from section 91. It is, I conceive, the duty of the Court so to construe the *British North America Act* as to make its several enactments harmonize with each other, and this may be effected, without doing any violence to the Act, by reading the enumerated powers in section 92 in the manner suggested, as exceptions from those given to the Dominion by section 91. Read in this way, sub-section 2 must be construed to mean the regulation of trade and commerce, save in so far as power to interfere with it is, by section 92, conferred upon the Provinces. Imposing licenses on auctioneers and shops is an undoubted interference with trade and commerce; and if the words "other licenses" have the wide primary meaning which, I think, is to be attributed to them, why should they be cut down and regarded as inconsistent with sub-section 2, any more than the words authorizing specific licenses? The reading of sub-section 2 of section 91, as subject to the exception of auctioneer and shop licenses, is absolutely

necessary to reconcile the two clauses, and, if that be so, upon what principles can the classes of licenses, whatever they may be, which are covered by the words "other licenses," be excluded from the exception? The words "other licenses" must either be silenced altogether, or else, whatever they may mean in conjunction with the preceding specific words, they must be read as an exception to sub-section 2 and every other enumeration of section 91, with which they would conflict if otherwise construed.

That Parliament has a general unrestrained power of taxation can make no difference. The same answer applies to this objection as that just suggested as regards sub-section 2; but, in addition, there is no repugnancy or inconsistency between this general power of taxation in the Dominion and the restricted right to tax in the Provinces.

It is true, that the same tax might be laid on by both Legislatures, but this constitutes no such absurd or unjust consequence as would necessitate a rejection of the obvious primary meaning of the words of the Act. If in section 91 unlimited power of taxing is given, and in section 92 power is given to tax brewers, and I read the act as if that had been expressed in so many words, there would not, so far as I can see, be any inconsistency.

The general Legislature can undoubtedly tax auctioneers, and by express words the Local Legislatures have authority to do the same. The Act, therefore, contains internal evidence that the double power of taxation was not considered inconvient or absurd. The protection of the people against oppressive taxation was left to their representatives in the Provincial Legislatures as well as in Parliament.

Some arguments addressed to the Court seem to have

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been intended to elicit opinions as to the locality of the power of prohibiting legislation with reference to the trade in spirituous liquors, wine and beer. This, so far as retail trade is concerned, must depend on the proper answers to two questions: 1st, Do the Local Legislatures possess what is called the "police power"? 2nd, If they do, does it authorize them to legislate so as to prohibit, or only to regulate, the retail traffic in liqours? The decision of this case does not call for any answer to either of these questions, and I therefore forbear from expressing any opinion upon them, since such an opinion would, in my point of view, be extra judicial, and therefore improper.

My conclusion is, that it was within the competence of the Legislature of *Ontario* to pass the Statute in question, and that this appeal should therefore be dismissed with costs.

TASCHEREAU, J.:—

The only question submitted for our decision is, whether the Legislature of *Ontario* had the power to pass the statute 37 Victoria, chapter 32, under which the Appellant was condemned, requiring Brewers to take out a license for selling fermented or malt liquor by wholesale.

I must confess, that for some time I had strong doubts against the legality of the pretensions of the Defendant *Severn*, amounting very nearly to conviction; but after long and mature deliberation I came to the conclusion that the sections of that Act applicable to the Defendant were *ultra vires*.

On reference to section 92 of the *British North America Act*, 1867, we find that the subjects of *exclusive* Provincial Legislation are determined in somewhat concise language; but, nevertheless, with sufficient

explicitness to be well ascertained after a careful examination of the whole Act.

On reference to sub-section 2 of section 92, we find that direct taxation only is one of the privileges of Local Legislatures, in order to raise a revenue for Provincial purposes; and, under sub-section 9 of this same section 92, it is enunciated that their powers shall extend to make laws about

> Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes;

but it is evident, that in adjudicating on the extent of sub-section 9 of section 92, we must read it in connection with the remainder of the Act itself, and more particularly with sub-sections 2 and 29 of section 91, which indicate the powers of the Parliament of *Canada*.

Under sub-section 2 of section 91, the Parliament has the exclusive regulation of trade and commerce, and under sub-section 29 of section 91, it is declared that

> Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

From section 122 of the *British North America Act* we can safely infer that the Parliament of *Canada* has *exclusive* jurisdiction as to excise.

Coming to sub-section 2 of section 92 of the *British North America Act*, I say that it is out of the question for the Crown to rest its case on this sub-section; for, according to it, the only tax the Government of *Ontario* could raise would be a direct one, and not an indirect one, such as the one complained of. The authorities quoted at the Bar warrant this interpretation of the nature of the tax.

> A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are

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those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another (1).

Now, from what I have read and heard, I think there is no difficulty in assuming that the tax imposed on the Brewer selling by wholesale in the present case, is an indirect tax, so that this question should not be further pressed against the Defendant *Severn*.

Now, can the Crown justify the Act in question in this cause under subsection 9 of section 92 of the *British North America Act*, which grants to Provincial Legislatures in the Dominion of *Canada* the right of making laws about shop, saloon, tavern, auctioneer and other licenses? I think not. This power would evidently clash with the Dominion power of regulating trade and commerce, and of imposing duties thereon, and exacting licenses. If this right existed, both Parliament and Provincial Legislatures would possess an equal right to impose a duty and exact licenses.

But what is the meaning of the words "*and other licenses*," immediately following the words "shop, saloon, tavern, auctioneer?"—I answer, that taken in connection with all the surrounding circumstances, and with the various sections of the *British North America Act*, they certainly cannot mean anything which could be interpreted as granting such powers as those claimed by the *Ontario* Legislature. They must not be so interpreted as to clash with the general spirit of that last mentioned Act and its special enactments. In a word, they cannot be so interpreted as to give to the *Ontario* Legislature a right to affect the general control of the Dominion over trade, commerce and excise, and its sovereignty over the country, by diminishing some of its principal sources of revenue. If these words mean what is contended

(1) Mill's Principles of Political Economy, Vol. 2, Ed. 1871, p. 415.

for by the prosecution, sub-section 29 of section 91 of the *British North America Act* is nonsensical and should be struck out of the statute. But these words may and must mean all matters and regulations of Police and the government of those saloons, taverns, auctioneers, &c., &c.; and if these words can not bear this last interpretation, the section has no meaning, or is *ultra vires*. I therefore say, that the Defendant *Severn* could not be legally convicted under the Act in question, as he has been by the judgment appealed from in the present case, and that that judgment should be reversed.

FOURNIER, J.:—

[TRANSLATED.]

The only question to be decided in this case arises on the constitutionality of a law of the Province of *Ontario*, imposing upon brewers and distillers the obligation of taking out a license of $50, in order that they may sell their products within the said Province.

The question we have therefore toconsider is, whether the law in question is, or is not, in direct conflict with the *British North America Act*, and, more particularly, 1st, with No. 2 of section 91, relating to the "regulation of trade and commerce," and, 2ly, with section 122, which gives to the Parliament of *Canada* the control over the custom and excise laws, and, therefore, beyond the limits of the jurisdiction of the *Ontario* Legislature.

The principal provisions in the *British North America Act*, which have reference to the present question, are the following:

Sec. 91 gives power to the Parliament of *Canada*

To make laws for the peace, order, and good government of *Canada*, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of

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the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of *Canada* extends to all matters coming within the classes of subjects next hereinafter enumerated :

Amongst others—

2nd. The regulation of trade and commerce.

3rd. The raising of money by any mode or system of taxation.

* * * * *

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Sec. 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated :

Amongst others—

2. Direct taxation within the Province in order to the raising of a revenue for Provincial purposes.

9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes.

Sec. 95. In each Province the Legislature may make laws in relation to agriculture in the Province, and to immigration into the Province, and it is hereby declared that the Parliament of *Canada* may from time to time make laws in relation to agriculture in all or any of the Provinces, and to immigration into all or any of the Provinces ; and any law of the Legislature of a Province relative to agriculture or immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of *Canada*.

Sec. 122. The custom and excise laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of *Canada*.

Before considering the two points above mentioned, I think it necessary to review briefly the argument of the learned counsel of Her Majesty, founded on their interpretation of the words "and other licenses," in paragraph 9 of section 92. They contend, as it was contended by the Court of Appeal of *Ontario*, in the case of *The Queen* v. *Taylor*, where the same question

arose, that the expression made use of is large enough to give jurisdiction to the *Ontario* Legislature to pass the law in question.

Now, if these terms are not to have the broad signification which, at first sight, their general meaning seems to convey, what restrictions should be put on them? What subjects would be susceptible of taxation by the mode of licenses, and what subjects would be exempt from such taxation? The line of division is no doubt somewhat difficult to be drawn, in consequence of a vagueness and want of precision in drafting the paragraph in which these expressions are to be found; but the Dominion, no more than the Provinces, can increase its jurisdiction by its own legislation; and we must therefore, notwithstanding the delicacy of the task, have recourse to a judicial interpretation in order to know the limits of both powers.

Is it true, as is contended by the learned counsel of Her Majesty, that, being unable to construe the words "and other licenses" in paragraph 9 according to the ordinary rule that general words following specific words must be taken to mean something of the same kind, *ejusdem generis*, the power to impose licenses is therefore absolute and unlimited?

They lay down their proposition as follows:

The rule of *ejusdem generis* is inapplicable here, first, in there being no controlling or particular classes to refer to in order to determine the like classes to which the word "other" might be referred with any definiteness; and 2ndly, because the latter words enlarge "other licenses" into all such as the legislative authority may consider necessary to the raising of a revenue.

It is true that "auctioneer" licenses were for a long time regulated by a different law from that which regulated the granting of licenses for shops, taverns, saloons, &c. But even before Confederation the Legislature of *Canada* had assimilated them, at least in the Province of *Upper*

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Canada, to these other licenses, and had subjected them, with the latter, to the control of the municipalities. They had, at least for that Province, become *ejusdem generis*. In *Lower Canada* the revenue derived from them had ceased to be appropriated for the general use of the Government, in order to form part of the seigniorial indemnity fund, for the purpose of paying off the dues of the *censitaires* which the Government had undertaken to pay.

Without attaching more importance than is necessary to the application of the rule of *ejusdem generis*, is it not more logical to suppose that the Imperial Legislature, finding already in some of the laws these licenses treated as of the *same kind* as other licenses, did likewise, and dealt with them as belonging to the one class; and, therefore, should we not apply in construing this 9th paragraph the rule of *ejusdem generis*? Otherwise, we must come to the conclusion that the insertion of the word "auctioneer," which, no doubt, was put in to give the Local Government a further source of revenue, would have the effect of giving to the Local Legislature an unlimited power to tax by means of licenses. This cannot have been the intention of the Imperial Parliament. They cannot, by the insertion of that word, have made a provision which would have the effect of destroying the financial system of both the Dominion and the Provinces established by the Constitution. The intention was no doubt that they should have a limited signification in accordance with the distinct powers so carefully allotted to the Federal and Local Governments.

Moreover, I am far from admitting that the word "other," coming immediately after an enumeration, can always have that broad meaning; on the contrary, I am of opinion that it should nearly always be accepted in a restricted sense, and that the cases in which its

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signification is absolute and unlimited are exceptional.

This is the rule as laid down by Chief Justice *Erle* in the case of *Williams* v. *Golding* (1), when construing the words "other person;" and by Lord *Campbell*, Chief Justice, in the case of *Reed* v. *Ingham* (2), while interpreting the words "other craft."

See also the case of *The East London Waterworks Co.* v. *The Trustees of Mile End Old Town* (3); and the case of the *King* v. *The Justices of Surrey* (4).

Besides, if these words "and other licenses" should not be construed (which I do not admit) according to the above ordinary rule, would it follow that there is not to be found in the Constitutional Act itself, taking a general view of it, as well as of certain of its provisions, a mode of solving this question conformably to the spirit of the Act, rather than according to the views of the learned Counsel of Her Majesty?

First, was it not the clear intention of the Imperial Parliament to establish two distinct Governments, with special and exclusive powers, in order to avoid all conflict between the different authorities?

To prove this it is not necessary to refer to the circumstances before the present state of affairs. The clear and precise terms of the Constitutional Act itself are sufficient to show this. It may be as well, however, to remark, that the *British North America Act* contains in substance hardly anything more than the *Quebec* resolutions, their object at that time being, most certainly, to constitute two distinct Governments with different and exclusive powers. This is also, in effect, what the new Constitution provides for, especially by sections 91 and 92, which distribute the legislative power to the Dominion and Provincial Legislatures.

(1) L. R. 1 C. P. 77.
(2) 3 E. & B. 889.
(3) 17 Q. B. 521.
(4) 2 Term R. Pp. 504. 510.

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The 91st section gives to the Federal Parliament the general power of taxation, a sovereignty over all subjects, except those specifically mentioned in section 92, as being subjects exclusively belonging to the Local Legislatures. We find, among the exclusive powers given to the Federal Parliament, the power of *regulating trade and commerce.*

This power, being full and complete, cannot be restricted, unless by some specific provision to be found in the *British North America Act.*

For this reason, the relative position of the Provinces towards the Federal Parliament is far different from that of the States towards the *United States* Congress. Here the power to regulate trade and commerce, without any distinction as to interior and exterior commerce, belongs *exclusively* to the Dominion Parliament, whilst, in the *United States*, Congress has power only to deal with exterior or foreign commerce, commerce between the different States and that with the Indian tribes. The States, not having delegated to Congress the power of regulating interior commerce, still have power to legislate on it as they please. We should not, therefore, look to the numerous decisions rendered on the laws relating to the interior commerce as precedents applicable to the present case, but rather to the decisions given on laws passed by the State Legislatures which happened to come in conflict with the power of Congress to deal with exterior commerce.

There is a decision, rendered as early as 1827, which has always been looked upon as being the true construction of that article of the Constitution of the *United States* which gives Congress power to regulate exterior commerce, and which is very applicable to the present case. It is that rendered in the case of *Brown* v. *State of Maryland* (1). In order to raise revenue to

(1) 12 Wheaton 419.

meet the expenses of the State, the Legislature of *Maryland* passed a law, by which, amongst other things, importers of foreign merchandise enumerated in the law, or such other persons as should sell by wholesale such merchandize, were directed to take out a license, for which they were to pay $50, before selling any of the imported goods, subjecting them, in case of neglect or refusal, to forfeit the amount due for the license and to a penalty of $100.

Brown, who was an importer residing in the city of *Baltimore*, refused to pay this tax, and an information was, in consequence, laid against him before the State Court, which declared the law to be valid and condemned him to pay the penalty prescribed.

This judgment was appealed by means of a writ of error to the Supreme Court, which Court, for the reasons so ably propounded by the learned Chief Justice *Marshall*, declared the law void as coming in conflict with the power of Congress to regulate exterior commerce.

The question here naturally arises, what was the extent of that power? This question was considered at great length in the case of *Gibbons* v. *Ogden* (1), by Chief Justice *Marshall*, who answered it as follows :

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed by the Constitution.

Since this is the law in the *United States*, there is an additional reason why it should be so declared here, where our Constitution does not acknowledge, as in the *United States*, a division of power as to commerce.

The law declared void in the case of *Brown* v. *The State of Maryland* was of the same kind as the one

(1) 9 Wheaton 231.

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enacted by the Province of *Ontario*. The only difference was that that law reached the importer, whilst the law under consideration here is directed against the manufacturer.

But is there not a perfect analogy between the two parties? Have not both the importer and the manufacturer the one object, viz.: to sell their goods? Both, the first by purchasing in a foreign market, the latter, by his industry, have filled their stores with goods which they cannot put into commercial circulation until they have paid the duties imposed upon them.

The importation of foreign goods, no doubt, is subject to the regulations of trade and commerce, but not more so than manufactured articles which are subject to the excise laws. If the Local Government have the right to tax the latter, they have the same right to tax the importer, by prohibiting him, as it is contended they have the right to prohibit the manufacturer, from selling his merchandise if he has not previously taken out a license allowing him to sell.

If this contention is well founded, the payment of the custom and excise duties would not be all that the importer and the brewer would have to calculate upon before offering their goods for sale, for they would also have to pay another duty in the shape of a license fee.

It is also contended, that in this case the Federal Government having regulated only the manufacture of the beer, it was in the power of the Local Government to regulate its sale.

The following answer could be made to this argument, viz.: that if the Federal Government, in the exercise of its power, has not deemed it necessary to restrict the sale of beer, it was because its intention was to leave it free. The regulations need not consist only of

restrictions. By imposing those mentioned in 31 Vic. ch. 8, was it not in effect enacting that there would be no others? To leave or to declare free a commerce, is it not exercising the power of regulating such commerce just as much as to impose upon it certain restrictions? To impose upon beer consumed in the Province of *Ontario* a tax which is not imposed upon beer consumed in the other Provinces, is to decree that there shall be a difference of price in favor of consumers of beer in the other Provinces against consumers in *Ontario*. It is regulating that commerce in such a way as to give to the first named an unjust preference which the Federal Government itself could not give without violating the principles upon which assessments are made. It would be strange, indeed, if the Legislature of *Ontario*, by assuming this jurisdiction under the pretence of its being a license, could have over this matter more power than has the Federal Government.

The power to tax is no doubt necessary to the existence of the Local Governments, but it is limited and proportioned to the extent of their jurisdiction. Fulfilling only certain duties of a Government within certain limits, the power to tax was in consequence divided between the Federal and Local Governments. To the first, whose jurisdiction is larger, belongs the power of raising money by all modes of taxation, whilst Local Governments can only do so by direct taxation (1) and by the issuing of licenses. Moreover, the tax imposed in the shape of a license by the law of *Ontario* on the sale of beer which has not yet been taken away from the stores of the brewer, is an indirect tax which must be borne by the consumer (1).

(1) B. N. A. Act, 1867, sec. 92, par. 2.

(2) See McCulloch on Taxation, 2 Ed., Pp. 1, 147, 242, 321; also Mill's Principles of Political Economy, Ed. 1872, Pp. 495, 496, 505.

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This new tax, no doubt, would have, as had the previous ones, to be added to the original cost of the beer, in order that it may be paid by the purchaser. With such means at their disposal, the Local Governments might control and regulate commerce and impose indirect taxes with as great security as if the power to do so was given to them instead of being specially taken away. Such a law comes certainly in conflict with the power of the Federal Government to regulate trade and commerce, and to impose indirect taxes.

If it should be admitted that the different Governments have concurrent power to impose taxes on the commodities subject to excise, who could draw the line where each Government would have to stop? If this power belongs to the Local Government, the exercise of that power must be complete, and be made use of according to the best of their judgment whenever the raising of money would be necessary. Now, in exercising such a power, might it not happen that the taxes imposed would be so high as, practically, to considerably diminish, if not exhaust, this source of revenue? What would then be the position of the Federal Government; how could it meet its obligations? Were not the duties of customs and excise left to the Federal Government, from which source it collects the largest part of its revenue, in consequence of having to bear the public debt of the Provinces and the expenses of a General Government? Could we, without violating the Constitutional Act, alter this position? To declare that both Governments have an equal right to legislate on these sources of revenue would place the Federal Government in the impossibility of meeting its obligations towards its creditors. By appropriating this revenue to other purposes, it would in fact be diminishing the security on which these creditors, when the Constitution was adopted,

had the right to count for the recoupment of their advances. Legislation which would transfer to the Provincial Legislatures the control over these sources of revenue would not fail to considerably embarrass the Federal Government, and at the same time effectively affect its credit.

It must also be remembered, that under our actual political system the Dominion, having taken upon itself the burden of the provincial debts, the Provinces, when Confederation was established, found themselves with a blank sheet on the debit side of their account, whilst there remained to their credit the Crown lands, the Federal subsidy, the power of direct taxation, and lastly, the *limited* power, in my opinion, to raise a revenue by means of licenses. A construction which would, moreover, give them the almost unlimited power of indirect taxation concurrently under the pretext of its being a license, would, no doubt, be the means of promptly and surely creating disorder and finally break up the Constitution. As soon as there would be confusion with regard to these sources of revenue, there would remain no more reason for a division of the legislative powers between the Federal and Local Governments. The confusion of the revenues would inevitably result in a fusion of the Governments. It would be the downfall of the present structure built with such care.

Fortunately, however, such a calamity is not to be feared, for the Constitution, in my opinion, contains no provision which can have the effect of bringing about such dangerous consequences. The prudence of the legislature, in giving to each Government special legislative powers, has averted such a danger. Each Government has legislative authority over certain subjects, and it is only over these subjects that each

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can exercise its powers. With the exception of agriculture and immigration, there is no subject-matter over which there can exist concurrent powers of legislation (1); and even then, should there be conflict, the authority of the Parliament of *Canada* is supreme.

By the remarks which I have just made on the consequences of the adoption of the construction contended for by the Respondent, I do not mean to argue that the exercise, nor even the possibility of abusing this power to tax by license, is a reason why it should not exist; for we can abuse all things. The proper way, no doubt, of solving this question is by referring to the express terms used in the Constitutional Act. But the clauses already cited show clearly to whom belongs this power assumed by the *Ontario* Legislature. The only reason for making these observations was to show that the interpretation adopted by the Respondent, would create a state of things quite different from that which the Imperial Parliament intended for us when they passed the *British North America Act.*

Nevertheless, I will add in support of my mode of reasoning, a passage of Chief Justice *Marshall's* opinion in the case of *Brown* v. *The State of Maryland* (2), and I also contend that in this case we should apply this ordinary rule of construction, that when a law is doubtful or ambiguous, it should be interpreted in such a way as to fulfil the intentions of the legislator, and attain the object for which it was passed. *Marshall*, C. J., says:

> We admit this power to be sacred [the State power to tax its own citizens, on their property within its own territory]; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed, that the powers remaining with the States may be so

(1) B. N. A. Act, 1867, sec. 95. (2) 12 Wheaton 448.

exercised as to come in conflict with those vested in Congress. When this happens that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the General and State Governments as a vital principle of perpetual operation. It results necessarily from this principle, that the taxing power of the State must have some limits. It cannot reach and restrain the action of the National Government within its proper sphere. It cannot reach the administration of justice in the Courts of the Union, or the collection of the taxes of the *United States* or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the States may tax all persons and property found on their territory, what shall restrain them from taxing in their transit through the State from one port to another for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a State from taxing any article passing from the State itself to another State, for commercial purposes? These are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and effect materially the purpose for which that power was given. We deem it unnecessary to press the argument further, or to give additional illustrations of it, because the subject was taken up, and considered with great attention in *McCulloch* v. *The State of Maryland* (1), the decision in which case is, we think, entirely applicable to this.

The reasoning of the Supreme Court in that case, under a system of Government which left to the States the regulation of the interior commerce, is not only applicable to the present question, but should have more weight from the fact that under our system the Federal Government has the *exclusive* power over commerce.

But, secondly, this Statute of the Province of *Ontario* not only comes in conflict with paragraph 2 of section 91, relating to the regulation of trade and commerce, but also with sec. 122 of the *B. N. A. Act*, giving to the Federal Government the power to regulate all

(1) 4 Wheaton 316.

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matters of excise. The trade of brewing, here as well as in *England*, has always been regulated by the excise laws. Before Confederation the same state of things existed in all the Provinces of the Dominion. Under the new *régime* this trade is still regulated by the excise laws, which, as we have seen by section 122 already cited, are subject to Federal legislation. It is true this section does not, as do sections 91 and 92, positively declare that it is an exclusive power, but, as it is given without any restriction, it can only be possessed by the Federal Government. The very fact of this power not being comprised in the enumeration of exclusive powers given to the Local Governments, takes away from them all jurisdiction over this matter. It is for this reason, no doubt, that on the 21st December, 1867, the Parliament of *Canada*, exercising the power which it had by sec. 122, abolished all the excise laws of *Canada*, as well as those of the Provinces of *Nova Scotia* and *New Brunswick*, and regulated, at the same time, by a very complete law this important trade in its most minute details.

Section 3 of 31 Vic. ch. 8 declares:

> From and after the passing of this Act, no person, except such as shall have been licensed as herein provided, shall carry on the business or trade of a distiller, or brewer, or maltster, or of a manufacturer of tobacco, or use any utensil, machinery or apparatus suitable for carrying on any such trade or business subject to excise.

Section 26 imposes on the brewer the obligation of taking out a license, the price of which is fixed at $50, in order that he may carry on his trade. He is also subject to a tax of one cent per pound of malt used in the brewery. In addition to this, he is subjected to a severe superintendence in all his operations, of which he is bound, under pain of heavy penalties, to render a minute account to the Inland Revenue Department.

This is certainly a trade, a commerce, over which the Federal Government has fully exercised its exclusive

power of regulation. Can it be said after this, that because this Statute only regulates the manufacture of the beer, the Provinces are still at liberty to prevent its sale until a license fee of $50 is paid as directed by the 23rd section of the *Ontario* Act? Should a brewer, after having paid to the Federal Government the duties above mentioned, and after being obliged to submit to numerous and inconvenient restrictions, still find himself in the strange position of not being allowed to take his products out of his stores? The agent of the Local Government would have the right to appear and say to him: The Federal Government can very well allow you to manufacture, but my Government will not allow you to sell unless you purchase from us, by paying a $50 license fee, the right of selling. Would not such a prohibition be clearly contrary to the Act of the Federal Parliament authorizing the brewer to manufacture? Can you give him the right to carry on his trade in virtue of the license fee paid to the Federal Government without, at the same time, giving him the right to sell the products of his trade? Do manufacturers manufacture for the sole pleasure of accumulating their products in their stores? Is not the manufacturer's sole aim to sell his manufactured articles; and does not the right to manufacture necessarily imply the right to sell? Here, again, the reasoning of Chief Justice *Marshall*, on the right to import, in the case already cited (1), is applicable:

> We think, then, that if the power to authorize a sale exists in Congress, the conclusion is that the right to sell is connected with the law permitting importation, as an inseparable incident. * * * The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on that part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce.

(1) *Brown* v. *The State of Maryland*, 12 Wheaton 448.

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The power to authorize the manufacture of an article must necessarily imply, as does the right to import, the right to sell. I am therefore of opinion, that the law of *Ontario* in prohibiting the sale of beer, unless the party complies with its exactions, comes in conflict with the 122nd section giving to the Federal Government the power over excise.

Now, the tax imposed by the Act in question, it is true, is only $50, but it might as well have been $500. If the Legislature have the right to impose this tax, the power must be plenary, and would be exercised according to their judgment and whenever the necessity of increasing the revenue arose. Already, since assuming this jurisdiction, the Legislature has increased the tax from $50 to $150, and if the power exists nothing could prevent them from fixing the amount so high as to virtually render impossible the collection of the excise duties on this article.

Moreover, if this law relating to brewers and distillers is legal and constitutional, there can be no doubt that a law could be passed reaching the manufacturer of tobacco, of coal oil, of vinegar, in fact of all articles subject to excise. The Local Government could even go further, and under the shape of a license reach the importer in the same manner as the brewer.

If there was concurrent jurisdiction, what would happen when the collector on the part of the Federal Government would come to seize for arrears of taxes? Let us suppose that the collector of the Local Government has anticipated him, and for duties which were owing to his Government had seized and closed the brewery. He is the first on the spot, and, if he exercises a legitimate power belonging to his Government, he has the right to forbid the Federal Officer to come with-

in the brewery. This latter officer, however, in virtue of the Dominion Statute has the most plenary powers; at all times he has access to the brewery. A conflict of authorities would necessarily take place; which authority should yield? For my part, not believing in the legal possibility of such a conflict, I need not seek for the means of avoiding it.

But the learned Counsel of Her Majesty, whose argument, should it prevail, would inevitably bring about this conflict, believe, that with the aid of the right of *veto* which belongs to the Federal Government, all interests might be conciliated, and the above inconvenient results avoided. The difficulty, they say, would be easily settled. The constitution, by giving the right of vetoing Provincial Legislation, has prudently given the means, if not to prevent, at least to put a stop to such conflicts of authorities. Such a law would be directly opposed to the interests of the Federal Government, and they would be justified in disallowing it by exercising their right of veto.

No doubt this extraordinary prerogative exists, and could even be applied to a law over which the Provincial Legislature had complete jurisdiction. But it is precisely on account of its extraordinary and exceptional character that the exercise of this prerogative will always be a delicate matter. It will always be very difficult for the Federal Government to substitute its opinion instead of that of the Legislative Assemblies in regard to matters within their province, without exposing themselves to be reproached with threatening the independence of the Provinces.

What would be the result if the Province chose to re-enact a law which had been disallowed? The cure might be worse than the disease, and probably grave complications would follow.

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It cannot, therefore, be argued, that because this right exists we must adopt an interpretation which would lead to the necessity of having recourse to it.

Before concluding my remarks, I wish to add a few words with regard to three of the principal points of argument relied on by the learned counsel for Her Majesty in support of the validity of this law. They contend they can justify the law, 1st, by the inherent constitutional power which the Local Legislatures, they say, possess to make laws for the general welfare of the people of the Province; and that, to give effect to their purport, they have the power to prohibit the sale of spirituous liquors and of such other articles as might be considered injurious; that is to say, that in order to exercise this power, they have jurisdiction over this matter; 2nd, by paragraph 13, section 92, relating to property and civil rights in the Province; 3rd, by paragraph 16 of the same section, giving them jurisdiction generally over all matters of a merely local or private nature in the Province.

In my above observations on the division of the legislative powers, I believe I have answered the argument of that plenary power, *plenum imperium*, which the learned counsel contend the Local Governments possess. I will only add, that while there can be no question of their exercising the police powers, the license imposed by this law is evidently exacted for the purpose of raising a revenue. In support of the view I take with regard to the nature of this license, I will cite *Cooley* on Constitutional Limitations (1):

> License laws are of two kinds: those which require the payment of a license fee by way of raising a revenue, and are, therefore, the exercise of the power of taxation; and those which are mere police regulations, and which require the payment only of such license fee as will cover the expenses of the license and of enforcing the regulation.

(1) P. 586.

Nor can the fact that the Local Government has the power over property and civil rights be relied on. The passage I have quoted above from Chief Justice *Marshall's* opinion in reference to the State power over property and civil rights is such a complete answer to this point that I need but refer to it.

As to the third point, that it affects a matter purely local and private in the Province, I think I have also proved that this argument cannot apply in this case. The license imposed by this law is of a nature to affect all the Provinces, and it amounts in reality to an exercise of the power of regulating commerce.

For these reasons, I have come to the conclusion that the law under consideration is *ultra vires.* These reasons can be summed up as follows :—

1st. The law in question is void because it comes in conflict with the power of the Federal Parliament to regulate trade and commerce under paragraph 2, sec. 91.

2nd. Because the terms "and other licenses," in paragraph 9, sec. 92, are limited by the interpretation to be given to paragraph 2 of sec. 91. In order to conciliate these two provisions, the words "other licenses" must be read as if they were followed by these words: "not incompatible with the power of regulating trade and commerce."

3rd. Because the tax imposed by this Act is an indirect tax which the Local Government has no right to impose.

4th. Because it comes in direct conflict with the 31st Vic. chap. 8 relating to excise.

HENRY, J. :—

The information in this case charges the Appellant with a breach of the Act of *Ontario,* 37th Vic., chap. 32, for having sold by wholesale a large quantity of fer-

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mented liquors which he had manufactured, he (the Appellant) then being a brewer licensed by the Government of *Canada* for the manufacture of fermented, spirituous and other liquors. To this information the Appellant demurred, and assigned as one of the grounds of demurrer that the Legislature of *Ontario* had no power to restrict by an Act the sale of such liquors; or to impose a penalty for a breach of the restrictive provisions of the Act by a brewer duly licensed by the Government of *Canada*. This ground of demurrer was fully argued before us, and we, having fully considered it in all its bearings and consequences, have now to give judgment upon it.

The constitutionality of the Act of *Canada*, 31st Vic. chap. 8, under which the Appellant was licensed, is admitted, and it is therefore necessary only to consider whether, in view of that Act, the Legislature of *Ontario* had power to pass an Act requiring a brewer, holding a license under the first mentioned Act, to take out another license, and pay an additional fee, or, in the event of his not doing so, to subject him to penalties, to such an extent even as might effectually render practically useless his license from the Dominion Government. The *Ontario* Act in question, sec. 24, provides:

> No person shall sell by wholesale or retail any spirituous, fermented or other manufactured liquors within the Province of *Ontario*, without having first obtained a license under this Act authorizing him to do so, &c.

Sec. 25:

> No person shall keep or have in any house, building, shop, eating-house, saloon, or house of public entertainment, or in any room or place whatsoever, any spirituous, fermented or other manufactured liquors for the purpose of selling, bartering or trading therein, unless duly licensed thereto under the provisions of this Act.

Sec. 26 recognizes the validity of the licenses granted

by the Government of *Canada*, and provides that sections 24 and 25 shall not prevent any brewer, distiller or other person so licensed

From *keeping*, having, or selling, any liquor manufactured by him, *in any building wherein such manufacture is carried on, &c.* * * * Provided that any such brewer, distiller, or other person, is further required to first obtain a license to sell by wholesale under this Act the liquor so manufactured by him when sold for consumption within this Province, &c.

Sec. 22 fixes the wholesale license fee at fifty dollars for Provincial purposes.

By sec. 4, "wholesale" is defined to be over five gallons, or 1 dozen bottles of three half pints, or two dozen of three-fourths of a pint each.

This Act came into operation on the 24th of March, 1874.

Under the Dominion Act, 31 Vic. chap. 8, before mentioned, the licenses expired on the thirtieth of June in each year, and those granted after the thirtieth of June, 1873, were current when the *Ontario* Act came into operation. Up to the passing of the latter Act a brewer had, by the effect of his license from the Dominion Government, the right, not only to *keep* and *have* for sale, but to *sell* fermented liquors by wholesale. By the latter Act he is not only prohibited from selling but from *keeping* or *having*. Does not that Act, therefore, virtually repeal, if effect be given to it, the Dominion Act in both respects, unless, indeed, the brewer should comply with its exactions? What, in the case of his refusal to accept further conditions to his compact with the Dominion Government, would become of his manufactured stock on hand? The selling and *keeping*, or *having* on hand for sale, or for consumption, in *Ontario*, was prohibited, and his *keeping* or *having* it legally, after the passing of the Act, is made *contingent* on his taking out a license *under it*. He had legally accumu-

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lated a large stock which, by the *Ontario* Act, he is forbidden either to *keep* or *sell* in pursuance of his rights under the license from the Dominion Government. It may be said the extra tax was a light one. No matter how light, it was in contravention of the rights he had acquired; and if the power to change the existing relations be at all admitted, the *extent* of the change cannot be questioned; for that is a question of expediency and parliamentary discretion, which no Court could control or interfere with; and the same power which levied a contribution to the extent of fifty dollars might raise it so high as to break up the manufacture altogether, and thus indirectly render nugatory the Dominion Act and deprive the Government of the revenue it would otherwise receive; and, consequently, as I take it, restrict the effect of the Imperial Act, section 91, sub-sections 2 and 3, which give to the Dominion Parliament the exclusive right of legislation in regard to "the regulation of trade and commerce" and "the raising of money by any mode or system of taxation."

If, indeed, it were contended that the Dominion Act was *ultra vires*, and that the right to provide for the licenses in question was one wholly with the Local Legislature, I could appreciate the contention to some extent; but when the constitutionality of that Act is admitted, I must have better reasons than I have yet heard to induce me to conclude that the Imperial Parliament intended that *both* Legislatures should have power to deal with the same subject. Under the two sub-sections just quoted, and the Dominion Act, the power of the Dominion Government to grant the licenses in question must be admitted, and even if the right of the Local Legislature should have strong reasons to sustain it (which, however, I cannot see), but which, nevertheless, leave it a matter of doubt and speculation, I feel that it is incumbent on us, for many good reasons,

to resolve that doubt against that claim of right. Suppose every Local Legislature in the Dominion were thus to interfere with the proper results to be expected from Dominion legislation in regard to this subject (and if one can do so, why not all ?), who can measure or estimate the extent to which " trade and commerce " might be affected and the revenues of the Dominion diminished ; its power to raise " money by any mode or system of taxation " seriously curtailed, and the customs and excise laws of the Dominion, passed as provided by sec. 122 of the Imperial Act, interfered with and rendered nugatory. If the right to legislate as to licenses for brewing be admitted, why not as to licenses to manufacture tobacco and everything else ?

The contention on the part of the Respondent is, that *both* Legislatures have power under the Imperial Act to legislate in regard to the matter before us. While all admit the legislative right of the Dominion Parliament, the power of the Local Legislature is denied. The claim for it has been urged on several grounds, one of which is, that direct taxation for Provincial purposes is given exclusively to the Local Legislatures, and that the license duty sought to be levied by the Act of *Ontario* is a direct tax. I must dissent from that proposition for reasons too well understood to require me to define what a direct tax is, or to show that the imposition in this case is clearly an indirect one.

The legislative power given to the Dominion Parliament is unlimited

> To make laws for the peace, order and good government of *Canada*, in relation to all matters not coming within the classes of subjects by this Act assigned *exclusively* to the Legislatures of the Provinces,

and we need not necessarily consider the provisions of sub-sections 2 and 3 of section 91.

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Everything in the shape of legislation for the peace, order and good government of *Canada* is embraced, except as before mentioned. But sub-section twenty-nine goes further and provides for exceptions and reservations in regard to matters otherwise included in the power of legislation given to the Local Legislatures, and also provides that:

> Any matter coming within any of the classes of subjects enumerated *in this section* shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

"The regulation of trade and commerce" and "the raising of money by any mode or system of taxation" is, however, specially mentioned, and both include the right to make and have carried out all the provisions in the Dominion Act. This position has not been, and cannot be, successfully assailed. The subjects in all their details of which trade and commerce are composed, and the regulation of them, and the raising of revenue by indirect taxation, must, therefore, be matters referred to and included in the latter clause of sub-section 29, before mentioned, and if so,

> Shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Every constituent, therefore, of trade and commerce, and the subject of indirect taxation, is thus, as I submit, withdrawn from the consideration of the Local Legislatures, even if it should otherwise be *apparently* included. The Imperial Act fences in those twenty-eight subjects wholesale and in detail, and the Local Legislatures were intended to be, and are, kept out of the inclosure, and when authorized to deal with the subject of "direct taxation within the Province," as in

sub-section 2 of section 92, and "shop, saloon, tavern, auctioneer, and other licenses," they are commanded, by the concluding clause of sub-section 29, sec. 91, not to interfere by measures for what they may call "direct taxation," or in regard at least to "other licenses," or in reference to "municipal institutions," with the prerogatives of the Dominion Parliament as to the "regulation of trade and commerce," including "Customs and Excise laws" and "the raising of money by any mode or system of taxation." I have already shown, that the exercise of the power contended for by the Legislature of *Ontario* is incompatible with the full exercise of that of the Dominion Parliament, and might be used to its total destruction. The object of the Imperial Act was clearly to give plenary powers of legislation to the Dominion Parliament with the exceptions before stated, and just as clearly to restrict local legislation so as to prevent any conflict with that of the former in regard to the subjects with which it was given power to deal.

The "excise laws" of the Dominion must be affected by an additional license fee being exacted by the Local Government. The "excise" revenues belong solely to the Dominion Government. The Dominion Parliament having imposed a license fee of $50 on a brewer of fermented liquors, might, at an early future, desire to impose, for revenue, a higher fee. It has the acknowledged right to do so; but, in the meantime, the Local Legislature has fully weighted the enterprise of brewing; and the result becomes, therefore, a transfer from the sources of Dominion revenue to the coffers of the Local Government. Who can say, then, that there is not an attempt to collect Provincial revenue from a source clearly appertaining to the Dominion?

But we are asked to hold that, under sub-section 9,

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"shop, saloon, tavern, auctioneer and *other licenses*" will include licenses to brewers, in the position occupied by the Appellant, to sell by wholesale. Such an application can only be made by virtue of the concluding words: "and other licenses." The extent and limit to be given to those words have not been stated or referred to; but some must exist to their application. If applicable to *brewers'* and *distillers'* licenses, which, at the date of the Imperial Act, were completely out of reach of any municipal control, why not extend them to other traders? If uncontrolled, a Local Legislature might organize a *system of licenses*, and indirectly, not only tax, but regulate and restrict certain industries, trades and callings, or might, indeed, virtually prohibit and destroy them. We must reasonably conclude the Legislature meant to restrict the power at some point, and we must determine where that restriction should be imposed, not only from the words of the sub-section in question, but from the tenor and bearing of the whole Act, the state of the law at the time, the peculiar position of the United Provinces and the object of their union, with the means for working out the Constitution provided.

Taking the words themselves, what is the law as to the construction of them? From a review of all the cases cited, and others, I am forced to conclude that the words "and other licenses" must be restricted. We find them preceded by the words "shop, saloon, tavern, auctioneer," and I cannot decide that brewers or distillers are *ejusdem generis* with them or any of them. That they should be, to include the right of legislation claimed, taking the whole of the *Imperial Act* together, is a position too clearly established to be doubted. In *Reed* v. *Ingham* (1) the law

(1) 3 E. & B. 889.

is clearly stated by Lord *Campbell*, C.J.; and also in *East London Water Works Co.* v. *Trustees for Mile End Old Town* (1). In the latter case the word "tenements" had to receive a construction. Referring to it, Lord *Campbell* said "tenements" must be understood according to the antecedent enumeration and as comprising only matters *ejusdem generis*. That rule of construction was followed in *Rex* v. *The Manchester and Salford Waterworks Company* (2), which is admitted to have been well decided. *Coleridge*, Justice, in the same case says:

If the Appellants are liable it is because they occupy a tenement which is ratable. It is admitted that the word cannot have its full meaning in either place where it occurs in the section 30. In the first, it clearly means something inhabited or belonging to a dwelling. In the second, where it is admitted that some restraint must be put upon the construction of the word, *the rule attaches, that a general word following specific ones must be taken to mean something of the same kind.*

A similar construction was put upon general words in *Sandeman* v. *Breach* (3). The 29 Car. 2, chap. 7, provided that

No tradesman, artificer, workman, labourer, or other person or persons should work at their ordinary calling on the Lord's day.

Per Lord *Tenterden:*

It was contended that under the words "other person or persons" the drivers of stage coaches are included. But where general words follow particular ones the rule is to construe them as applicable to persons *ejusdem generis.*

We think the words "other person or persons" cannot have been used in a sense large enough to include the owner and driver of a stage-coach.

I feel bound, therefore, on principle, and as the result of all the cases, to construe the words in question as controlled by the other portions of the Act, and, therefore, not to include power to the Legislature of *Ontario* to legislate for licenses to brewers or distillers to sell by wholesale.

(1) 17 Q. B. 512. (2) 1 B. & C. 630.
(3) 7 B. & C. 100.

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I will not, however, say, that where the terms used are exhaustive of the particular class or subject named, we are bound to apply the principle of construction just stated; and it may possibly be argued that such is here the case in respect of the words preceding "and other licenses." In such a case, where there are no controling conditions, the words might be sufficient to give the right claimed for the Local Legislature; but when considering the objects and purview of the whole Act, and the mode provided for effecting them, I can come to no other conclusion than one founded upon the duty I feel incumbent upon me, of reading the whole Act together, and therein and thereby, and not from the technical reading of a few words in a sub-section, however otherwise important, seek for the intention and meaning of the Legislature. By this mode the Act is made to harmonize in all its parts, and the feasibility of working it out is established. By the other construction, and not in my view the proper one, the evident intention of the Legislature is frustrated, and the legislation itself made absurd and inconsistent, and the working out of the details made most difficult, and, it may be found, totally impossible. I am of opinion, for these reasons, that the Act of *Ontario* in question was *ultra vires*, and that the appeal should be allowed with costs and judgment entered for the Appellant.

Appeal allowed with costs.

Solicitors for Appellant: *Bethune, Osler & Moss.*

Solicitors for Respondents: *Mowat, Maclennan & Downey.*

THE RECTOR, CHURCHWARDENS AND VESTRY OF ST. GEORGE'S PARISH, PARRSBORO'..... } APPELLANTS; 1878 *Jan'y. 28.

AND

ALIDA Y. KING..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Arbitration—Award, finality of—Finding specifically on each of the matters in difference.

Plaintiffs brought ejectment to recover possession of certain lands in the Parish of *P.* After cause was at issue, under a Rule of reference, all matters in difference were referred to arbitration, and the arbitrators were to have power to make an award concerning the Glebe and Church Lands at *P.*, and to make a separate award concerning the School Lands at *P.* The powers of the arbitrators were to extend to all accounts and differences between the said Parish and the late Rector, and the Defendant, as Executrix of said Rector, as also between the said Defendant individually and the Parish.

The arbitrators made two awards. First, as to the School Lands, they awarded that the Defendant was indebted to the Plaintiffs, as such Executrix, on the school moneys in the sum of $1,400; that the Defendant should pay that sum to the Plaintiffs; and that judgment should be entered for the Plaintiffs for that amount. Secondly, as to the Glebe and Church Lands, they awarded that the Plaintiffs were entitled to recover the lands claimed on the writ of ejectment, and ordered judgment in ejectment to be entered for the Plaintiffs with costs of suit; and, after reciting that all accounts respecting the receipt and disbursements of all moneys received from the interest, rent, and sale of these lands by the late Rector, or his agents, or by the Defendant, as his Executrix, were also referred to them, as well as all accounts and differences between the said Parish and the Defendant individually, they further awarded, that the Defendant should "pay to the Plaintiffs the sum of $1 in full of the same," saving and excepting the matters in controversy respecting the School Lands, on which they had made a separate award; and that judgment should be entered for the Plaintiffs for the

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said sum of $1. They also awarded that the Defendant should pay all the costs of the reference and award.

Held,—That the awards sufficiently specified the claims submitted and the various capacities in which such claims arose. That the first award, being against the defendant in her representative capacity, could not be considered against her personally, and negatived any claim of that kind, and was also an adjudication against the Defendant that she had assets; and that the finding in the second award that the Defendant should pay $1 could be considered a finding as against her in her individual capacity for that sum, and, as to the claims of the Plaintiffs against her for moneys received by her husband or by her as Executrix, as a finding against the Plaintiffs on their claim. That the part of the second award, directing payment of the costs of the reference and award was bad, but might be abandoned.

APPEAL from the judgment of the Supreme Court of *Nova Scotia*, setting aside the award made between the parties.

The Plaintiffs brought ejectment to recover possession of certain lands (about four acres) in the Parish of *Parrsboro'*, in the County of *Cumberland*, in *Nova Scotia*. The action was begun 22nd May, 1876. The lands were described in the writ, and the Defendant pleaded that Plaintiffs were not entitled to the possession of the property described in the writ and declaration, or any part thereof.

After the cause was at issue, it was agreed, on 21st September, 1876, by consent of the parties, that the cause and all matters in difference between the parties be referred to the award of three arbitrators. In the rule of reference the two arbitrators named were *John M. Hay* and *Angus McGilvray*, and the third was to be chosen by them. The award of the arbitrators, or of any two of them, was to be final. The arbitrators were to have full power and authority to examine, investigate and award, either separately or in one, of and concerning all accounts respecting the receipts and disburse-

ments of moneys received from the interest, renting and sale of the glebe and church lands and the buildings thereon, at *Parrsboro'*, by the late Rev. *W. B. King*, or his agents, or by the Defendant, as his executrix, and all and every matter connected therewith, and all and every account existing or pending between the said Parish and the said Rev. *W. B. King*, or the Defendant, as executrix, or otherwise.

They had like authority to hear, examine, &c., and to take evidence and make an award concerning the receipts and disbursements of moneys received from the sale of the school lands at *Parrsboro'*, and the rents, issues and profits of the same, and every matter connected therewith, adjusting the accounts and settling the balance due thereon; Provided, in such last-mentioned case their award should be separate from any other award or awards in the suit.

The arbitrators were to have power to order judgment to be entered in the cause, either for the Plaintiffs or Defendant, with or without costs, or to order judgments to be entered for both Plaintiffs and Defendant, with or without costs, as they should find the several issues, either for or against either party.

It was agreed that the powers of the arbitrators should extend to all accounts and differences between the said Parish of *St. George* and the late Rector, and the Defendant as executrix of said Rector, as also between the said Defendant individually and the Parish, so that the said award might, in all respects, be final and conclusive between all the parties in difference.

The two arbitrators named in the submission (*John M. Hay* and *Angus McGilvray*) named *Thomas Jennings* as the third arbitrator; and on the 13th January, 1877, the three arbitrators made two awards.

In the first, it was recited, amongst other things, that

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certain disputes which had arisen between the parties respecting the receipts and disbursements received for the sale of school lands at *Parrsboro'*, and the rents, issues and profits thereof, were referred to them ; that they had heard the parties, their counsel, attorneys, witnesses and evidence produced on behalf of either party, and duly weighed and considered the same ; and as it was provided by the rule that they should make a separate award concerning the school lands :

They, therefore, awarded that the Defendant was indebted to the Plaintiffs, as such executrix, on the said school moneys, in the sum of one thousand four hundred dollars, and they awarded "that the Defendant do pay to the Plaintiffs the said sum of $1,400, and that judgment be entered for the Plaintiffs for that amount." The second award, dated the same day, signed by all the arbitrators, stated that the rule of Court, amongst other things, recited that the cause and all matters in difference between the parties had been referred to them ; that they had heard and examined the parties, their counsel and attorneys, and all witnesses and evidence adduced on behalf of the Plaintiffs and Defendant, and had duly weighed and considered the same; they awarded and adjudged, of and concerning the premises, that the Plaintiffs were entitled to recover the lands claimed in the writ of ejectment in the cause, and ordered that judgment in ejectment be entered for the Plaintiffs, with costs of suit.

They further recited, that by the rule of Court, all accounts respecting the receipt and disbursements of all moneys received from the interest, rent and sale of the glebe and church lands at *Parrsboro'* by the late *W. B. King*, or his agents, or by the Defendant as his executrix, were also referred to them, as well as all accounts and differences between the said Parish of *St. George*

and the Defendant individually. They further recited that they had heard the parties, their witnesses, evidence, counsel and attorneys of and respecting the same; and having duly weighed and considered the same, they awarded that the Defendant should pay to the Plaintiffs the sum of one dollar in full of the same, saving and excepting the matters in controversy respecting the school lands, on which, as required by the rule, they had made a separate award; that judgment should be entered for the Plaintiffs for the said sum of one dollar. They also awarded and adjudged that the Defendant should pay all the costs of the reference and award.

On the 6th February, 1877, a rule *nisi* was obtained to set aside the awards on the following grounds:

"1st. That the said award or awards, is and are not, nor is either of them, final and conclusive, or in accordance with the requirements of the rule of reference herein.

2nd. Because the arbitrators did not determine and decide all matters submitted to them under the said rule of reference and the evidence in the cause.

3rd. Because the arbitrators have not, as they were required to do, determined and passed upon all accounts respecting the receipts and disbursements of all moneys received from the interest, rent and sale of the glebe and church lands, and the buildings thereon, at *Parrsboro'*, by the late Rev. *W. B. King* or his agents, or by the Defendant, as his executrix, as well as all accounts and differences between the said Parish of *St. George* and the said Defendant individually.

4th. Because the said arbitrators did not make their award of and concerning the receipt and disbursement of moneys received for the sale of the school lands at *Parrsboro'* and rents, issues nd profits of the same, and every

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matter connected therewith, adjusting the accounts and settling the balance due thereon, as required in and by the said rule of reference.

5th. Because the said award or awards, and both and each of them is and are uncertain and inconclusive, and do not finally determine the matters referred to the said arbitrators in and by the said rule of reference.

6th. Because the said award is illegal, uncertain and void."

The rule was granted on the affidavit of the Defendant's counsel stating the nature of the action. That the Defendant was the widow of the late Rev. *W. B. King*, who was in his lifetime Rector *of Parrsboro'*, and she was executrix of his will. That Defendant claimed there were large amounts due to her husband in his lifetime by Plaintiff, and to her as his executrix and in her individual capacity; and it was agreed by the parties to have all matters in difference referred to arbitration, and the rule of reference was entered into, and the usual plea in ejectment pleaded *pro formâ* in the suit. That the accounts between the Plaintiffs and the late Rev. *W. B. King* in his liftime, and the Plaintiffs and Defendant, as executrix, since his death, were fully gone into and investigated before the arbitrators, and they made their awards. The affidavit concludes that the deponent is advised and believes that the awards so made are not in accordance with the rule of reference, and do not find the separate liability of the late *W. B. King* in his lifetime, or the liability of the Defendant, as his executrix, since the death of the said *W. B. King*, or of the Defendant in her individual capacity.

The case was argued, and, on the 17th of March, the rule was made absolute, with costs.

From that decision the Plaintiffs appealed to this Court.

Mr. *Gormully*, for the Appellant:—

The Court below ought not to have set aside the award, because, under the *Revised Statutes of Nova Scotia* (1), the grounds for setting aside the award should have been specifically set forth in the rule to shew cause.

[THE CHIEF JUSTICE:—Was this objection taken in the Court below?]

It does not appear by the printed case, but I am instructed it was. He cited the following authorities in support of this contention, and pointed out that in Nova Scotia the Statute required the grounds to be specifically stated:—*Boodle* v. *Davies* (2); *Grenfell* v. *Edgecomb* (3); *Gray* v. *Leaf* (4); *Staples* v. *Hay* (5).

As to the merits of the case, Appellants contend that the awards are perfectly good. By the rule of reference made with the consent of both parties, a direction was given to the arbitrators to make two awards—one respecting the school lands and one respecting the glebe lands. The arbitrators made two awards which have been set aside in the Court below. The objection to the award respecting the school lands in the Court below was, that it was not sufficiently final, and that it was not sufficiently certain. The arbitrators, after reciting that certain disputes were referred to them, and that they had heard the parties, their counsel and attorneys, as well as *all* witnesses and evidence produced for or on behalf of either party, and having duly weighed and considered the *same*, (the word "same" here necessarily means *everything* referred to them,) awarded that the Defendant, as executrix, was indebted to the Plaintiffs in the said school moneys in

(1) 4th Series, ch. 109, sec. 14.
(2) 3 A. & E. 200, per Coleridge, J., at 210.
(3) 7 Q. B. 661.
(4) 8 Dowl. R. 654.
(5) 1 D. & L. 711.

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the sum of $1,400, and that the said amount should be paid to the Plaintiffs. There was nothing in the rule requiring the arbitrators to decide as to amount due by the Defendant in her different capacities; and the following authorities support Appellant's contentions, that such an award cannot be set aside on the ground of *uncertainty*; *Russell* on awards (1); *Boodle* v. *Davies* (2).

Neither is there, on the face of the award, anything to show that the arbitrators have not *finally* adjudicated on all the matters referred to them. On this point reference was made to *Birks* v. *Trippett* (3).

Neither isthe school lands award objectionable because it finds that the Respondent is indebted, as Executrix, to the Appellants in the sum of $1,400, and directs the Respondent to pay that sum to the Appellants, and the submission by the Respondent to refer is a submission to the arbitrators of the fact, whether the Respondent, as executrix, has assets or not; and the finding is a finding of assets, and creates a personal liability to pay.

Worthington v. *Barlow* (4).

The other award as to the glebe lands, being an award *de premissis*, is final and conclusive. The leading case is *The Duke of Beaufort* and *The Swansea Harbor Trustees* (5). See also *Harrison* v. *Creswick* (6); and the most recent case of all *Jewell* v. *Christie* (7).

Moreover, the arbitrators had power under the said rule to award generally, as they have done, and were not bound to find separately the state of the account between the late Mr. *King* and the Appellants; between the Respondent, as executrix of the late Mr. *King*, and the Appellants; between the Respondent individually and the Appellant.

(1) 4th ed., pp. 277 and 278.
(2) 3 A. & E. 200.
(3) Williams' notes to Saunder's Rep., vol. 1, p. 37, and cases there collected.
(4) 7 T. R. 146.
(5) 8 C. B. N. S. 146.
(6) 13 C. B. 399 and 416.
(7) L. R. 2 C. P. 296.

The two cases relied upon by the Court below are *Rule* v. *Bryde* (1) and *Whitworth* v. *Hulse* (2).

In these cases the question was whether the award was in accordance with the true construction of the submission, and whether it was the intention of the parties that the arbitrators should award separately on some of the matters, as, for instance, to determine the right to costs. It is submitted that, by the terms of the rule of reference here, it appears that the arbitrators were empowered to find generally as they have done; and if the terms of the rule on this point were doubtful, it was the duty of the Respondent to request the arbitrators to find specially on each matter in difference, and it does not appear that any such request was made. *Dibben* v. *Marquis of Anglesea* (3).

An award, though bad in part, is not necessarily bad altogether; if the good part is severable from the bad, the award will stand as to so much as is good. As to the school land award, the entry of a verdict for the Appellants, and the direction of the arbitrators as to the costs of the reference and award, even though in excess of the powers of the arbitrators, are severable from the rest of the award, and do not invalidate the same. As to the glebe land award, the entry of a verdict for the Appellants for one dollar, even though in excess of the powers of the arbitrators, is severable from the rest of the award, and is mere surplusage, and does not invalidate the same.

Doe d. Body v. *Cox* (4); *Howett* v. *Clements* (5); *Rees* v. *Waters* (6).

An award will not be avoided, unless it is very clearly made out that some matters in difference had not been considered by the arbitrators and determined by the

(1) 1 Ex. 151.
(2) L. R. 1 Ex. 251.
(3) 10 Bing. 570.
(4) 4 D. & L. 75.
(5) 1 C. B. 128.
(6) 16 M. & W. 263.

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award. *Russell* on Awards (1). Even silence of the arbitrators as to some matters is sometimes presumed to be a decision thereupon. *Cargey* v. *Aitcheson* (2); *The Duke of Beaufort* and *Swansea Harbor Commissioners* (3).

Moreover, the Courts will presume overything in favor of the validity of an award, and will make every reasonable intendment and presumption in favor of its being a final, certain, and sufficient determination of the matters in dispute; and where specific differences are recited in the award and determined thereby, the Court, in the absence of evidence to the contrary, will presume that the recited differences were all the matters in difference between the parties. See *Russell* on Awards (4).

The Court will be astute to answer objections to the award.

Mays v. *Cannell* (5); virtually over-ruling *Doe* v. *Horner* (6).

Mr. *Cockburn*, Q. C., for Respondent:—

It is argued on the part of the Appellant that even silence upon one subject is sometimes to be presumed to be a decision thereupon. Now, each case must be governed by its own facts. If the submission is specific and requires that the arbitrators must find specifically on matters referred to them, and they do not, then their award is not final. The case of *The Duke of Beaufort* and *The Swansea Harbour Trustees* (7) is quite consistent with this view.

Now, what is the submission here? The Respondent is an executrix, and it was sworn that she claimed

(1) 4 Ed. 254.
(2) 2 B. & C. 170.
(3) 8 C B. N. S. 146.
(4) 4 Ed. 255, and cases there cited.
(5) 15 C. B. 125, per Williams, J.
(6) 8 A. & E. 235.
(7) 8 C. B. N. S. 146.

moneys not only as executrix but also in her individual capacity.

It was one of the matters of the reference, and Respondent had a right to expect that the arbitrators would adjust these several amounts before making their award.

It was the duty of the arbitrators to have found specifically respecting the Glebe and Church Lands at *Parrsboro'* and also the School lands at *Parrsboro'*; it was their duty to have adjusted the accounts as to both of said subject-matters, and to have found and declared how such accounts respectively stood between the deceased, Rev. *W. B. King*, in his lifetime, of the one part, and the Appellants; and between the Respondent, as his Executrix, of the one part, and the Appellants; and between the Respondent in her individual capacity and the Appellants.

See *Whitworth* v. *Hulse* (1).

Where two substantive matters are referred, and the arbitrator finds only on one of them, the award is bad altogether as not being conclusive.

Haywood v. *Philips* (2); *Rider* v. *Fisher* (3); *Fisher's* Digest (4); *Stone* v. *Philips* (5).

The arbitrators had no power over the costs of the reference and award; and the award No. 2, as to these costs, is in excess of their authority. See *Russell* (6).

It was also contended that the Respondent should have requested the arbitrators to award specifically on these different subject-matters. But here it was not a doubtful case. It was not, therefore, the Respondent's duty to ask the arbitrators to do what they were clearly directed to do by the submission.

Killburn v. *Killburn* (7).

(1) L. R. 1 Exch. 251.
(2) 6 A. & E. 119.
(3) 3 Bing. N. C. 874.
(4) 261-2.
(5) 4 Bing. N. C. 37; 6 D. P. C. 247.
(6) 4th Ed., p. 364.
(7) 13 M. & W. 670.

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Mr. *Gormully* in reply:

The award respecting costs may be cured by striking out those words, this is surplusage and it may be disregarded by the parties. Admitting that different issues were raised by the submission, it is submitted, however, that the authorities cited show that a general finding was sufficient.

The Judgment of the Court was delivered by

THE CHIEF JUSTICE:

Whatever may have been the views taken by the Courts at one time as to the necessity of an arbitrator minutely specifying in the award all questions discussed before him on a reference, such is not the doctrine of the modern cases. In *Harrison* v. *Creswick*, in the Exchequer Chamber (1), *Parke*, Baron, refers approvingly to the rule laid down in the notes to *Birks* v. *Trippett* (2), when an award professes to be made *de premissis*:

Even when there is no award [of general releases, the silence of the award as to some of the matters submitted and brought before the arbitrator does not *per se* prevent it from being a sufficient exercise of the authority vested in him by the submission. An award is good notwithstanding the arbitrator has not made a distinct adjudication on each or any of the several distinct matters submitted to him, provided it does not appear that he has excluded any.

He refers to the authorities cited for the position by the learned editor, and proceeds:

When an award is made *de premissis*, the presumption is that the arbitrator intended to dispose finally of all the matters in difference, and his award will be held final, if, by any intendment, it can be made so. The rule is this, when there is a further claim made by the Plaintiff, or a cross demand set up by the Defendant, and the award, professing to be made of and concerning the matters referred, is silent respecting such further claim or cross demand, the award

(1) 13 C. B. 416; (2) 1 Williams' Saunders, 33 a.

amounts to an adjudication that the Plaintiff has no such further claim, or that the Defendant's cross demand is untenable; but, where the matter so set up, from its nature, requires to be specifically adjudicated upon, mere silence will not do.

Harrison v. *Creswick* was approved of in *The Duke of Beaufort* and *The Swansea Harbour Trustees* (1). There *Williams*, J., said:

The cases have long ago settled, that, where several cross claims are the subject of a reference, and the arbitrator by his award directs a sum to be paid by one party without mentioning the cross claim, his silence is tantamount to a negation of the cross claim.

Willes, J., in his judgment in the same case, referring to the arbitrator stating his award to be made *de premissis*, says:

The use of that expression is unnecessary now; for, the Court will assume that the award is made upon all the matters referred, unless it is apparent on the face of it that it is not so made.

He then refers to the argument that it might be difficult, if necessary in future proceedings to rely on the award, to show that the arbitrator intended to negative the claim in that action (for severance), and says:

That is only an objection of form;

And adds further on:

I apprehend it would always be competent to the parties, in case a question should at any time arise as to whether or not the claim for severance damage was really disposed of by the award, to aver that that was a matter in difference before the arbitrator; and then the finding, as it now stands, would show that the arbitrator negatived the existence of any foundation for the claim.

He referred to, and quoted from, the case of *In re Brown* and *The Croydon Canal Company* (2) as sustaining that view.

Harrison v. *Creswick* was approved of in *Jewell* v. *Christie* (3).

I do not think *Whitworth* v. *Hulse* (4) in any way interferes with the cases to which I have referred.

(1) 8 C. B. N. S. 146.
(2) 9 Ad. & E. 522.
(3) L. R. 2 C. P. 296.
(4) L. R. 1 Ex. 251.

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The argument against the award as to the Glebe and Church Lands is: suppose she were hereafter sued by the Plaintiffs for a claim against her in her representative character, for monies received by her husband in his lifetime, or by her as Executrix, could this award be set up as a defence to the action?

It seems to me, the cases to which I have referred are authority that it could; and the observations of *Willes*, J., in the case of *The Duke of Beaufort* and *The Swansea Harbour Trustees*, already cited, that the Defendant might in such a case aver it was a matter in difference; and then the finding of the arbitrators that she pay the Plaintiffs one dollar in respect of the same, may, I think, under the authorities, be considered a finding as against her in her individual capacity for that sum, and as to the claims of the Plaintiffs against her for money received by her husband, or by her as Executrix, as a finding against the Plaintiffs on their claim; and if she had any set off as to such claim the finding is against such set off or counter claim.

As to that part of the award which directs the Defendant to pay the costs of the reference and award, it was admitted on the argument that it was bad, and there is no doubt the Plaintiffs may abandon it, as they offer to do, and they can be restrained from enforcing that part of it if they attempt to do so.

The other award, as to the school lands, seems to me still less liable to objection, for the award is against the Defendant in her representative capacity, and cannot be considered against her personally, and, of course, negatives any claim of that kind. As to the suggested difficulty as to her not having assets, the award against her as Executrix and that she do pay the said sum, and that judgment be ruled against her for that amount, is an adjudication against her that she had assets. The

case of *Worthington* v. *Barlow* (1) established that doctrine, and I am not aware that it has ever been questioned.

In the affidavit filed it is not suggested that Defendant has not assets, or that there is any fair objection to the award, or that the arbitrators did not really decide on all the matters referred to them. The objection taken is a mere technical one, and it seems strange if there were any merits in the application or any real apprehension of difficulty from any omissions in the award, that the facts shewing such difficulty were not brought to the notice of the Court, that the matters might be referred back to the arbitrators under the Statute permitting a reference of the award to the arbitrators to amend it.

Since that power has been given to the Courts in *England*, they seem less inclined to allow mere technical objections to prevail; and when there is any serious objection to the form of the award and even the substance from some omission of the arbitrator, it is referred back to be put right.

The appeal will be allowed with costs and the rule *nisi* in the Court below to set aside the awards will be discharged with costs.

Appeal allowed with costs.

Solicitor for Appellants: *C. J. Townshend.*

Solicitors for Respondent: *McDonald & Rigby.*

(1) 7 T. R. 453.

1877 DAVID C. LANDERS *et al*.....APPELLANTS;

*June 11, 12.

AND

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DOUGLAS B. WOODWORTH.....RESPONDENT.

*Jan'y 29.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Nova Scotia, Legislative Assembly of—Power of punishing for contempt—Removal of a Member from his seat by Sergeant-at-Arms—Action of trespass for assault against Speaker and Members—Damages.

W., a member of the House of Assembly of the Province of *Nova Scotia*, on the 16th of April, 1874, charged the then Provincial Secretary—without being called to order for doing so—with having falsified a record. The charge was subsequently investigated by a Committee of the House, who reported that it was unfounded. Two days after the House resolved, that, in preferring the charge without sufficient evidence to sustain it, *W.* was guilty of a breach of privilege. On the 30th April, *W.* was ordered to make an apology dictated by the House, and, having refused to do so, was declared, by another resolution, guilty of a contempt of the House, and requested forthwith to withdraw until such apology should be made. *W.* declined to withdraw, and thereupon another resolution was passed ordering the removal of the said *W.* from the House by the Sergeant-at-Arms, who, with his Assistant, enforced such order and removed *W.* *W.* brought an action of trespass for assault against the Speaker and certain Members of the House, and obtained a verdict of $500 damages.

Held, on appeal, affirming the judgment of the Supreme Court of *Nova Scotia*, that the Legislative Assembly of the Province of *Nova Scotia* has, in the absence of express grant, no power to remove one of its members for contempt, unless he is actually obstructing the business of the House; and *W.* having been removed from his seat, not because he was obstructing the

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business of the House, but because he would not repeat the apology required, the Defendants were liable.

Kielley v. *Carson* (1) and *Doyle* v. *Falconer* (2) commented on and followed.

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, discharging a rule *nisi* to set aside verdict and for a new trial.

This was an action brought by the Respondent, a member of the House of Assembly of the Province of *Nova Scotia*, to recover $10,000 damages against the Appellants.

The Plaintiff, by his declaration, alleged:

1. "That the said Defendants, on the 30th day of April, 1874, assaulted and beat the Plaintiff, and with force and violence ejected and expelled the Plaintiff from the Legislative Assembly of *Nova Scotia*, and from his seat in the said Assembly."

2. "That the Plaintiff was and is a Member of the Legislative Assembly of *Nova Scotia*, and being lawfully in his seat in the said House of Assembly where the said Legislative Assembly meets for the transaction of business, the said Defendant assaulted and beat the Plaintiff, and with force and violence illegally ejected and expelled the said Plaintiff from the said Legislative Assembly, and from his seat therein."

3. "That being a Member of the said Assembly, as in the second count mentioned, and being in his place in said Assembly, the said Defendants, on the day and year in the second count mentioned, and on divers other days and times between that day and the commencement of this suit, assaulted and beat the Plaintiff, and caused him to be seized and illegally and wrongfully ejected and expelled from the said Assembly, and from his seat therein, and caused the said Plaintiff to be kept so ejected and expelled from thence hitherto."

(1) 4 *Moore* P. C. C. 63. (2) L. R. 1 P. C. App. 328.

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4. "That the Defendants on the day andyear aforesaid, and on divers other days and times between that day and the commencement of this suit, assaulted and beat the Plaintiff, and ejected and expelled him from the Legislative Assembly of *Nova Scotia*, of which he is and was a Member, and from his seat therein, and have kept and continued to keep the said Plaintiff ejected and expelled from the said Assembly, and have thereby prevented and hindered the Plaintiff from enjoying his rights and privileges as such Member and discharging his duty as such Member."

5th. "That the Defendants assaulted and beat the Plaintiff, and he claims $10,000 damages."

The Defendants pleaded ten pleas :

The 1, 2, 3, 4 and 5 pleas traverse each count severally.

The 6th plea traverses the severally counts generally, suggesting that they are for the same cause of action.

The 7th plea is a special plea to the whole declaration, denying the committal of the alleged trespasses, and stating "that Plaintiff, being in his seat illegally and against the lawful resolution of said Assembly, and in contempt thereof, and hindering, obstructing and delaying the business thereof, and creating a disturbance, and using violent, abusive, disorderly and unbecoming language in said Assembly on said days and divers other days, one *Angus M. Gidney*, the Sergeant-at-Arms of said Assembly, for the preservation of the order of said Assembly, requested said Plaintiff to depart from said Assembly, whereupon said Plaintiff departed voluntary from said Assembly."

The 8th plea discloses the grounds of defence, setting out the facts and circumstances under which the alleged ejection and expulsion occurred, (and which are also set out in the other pleas hereafter given), and the Defendants justification therefor.

The 9th plea is to the same effect, and adds, that the order, resolutions and proceedings of the House of Assembly, ordering that the Plaintiff be kept temporarily removed from the House by the Sergeant-at-Arms, until he should signify to the Speaker that he was prepared to make an apology required by the House, were, "according to law, custom and practice theretofore used and practised, and which might be and were necessary to be used and practised by said Assembly, and which always of right did belong to said House to remove interruptions and obstructions to the deliberations and business of said Assembly by its members and others during its sittings, and which authority had heretofore so far and further been exercised and enjoyed by said Assembly in like cases, and by legislative assemblies in other parts of the Dominion of Her Majesty the Queen."

The 10th plea is also a plea of justification, specially alleging, amongst other things, "That on the 26th April, 1874, Plaintiff, in his place in the said House of Assembly, then in session, contrary to the established rules and practice of the House, no motion or question being before said House, proceeded to speak and falsely charged the Honorable *William B. Vail*, then present in said House of Assembly, with falsifying certain public records, viz., the original map of surveys in the County of *Guysboro'*; also the only legal record of lands granted in that County;" said Plaintiff then also charged said Honorable *William B. Vail*, 'that after the grants had passed, he purposely ordered the name of *William Esson* to be expunged, and the names of other persons to be interlined in the records, and that this had been done after the grants had passed, and after the signature of Governor *Doyle* had been appended to the grants and the record.' The said Plaintiff at said time and place called for certain record books from the Crown Land

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Office, and proceeded to say that 'those books would not be safe if allowed to remain in the Crown Land Office, under the control of said Honorable *William B. Vail*,' charging and implying in his said speech that said Hon. *William B. Vail* had corruptly altered the public records, and that he would do so again; that during the said sitting, in reply to a speech of the said Honorable *William B. Vail*, the Plaintiff, after reiterating the said charge, proceeded to say that 'if it could be proved he had made it without foundation, no one would be more happy than he would be to make every apology.' That after an investigation of said charges, demanded by said Honorable *William B. Vail*, by a committee chosen unanimously by said Assembly at said meeting, a report was, on the 24th April, 1874, presented to said House then in session, as follows:—

'COMMITTEE ROOM, April 24th, 1874.

'The Committee appointed to investigate the charges made by *Douglas B. Woodworth*, Esq., member for *Kings* County, on the sixteenth day of April last past, in the House of Assembly against the Honorable Provincial Secretary, of having altered certain records in the Crown Land Office, after the same had been signed by the Governor and Provincial Secretary, beg leave to report that after having fully investigated the charges preferred, we find that said charges are altogther unfounded, and that the evidence produced has completely exculpated the Honorable Provincial Secretary therefrom.'

'DONALD ARCHIBALD, *Chairman.*
'THOMAS JOHNSON.'

"That the said report was, after debate, unanimously adopted and entered on the journals of the said House of Assembly, the said Plaintiff being present and not calling for a division on the vote thereon; that after the

unanimous reception and adoption of said report by said House of Assembly, at the same sitting, another resolution was submitted of and concerning said Plaintiff and the said charge made by him in said House, in the words following: 'Whereas *Douglas B. Woodworth*, Esq., member for the County of *Kings*, did, in his place in the House of Assembly of this Province, on the 16th day of April instant, charge the Honorable the Provincial Secretary with having altered certain records of the Crown Land Department after the same had been signed by His Honor the Lieutenant Governor, and the said Honorable Provincial Secretary and the Commissioner of Crown Lands, which said charge involved a high crime and misdemeanor. And whereas the said charge has been fully investigated by a committee of this House, and has been ascertained to be utterly unfounded, and the said Provincial Secretary has been completely exculpated therefrom, as fully appears from the report of the committee adopted by this House. And whereas, the said charge was preferred without due and proper investigation by the said *Douglas B. Woodworth*, and was accompanied by expressions tending to lead the House to believe that said charge was founded on fact and could be sustained; therefore resolved, that this House feel it to be their duty to express the opinion, that in preferring such a charge without adequate and sufficient evidence to sustain the same, or the proper and necessary preliminary investigation requisite to the formation of a correct opinion thereon, the said *Douglas B. Woodworth* has been guilty of a breach of privilege, and that he be dealt with according to the rules and practice of Parliament.'"

By this plea also the Appellants allege, that this report was adopted and entered on the Journals of the House, and, after stating what took place in the House on the 28th and 30th April, conclude by saying, that

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the Plaintiff refused to obey or comply with a resolution of the House requiring Respondent to appear at the bar of the House and apologize to the House for having preferred a charge against another member without due and sufficient consideration, " whereupon the Sergeant-at-Arms, the said *Angus M. Gidney*, and the said *James L. Griffin* him assisting, in obedience to the orders and requirements of the said Assembly, required the said Plaintiff to retire from the said Assembly, and that said *Angus M. Gidney* and said Assistant used as little force as possible in said behalf, and the said Plaintiff retired from said Assembly."

The case came on for trial at *Halifax*, on the 18th November, 1875, before Mr. Justice *Macdonald* and a jury.

The following are the material facts of the case as disclosed by the evidence.

The Plaintiff, at the time of the assault, was a Member of the Legislative Assembly of *Nova Scotia*; the Defendant *J. C. Troop* was Speaker; the Defendant *A. M. Gidney* was Sergeant-at-Arms; the Defendant, *J. S. Griffin*, was Assistant Sergeant-at-Arms; and the other Defendants were respectively members of the said Legislative Assembly.

The Honorable *W. B. Vail* was also a member, as well as Provincial Secretary of the Province.

On the 16th of April, 1874, the Plaintiff, in his place in the House, used substantially the following words: "I now, in my place in this House, publicly charge the Honorable Provincial Secretary with falsifying certain records, viz.: The original map of surveys in the County of *Guysboro'*, and the only legal record of lands granted in that County, mentioned in certain grants, containing in the whole 17,000 acres of land granted to *William Esson*. I charge the Hon. Provincial Secretary, that after the grant had passed, he purposely ordered the

name of *William Esson* to be expunged, and the names of other persons to be inserted in the records. I charge that this had been done after the grants had passed, after the signature of Governor *Doyle* had been appended to the grants and the record."

The Plaintiff was not called to order, nor were his words taken down.

Mr. *Vail*, having asked for a committee to investigate the charges, the House adopted a resolution appointing a committee of three members for that purpose. The committee sat and heard evidence, in the presence of the parties and their counsel, and on the 24th of April the committee, (one member refusing to concur and submitting a separate report) reported to the House their finding upon the said charge as follows: "The committee, appointed to investigate the charges made by *Douglas B. Woodworth*, Esq., member for the County of *Kings*, on the 16th day of April last past, in the House of Assembly, against the Hon. the Provincial Secretary, of having altered certain records in the Crown Land office after the same had been signed by the Lieutenant-Governor and Provincial Secretary, beg leave to report that after having investigated the charges preferred, we find that such charges are altogether unfounded, and that the evidence produced has completely exculpated the Honorable Provincial Secretary therefrom,"

This report was received and adopted by the House, and thereupon the following resolution was moved and seconded:

"Whereas, *Douglas B. Woodworth*, Esq., member for the County of *Kings*, did, in his place in the House of Assembly of this Province, on the 16th of April, instant, charge the Honorable the Provincial Secretary with having altered certain records of the Crown Land Department after the same had been signed by his

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Honor the Lieutenant Governor and the Hon. Provincial Secretary, and the Commissioner of Crown Lands, which said charge involved a high crime and misdemeanor;

"And Whereas, the said charge has been fully investigated by a committee of this House, and has been ascertained to be utterly unfounded, and the said Provincial Secretary has been completely exculpated therefrom, as fully appears from the report of a committee adopted by this House;

"And Whereas, the said charge was preferred without due and proper investigation by the said *Douglas B. Woodworth*, and was accompanied by expressions tending to lead the House to believe that the said charge was founded in fact, and could be sustained;

"THEREFORE RESOLVED, That this House feel it to be their duty to express the opinion, that in preferring such a charge, without adequate and sufficient evidence to sustain the same on the proper and necessary preliminary investigation requisite to the formation of a correct opinion thereon, the said *Douglas B. Woodworth* has been guilty of a breach of privilege, and that he be dealt with according to the Rules of Practice of Parliament."

This resolution was passed by the House on the 28th April, and on the same day the House, on motion of the Attorney General,

"*Resolved*, That Mr. *Woodworth* do appear at the Bar of the House, and with the doors open, make the following apology:

'Being convinced, that in making the charge, I did so without sufficient evidence to authorize me in my place in Parliament to accuse a member of this House of so serious an offence, I do now apologize therefor to this House, and trust to be excused by the House for having

preferred such a charge without sufficient and due consideration.' "

Mr. *Woodworth* (the Plaintiff) having stated, in his place in the House, that he did not intend to make such an apology, on the 30th of April, on motion of the Attorney General, it was

" *Resolved*, That this House is of opinion that Mr. *Woodworth*, in making the charge against the Hon. Provincial Secretary, on the 16th April, inst., viz.: of having altered certain records of the Crown Land Office, after the same had been signed by the Governor and Hon. Provincial Secretary, did so without foundation, and without sufficient evidence to justify him in making so grave an accusation, and, therefore, that Mr. *Woodworth* do appear at the Bar of the House, and with the doors of the House open, make the following apology, viz.: Being convinced, that in making the charge, I did so without sufficient evidence to authorize me in my place in Parliament to accuse a member of so serious an offence, I do now apologize therefor to this House, and trust to be excused by this House for having preferred such a charge without sufficient and due consideration; and Mr. *Woodworth*, in his place in the House, having declined to make the apology dictated in that resolution, the following resolution was adopted by the House:

" *Resolved*, That the refusal of Mr. *Woodworth*, the member for the County of *Kings*, to make the apology dictated by this House, is a contempt of this House:

" *Resolved further*, that this House cannot consistently with its dignity, admit Mr. *Woodworth* to take his seat until he comply with the order of this House, and, therefore, he be required forthwith to withdraw from this House until such apology be made."

The Speaker then and there, having enquired if he,

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Mr. *Woodworth* (the Plaintiff), was prepared to withdraw, and the Plaintiff having declined to do so, the following resolution was adopted:

"*Douglas B. Woodworth*, Esq., member for the County of *Kings*, having this day taken his seat without having made the apology dictated by this House in the resolution of the twenty-eighth day of April, inst., and having refused to withdraw from the House in obedience to the resolutions just passed by the House;"

Therefore Resolved, That the said *Douglas B. Woodworth* be forthwith removed from this House by the Sergeant-at-Arms, and be excluded therefrom until he shall have signified to his Honor the Speaker that he is prepared to make the apology required by this House.

Mr. *Woodworth* was then, in pursuance of such resolution, removed by the Sergeant-at-Arms and his Assistant.

The rules for the regulation of the House of Assembly of *Nova Scotia* were also put in evidence. The 12th, 13th and 32nd were the only rules referred to in support of Appellant's contention, and are as follows:

"RULE XII.—Whenever any disorderly words have been used by a member in debate, notice should be immediately taken of the words objected to; and if any member desire that they may be taken down, the Speaker or Chairman, if it be the pleasure of the House, or Committee, will direct the Clerk to take them down; and they shall be noticed in the House before any other member has spoken, or other business intervened: or otherwise, he who is offended may move at any time during the same day, and before such offending person go out of the House, that such member may not go out of the House till he gives satisfaction in what was by him spoken; and in case he desire, or the House command him, to explain himself, he is immediately so to

do, standing in his place, which, if he refuses to do, or if the House be not satisfied with his explanation, then he is to be subject to the censure of the House."

"XIII. Though freedom of speech in debate be the undoubted privilege of the House, yet, whatsoever is spoken in the House is subject to the censure of the House."

"XXXII. In all cases, not herein otherwise provided, the House shall be guided by the usage and forms of the Imperial Parliament."

The learned judge, in his charge to the jury, after explaining the nature of the action and the pleadings, and what the law was, in his opinion, on the powers of Provincial Assemblies, made use of the following words:

"As the matter stands, you are to consider whether, on the one hand, turning the Plaintiff out at the time and in the manner proved was, in point of fact, necessary on the ground that he was an obstruction to the business of the House, in which case he would have no right of action; or, on the other hand, whether or not he was removed, not because he was such an obstruction, but merely for a contempt in refusing to make an apology for a past offence. If you find the latter to be the case, that is, that the exacting of the apology was a penalty for a past offence, and that the Plaintiff was turned out merely because he would not repeat that apology, though not obstructing the business, you ought to give him a verdict."

The jury rendered a verdict for the Plaintiff, with $500 damages.

On the 1st December, 1875, the Defendants moved to set aside the verdict, and for a new trial, on the grounds that the verdict was contrary to law and evidence; for the erroneous admission of evidence; for the erroneous

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rejection of evidence; for the mis-direction of the learned judge, and on the points taken at trial. After argument, the Supreme Court of *Nova Scotia* discharged the rule, *Wilkins*, J., dissenting.

The question submitted for the opinion of the Supreme Court of *Canada* was, whether the House of Assembly of *Nova Scotia* has the inherent power, in dealing with one of its members in relation to his conduct within it, to punish him for contempt?

Mr. *Walker* and Mr. *A. F. McIntyre* for the Appellants:

The main question raised by this appeal is, whether or not the privilege claimed by the House of Assembly of the Province of *Nova Scotia* to punish for contempt existed, and if so, whether they had power to remove the Respondent. The Court below proceeds, on the supposition, that at the time of the removal there was no offence, and that it was a punishment for a past offence.

His *delictum* was continuing at the moment of his removal. It has always been treated as a *continuous* contempt. The resolution for removing the Respondent was, not only for taking his seat without making the apology, but also for refusing to comply with an order of the House; the manner in which this refusal was made is a subject for the Court to enquire into. The resolutions were passed in the following order:

1st. Declaring Respondent guilty of a *breach of privilege.*

2nd. Requiring Respondent *in his place in the House* to answer charge and then *withdraw* till question determined;

3rd. Requiring charge read, *Respondent to reply*, and *withdraw* till question determined;

4th. Reciting previous resolutions, and requiring Respondent to *withdraw* till question determined;

5th. Requiring apology *to the House* at the Bar of the House ;

6th. Requiring Respondent to *withdraw* until apology made ;

7th. Reciting refusal to *withdraw* and refusal to apologize, and ordering Respondent's removal.

Now, the House of Assembly of *Nova Scotia* has Supreme legislative authority in the Province, and has, when sitting, the inherent right of protecting itself from insult and indignity, when offered in its presence, and of ejecting and expelling a member guilty thereof, or of a breach of privilege. The evidence in this case clearly established the fact that the Respondent was guilty of disorderly conduct, and refused to obey the orders of the House. The House had, therefore, the inherent right to make and pass the resolutions and orders above referred to, in vindication of their privileges from wrong and insult.

Burdett v. *Abbot* (1) ; *Beaumont* v. *Barrett* (2) ; *Fenton* v. *Hampton* (3) ; *Anderson* v. *Dunn* (4) ; *Cushing* on Leg. Assemblies (5).

The following authorities clearly show that the House of Assembly of *Nova Scotia* has the power to deal summarily with contempts :

Stockdale v. *Hansard* (6) ; *Stockdale* v. *Hansard* (7) ; *In re The Sheriff of Middlesex* (8) ; *Gossett* v. *Howard* (9) ; *Hensman* on the Constitution (10); *Amos* on the Constitution (11); *Fulton's* Constitutional History (12); *Thomas's* Cases Constitutional Law (13) ; *Brougham's* British Con-

(1) 14 East 1.
(2) 1 Moore P. C. C. 59.
(3) 11 Moore P. C. C. 347.
(4) 6 Wheaton 204.
(5) Pp. 217, 246, 250.
(6) 9 A. & E., Pp. 113, 114, 129, 150, 169, 185, 189, 195, 228, 229, 243.
(7) 11 A. & E., Pp. 253, 297.
(8) 11 A. & E., Pp. 289, 290, 291, 295.
(9) 10 Q. B., Pp. 411, 451, 456, 458
(10) Pp. 153, 154.
(11) Pp. 38, 39.
(12) Pp. 119, 124.
(13) Pp. 25, 35.

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stitution (1); *Cox's* British Commonwealth (2); *Cox's* Institution of British Government (3); *Bowyer's* Constitutional Law (4); *Fischel* on the English Constitution (5); *Tiffany* on Constitutional Law (6); *Pomeroy's* Constitutional Law (7); *Kent's* Com. (8); *May* on Parliamentary Practice (9); Lex Parliamentaria (10).

Moreover, there are cases decided here which favor Appellant's contention, that it has been the practice of Houses of Assembly in other British North American Colonies to consider the House the sole and exclusive judge of its own privileges and what is a breach thereof, and its action is conclusive upon Courts of Law. See *May* on Parliamentary Practice (11); *The Speaker of Victoria* v. *Glass* (12); *McNab* v. *Bidwell* (13); *Lavoie's* Case (14); *Cuvillier's* Case (15); *Monk's* Case (16); *Tracey's* Case (17); and the recent case of *Ex-parte Dansereau* (18).

If the Legislative Assembly of the Province of *Quebec* can exercise that right, surely it cannot be denied to the Legislative Assembly of *Nova Scotia.* Moreover, this case is distinguishable from the cases of *Kielley* v. *Carson* (19), and *Doyle* v. *Falconer* (20). The House, in this case, did not attempt to punish for the contempt by committal, which is a judicial power, but merely exercised their power of removal.

The Appellants contend also, that the Judge at the trial mis-directed the jury in charging them that expulsion was a punishment for a past offence, and that

(1) Pp. 256, 260.
(2) P. 82.
(3) Pp. 203, *et. seq.*, 219.
(4) Pp. 51, 53, 54, 82.
(5) Pp. 447, 449, *et. seq.*
(6) P. 153.
(7) P. 139.
(8) 12th Ed., vol. 1, 235 *et. seq.*
(9) 4th Ed., Pp. 113, 114, 300, 308, 309, 310, 317, 319, 320, 321.
(10) P. 136 *et. seq.*
(11) 4th Ed., 157 *et. seq.*
(12) L. R. 3 P. C. C. 573.
(13) Draper's Reports (U.C.) 144.
(14) 5 L. C. R., Pp. 95, 125.
(15) 4 L. C. R. 146.
(16) Stuart's Rep. 120
(17) Stuart's Rep. 478.
(18) 19 L. C. Jur. 210.
(19) 4 Moore P. C. C. 63.
(20) L. R. 1 P. C. C. 328.

when removed Respondent was not misbehaving or obstructing business, and that the House had no right to exact an apology as a condition to his remaining in his seat.

The learned counsel also cited the following authorities:

As to practice of Congress and Houses of Representatives in the *United States*, and in the several States forming the Federal Union—

Potter's Dwarris on Statutes and Constitutions (1); *Hough* on American Constitutions (2).

As to the Constitution of *Nova Scotia* prior to Confederation—

Clarke's Colonial Law (3); *McGregor's* British America (4); *Howard's* Laws of British Colonies (5).

As to Tenth Plea being proved—a sufficient justification not being demurred to—

Edwards v. *Walter, et al*, (6).

Mr. *Cockburn*, Q. C., for Respondent:—

There was no breach of privilege in publicly charging the Provincial Secretary with falsifying certain records. The charge was preferred in Respondent's undoubted right as a member of the Legislature—a right established and recognized by the law of Parliament. In strict parliamentary practice, when a statement by a member has been adopted as the ground of a proceeding by the House, any irregularity in it is waived. If, on the other hand, the charge could, by any possibility, have been treated as a breach of privilege, it should have been exclusively dealt with under Rule 12 of the Rules of the *Nova Scotia* House of Assembly. Now,

(1) Pp. 566, 567, 569, 571, 576, 608, *et. seq.*
(2) Vol. 2, Pp. 632, 633.
(3) Pp. 454—457.
(4) Vol. 2, p. 59.
(5) Vol. 1, Pp. 312, 314, *et seq.*
(6) 3 Starkie 7.

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in this case, the Respondent was not called to order, nor were the words alleged to have been spoken immediately taken down, according to the practice; but, after a reference to a committee had been ordered, and a report had been made, to the effect that the charges were unfounded, the House proceeded to pass several resolutions, and finally to order that the Respondent do appear *at the Bar*, and there make an apology; all of which is contrary to English precedents and the rules of the House of Assembly. Moreover, there are no instances in which it can be shown that a Member has ever been ordered to apologize from the Bar of the House, it having been authoritatively laid down that no Member shall appear at the Bar unless as a criminal. See *May's* Parliamentary Practice (1), *Bourke's* Precedence (2).

It is contended, that a resolution of the House is binding, and that the Courts cannot enquire into the facts. This brings us to discuss the question of the sovereignty of a Colonial Legislative Assembly within its own walls. The state of the law in relation to the House of Commons in England is, that the House has the sovereign power to decide what is a contempt of its own authority, and if the ground of such decision is not stated, the adjudication is not open to be reviewed by a Court of Law; but, if the grounds are given, Courts of Law have power and jurisdiction to examine into questions of breach of parliamentary privilege and of contempt, and to determine whether or not the pretension is supported by the proceedings that have taken place. *Gossett* v. *Howard* (3); *Harrison* v. *Wright* (4); *Stockdale* v. *Hansard* (5); *Potter's Dwarris* on Stat. (6).

But the House of Assembly of *Nova Scotia*, established by chap. 4, *R. S. of N. S.*, 4th series, has no such

(1) 107; 10 Com. Jour. 46.
(2) 123.
(3) 10 Q. B. 411.
(4) 13 M. & W. 816.
(5) 9 A. & E. 107.
(6) 567 *et seq.*

authority as to the punishment of contempt and breaches of privilege as the House of Commons possesses.

Keilley v. *Carson* (1), overruling *Beaumont* v. *Barrett* (2); *Doyle* v. *Falconer* (3), on which case Respondent principally relies.

One branch of the Legislature has no power to increase its own powers and jurisdiction such as rule 32 of the *Nova Scotia* House is contended to confer.

See *May* on Parliamentary Practice (4) ; Chap. 22 of the Acts of the Legislature of *Nova Scotia*, 1875. Also despatch of Minister of Justice, as to partial allowance of same.

The exercise of the powers of the House in this case was a judicial act, which required lengthy investigation and the examination of witnesses to ascertain whether the charge preferred by the Respondent was sustained or not, and its alleged falsity (as so found by the committee) was what the House resolved to be a breach of privilege, not the mere making of the charge. The House, in requiring an apology, was adjudicating on a past offence ; but Colonial Legislatures have no such power, according to the clearly expressed opinion of Baron *Parke* in *Kielley* v. *Carson*, cited above.

The cases cited by Appellants are not applicable to this case, for here the charge is against a responsible Minister of the Crown. See the Parliamentary Debates in the English House of Commons in the following cases, in which grave charges having been preferred against Ministers, they were investigated and either affirmed or negatived ; but no attempt was ever made to punish the Member who had preferred the charge. In fact, such a course would be a direct invasion of our system of Parliamentary and Responsible Government.

(1) 4 Moore P. C. C. 84.
(2) 1 Moore P. C. C. 59.
(3) L. R. 1 P. C. App. 329.
(4) P. 65.

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Case of Mr. *Daniel O'Connell*, 26th February, 1838 (1); Case of Mr. *Ferrand* (2); see Sir *Robt. Peel's* speech thereon (3); Case of Mr. *Cobbett* (4); Case of Col. *Davies* (5); Charges against Lord *Melville* in 1805; Duke of *York*, 1809; Earl of *Chatham*, 1810; Lord *Eldon*, 1825; Earl *St. Vincent*, 1826; Sir *James Graham*, 1844; Lord *Stanley*, 1845; Lord *Palmerston*, 1850; Lord *Westbury*, 1865, and many others.

THE CHIEF JUSTICE :—

All my early reading, historical, political and legal, led my mind to give a ready assent to the doctrine, that it is one of the incidents to the possession of supreme legislative power, however limited the sphere for the exercise of that power (and though controlled by the Legislature of the Empire), that the Legislature exercising such power should have the right to punish parties for contempt. If they cannot do so, they are shorn of much of their dignity, and, in many respects, their influence and usefulness will be much impaired.

No doubt there have been occasions on which, before the beginning of this century, the right of the House of Commons to the possession of all the privileges and powers claimed by them has been questioned by the Courts; and Lord *Holt's* well known resistance to their claims, when unreasonable, has challenged the admiration of the Bar, wherever respect is had for judicial integrity and firmness.

Nevertheless, though some of the rights and privileges claimed have been defined by Act of Parliament, other important ones have not been given up. In the important case of *Burdett* v. *Abbot* (6), which was ex-

(1) 93 Com. J. 307.
(2) 99 Com. J. 235.
(3) Hansard, Vol. 74, Pp. 236, 302, 306.
(4) Mirror of Parlt., 1833, May 16, Pp. 1809, 1822.
(5) Mirror of Parlt., 1830, p. 487.
(6) 14 East 1.

haustively argued, Lord *Ellenborough*, C. J., gave an elaborate judgment, affirming the right of the House of Commons to commit for contempts.

In one part of his judgment, his Lordship used these words :

I have already said, that *a priori*, if there were no precedents upon the subject, no legislative recognition, no practice, or opinions in the courts of law recognizing such an authority, it would still be essentially necessary for the houses of parliament to have it; indeed, that they would sink into utter contempt and inefficiency without it. Could it be expected, that they should stand high in the estimation and reverence of the people, if, whenever they were insulted, they were obliged to wait the comparatively slow proceedings of the ordinary course of law for their redress? That the Speaker, with his mace, should be under the necessity of going before a grand jury to prefer a bill of indictment for the insult offered to the house? They certainly must have the power of self vindication and self protection in their own hands; and if there be any authenticity in the recorded precedents of parliament, any force in the recognition of the legislature and in the decisions of the courts of law, they have such power.

In another part of the judgment he uses these words:

The necessity of the case would, therefore, upon principles of natural reason, seem to require that such bodies, constituted for such purposes, and exercising such functions as they do, should possess the powers which the history of the earliest times shews that they have in fact possessed and used.

I make but one further quotation from the concluding part of his judgment:

It is made out that the power of the House of Commons to commit for contempt stands upon the ground of reason and necessity, independent of any positive authorities on the subject; but it is also made out by the evidence of usage and practice, by legislative sanction and recognition, and by the judgments of the courts of law, in a long course of well established precedents and authorities.

This judgment was pronounced in 1811, and similar doctrines and principles were laid down and acted upon by the courts and the legislatures of different colonies; reference was made to these cases in the argument

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before us. It does not appear that the right of colonial legislatures to commit for contempt was, after that, successfully resisted. It was questioned in *Beaumont* v. *Barrett* (1), decided in the year 1836, on appeal from *Jamaica*. It was argued that the Legislative Assembly of that island had no power to commit for contempt. The appellant had, by order of the Legislative Assembly, been committed for contempt in publishing a libellous article in a newspaper. The action was trespass, and the defendant justified under the warrant and resolution of the Assembly. On the arguments in the Courts of *Jamaica* two points were made: 1. Whether the Assembly possessed the power of committing for any contempt which was not an immediate obstruction to the due course of its proceedings; 2. Whether, if they possessed the power, it had been shown by the pleas to have been properly exercised. The question was also expressly raised, whether the House of Assembly of *Jamaica* possessed the power to commit for an alleged breach of their privileges. The opinion of the Judicial Committee of the Privy Council was delivered by *Parke*, Baron, affirming the right of the House of Assembly to commit for contempt.

The Lords of the Council present, when the matter was argued before the committee, were *Parke*, B., *Bosanquet*, J., and the Chief Judge in Bankruptcy (*Erskine*).

The next time the question came up in the Privy Council was in 1842, in the case of *Kielley* v. *Carson* (2). The case was twice argued, and when finally decided, there were present Lord Chancellor *Lyndhurst*, Lord *Brougham*, Lord *Denman*, Lord *Abinger*, Lord *Cottenham*, Lord *Campbell*, *Shadwell*, V. C., *Tindall*, C. J., *Parke*, Baron, *Erskine*, J., and Dr. *Lushington*. The

(1) 1 Moore P. C. C. 59. (2) 4 Moore P. C. C. 63.

opinion of their Lordships was delivered by Baron *Parke*, who had pronounced the judgment in *Beaumont* v. *Barrett*. It was held, virtually reversing *Beaumont* v. *Barrett*, that the House of Assembly of *Newfoundland* had no power to commit the plaintiff for contempt for having used threatening language to a Member of the House for what he had said, in his place in the House, respecting the plaintiff. The following language is used in deciding the matter before the Judicial Committee :

> The question, therefore, whether the House of Assembly could commit by way of punishment for a contempt in the face of it, does not arise in this case. Their lordships are of opinion, that the House of Assembly did not possess the power of arrest with a view to adjudication on a complaint of contempt committed out of its doors, and consequently, that the judgment of the Court below must be reversed.

In another part this language is used :

> To the full extent of every measure which it may be really necessary to adopt to secure the free exercise of their legislative functions, they are justified in acting by the principle of the common law ; but the power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body irresponsible to the party accused, whatever the real facts may be, is of a very different character, and, by no means, essentially necessary for the exercise of its functions by a local legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions.

Another quotation :

> They are a local legislature, with every power reasonably necessary for the proper exercise of their functions and duties, but they have not what they have erroneously supposed themselves to possess, the same exclusive privileges which the ancient law of *England* has annexed to the House of Parliament.

It will be observed, that this case was decided after

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the decision in *Stockdale* v. *Hansard* (1), and *The Sheriff of Middlesex* Case (2), by the Court of Queen's Bench, cases in which the right to the privileges claimed by the Houses was discussed with great power and ability.

Looking at the time this decision was made, 1842, we find, that the question as to the powers and privileges of the House of Commons in *England* had been raised and discussed under circumstances which seemed at one time, to be likely to lead almost to a collision between the Judges of the Court of Queen's Bench and the House of Commons. The Court of Queen's Bench, notwithstanding the strong opinions expressed by some of the leading statesmen of all parties, and the report of a Committee of the House of Commons, adopted by the House, affirming the privilege contended for in *Stockdale* v. *Hansard*, decided against those privileges, and affirmed the right of the plaintiff to maintain an action for libellous matter contained in parliamentary documents printed and sold by the defendants, by the order and permission of the House of Commons. Lord *Campbell's* argument for the defendant, on the demurrer to the plea setting up the privilege, as reported in 9 *A.* & *E.*, occupies nearly 100 pages.

The matter was again brought to the consideration of the Court, on an application to compel the Sheriff to pay over the money made under a writ of *venditioni exponas*, issued in another suit of *Stockdale* v. *Hansard* (3), and in the case of *The Sheriff of Middlesex* (4), brought before the same Court, on a writ of *habeas corpus*. The Sheriff had been brought to the Bar of the House and examined, touching the execution of the writs of *fieri facias* and *venditioni*

(1) 9 A. & E. 1.
(2) 11 A. & E. 273.
(3) 11 A. & E. 253.
(4) 11 A. & E. 273.

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exponas, in the last named suit of *Stockdale* v. *Hansard*, and on the 21st of January, 1840, the House resolved, that the execution had been levied in contempt of the privileges of the House, and that the Sheriff should be ordered to return the amount. After that, and after they had again appeared at the Bar, and after the resolutions had been communicated to them, the House resolved:

That *William Evans*, Esq., and *John Wheelton*, Esq., having been guilty of contempt and breach of the privileges of this House, be committed to the custody of the Sergeant-at-Arms attending this House, and that the Speaker do issue his warrant accordingly.

They were thereupon taken into custody for not returning the money in obedience to the order of the House. The resolutions of the House affirmed that the power of publishing such of its reports, votes and proceedings, as it might deem necessary, was an essential incident to the constitutional functions of Parliament, more especially of that House as the representative portion of it; that, by the law and privileges of Parliament, the House had the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges, and that the institution, or prosecution of any action, suit or other proceeding, for the purpose of bringing them into discussion, or decision, before any Court, or Tribunal, elsewhere than in Parliament, was a high breach of such privilege, and rendered all parties concerned therein amenable to its just displeasure and to the punishment consequent thereon. Other resolutions were passed, having reference to a report published by Messrs. *Hansard*, under the orders of the House, respecting the islands of *New Zealand*, and declared that to bring, or assist in bringing, any action against the Messrs. *Hansard* for such publication, would be a breach of the privileges of the House. They also directed Messrs. *Hansard* not to defend an action

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with which they were threatened, for publishing the report.

These resolutions are referred to in the case of *The Sheriff of Middlesex* (1), having been passed on the 30th May, 1837, and the 1st of August, 1839.

To get over the difficulty, an Act was passed on the 14th April, 1840, 3 & 4 Vic., Chap. 9.

The privileges and powers contended for by the House of Commons, and the refusal of Lord *Denman* and the Court of Queen's Bench to yield assent to these pretensions, naturally attracted the attention of the leading legal minds in *England*, and when the case of *Kielley* v. *Carson* came on for discussion and consideration before the Committee of the Privy Council in 1842, the great lawyers before whom the case was then argued, were, no doubt, fully prepared to consider it in all its bearings, and pre-eminently qualified to decide it, from their high legal attainments, and most of them having also been members of the House of Commons.

Fenton v. *Hampton*, in 1858 (2), was an appeal to the Queen in Council from a decision of the Supreme Court of *Van Dieman's Land*. Present: Lords Justices *Knight Bruce*, *Turner*, *Pemberton Leigh*, and L. C. Baron *Pollock*. The opinion of the committee was delivered by *Pollock*, C.B. The case was for the committal for contempt of a person not a member of the Legislative body (the Comptroller-General of Convicts in the Island), for refusing to give evidence before a committee, and to attend at Bar when ordered. The committal was by the Legislative Council of the Island, the only legislative body in the Colony, and which had been created by Statute. The Chief Justice in the Island (*Fleming*) held, that the Council had no power to commit for contempt, and that the warrant, being general, was bad. *Horne*, J., held, that the law of Parliament

(1) 11 A. & E. 273. (2) 11 Moore P. C. C. 347.

was introduced as part of the law of *England*, and that there was power to commit for contempt; but he also held the warrant was bad, as the plaintiff had had no opportunity of defence, it not appearing he had been called to the Bar to show cause why he should not be punished for contempt. The leading counsel, in arguing the case before the Committee, were *Thesiger* and *Kelly*, Q. C.'s. *Pollock*, C. B., in giving the opinion of the Committee, directly repudiated Mr. Justice *Horne's* position, that the *Lex et consuetudo Parliamenti* had been introduced by the Statute introducing the Law of *England*, and also rejected the ground that it was an incidental power, and said there was no distinction between that Legislature created by Imperial Statute and those of *Jamaica* and *Newfoundland* created by the Crown. He said:

> If the Legislative Council of *Van Dieman's Land* cannot claim the power they have exercised on the occasion before us, as inherently belonging to the supreme legislative authority which they undoubtedly possess, they cannot claim it under the Statute as part of the common law of *England* (including the *Lex et consuetudo Parliamenti*), transferred to the Colony by the 9 Geo. 4, chap. 83, sec. 24. The *Lex et consuetudo Parliamenti* apply exclusively to the Lords and Commons of this country, and do not apply to the supreme Legislature of a Colony by the introduction of the common law therein.

This case seems applicable to the extent of approving of *Kielley* v. *Carson*, and shewing *Beaumont* v. *Barrett* not supportable on the grounds of usage or statute.

Dill v. *Murphy* (1) was an appeal from the Supreme Court of *Victoria* to the Privy Council. Present: Lords *Cranworth* and *Chelmsford*, and Lords Justices *Knight Bruce* and *Turner*, February, 1864. The case arose on a committal for contempt in publishing a libel on a member of the House of Assembly. The statute of the

(1) 1 Moore P. C. C. N. S. 487; S. C. 10 L. T. N. S. 170.

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Imperial Parliament, establishing the Legislative Assembly in *Victoria*, authorized the Legislature, by an act, to define the privileges, immunities and powers of the members. The Colonial Legislature passed an Act declaring:

> That the Legislative Council and Legislative Assembly of *Victoria* respectively, and the committees and members thereof respectively, should hold, enjoy and exercise such and the like privileges, immunities and powers as, and the privileges, immunities and powers of the said Council and Assembly respectively, and of the committees and members thereof respectively, were thereby defined to be the same as, at the time of the passing of the Constitution act, were held, enjoyed and exercised by the Commons House of Parliament of *Great Britain* and *Ireland*, and by the committees and members thereof, so far as the same were not inconsistent with the Constitution act, whether such privileges, immunities or powers were so held, possessed or enjoyed by custom, statute, or otherwise.

By the same act, printed copies of the Journals of the House of Commons were made *prima facie* evidence upon any inquiry touching such privileges, immunities, &c.

That act received the Royal assent in 1857, before committing of the trespasses complained of in the suit. The question raised under the pleadings on demurrer was, whether by the statute referred to, the privileges contended for were sufficiently defined by the words used. The opinion of the Committee was delivered by Lord *Cranworth*, holding that under the words of the act, the Colonial Legislature had the same power to commit that the House of Commons had in *England*. *Kielley* v. *Carson*, and *Fenton* v. *Hampton* were referred to in argument, and their authority not in any way questioned.

Doyle v. *Falconer* (1)—before the judicial Committee of the Privy Council; present: Lord *Westbury*, Sir *James William Colville*, and Sir *Edward Vaughan Wil-*

(1) L. R. 1 P. C. App. 328.

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liams—is the next case in the order of time before that tribunal, and is very important. It was an appeal from the Court of Common Pleas of *Dominica*. The action was brought by the plaintiff (the respondent), a member of the House of Assembly of *Dominica*, against the appellant, the Speaker, and two members of the House.

The material facts were set out in the pleas of the defendants, and were to the following effect, that the plaintiff, when debating a question before the House contrary to its established rules and practice, was called to order by the Speaker, persisted in his speech, and addressed insulting words to the Speaker, which, pursuant to motion, were noted down as follows: "Who the devil are you to call me to order? You are a disgrace to the House." It was thereupon resolved, that the plaintiff had been guilty of a high contempt of the House, and that he should be held in such contempt until he should have apologized. The defendant (the Speaker), therefore called on him to apologize. He refused to do so, saying he had said nothing requiring an apology, and continued to address the House. The Speaker again called on the plaintiff for an apology, when he replied: "You may tell me that I am in contempt one hundred times if you like, but I will speak. You may move it one hundred thousand times. I repeat what I have said: you are a disgrace to the House, you were expelled from the House for robbery; the minutes of 1845 can shew it." The House, by resolution, referred to what had before taken place, and to the fact, that whilst he was in contempt he interrupted and obstructed the business before the House, and it was thereupon resolved, that the plaintiff, for his disorderly conduct and contempt of the House, be taken into the custody of the Sergeant-at-Arms, and that the Speaker do issue his warrant committing the plaintiff to the common gaol during the pleasure of the House;

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whereupon the defendant *Doyle* issued his warrant to the Sergeant-at-Arms, who arrested him under it, and delivered him to the custody of the Keeper of the gaol, who, under another warrant issued by the defendant *Doyle*, reciting the same matter, detained him under its authority. The pleas were demurred to and issue also joined on them. On argument of the demurrer, judgment was given in favor of the plaintiff. The case was afterwards tried before the Chief Justice, in July, 1864, when a verdict was rendered for the plaintiff, with £770 damages. Exceptions were taken to the ruling of the Judge and admission of evidence, and a rule *nisi* obtained to set aside the verdict, and for a new trial, on the exceptions taken, and on the ground of excessive damages. The rule was argued, but subsequently abandoned, the learned counsel intimating his intention to appeal from the judgment on the demurrer as well as the refusal to non-suit, to Her Majesty in Council. Whereupon judgment was entered against the defendant, and execution awarded. The appeal came on for hearing. The material question raised on the appeal was against the judgment of the Court on the demurrer, and that alone was argued.

Mr. *Mellish*, Q. C., and Mr. *MacNamara* were for the appellants; and Sir *Roundell Palmer* and Mr. *Leith* for the respondent.

The appellant's Counsel, in argument, stated, that two questions were raised by the pleadings: First, had the Lower House of Assembly in the Island power to commit one of its members, by way of punishment, for contempt committed against it in its presence; and, secondly, assuming the existence of this power, are the pleas which set forth the several facts sustainable. They contended that, assuming that it had been decided by the cases of *Kielley* v. *Carson* and *Fenton* v. *Hampton*, that the House of Assembly had no power to

punish for a contempt committed out of the House, this was a different question, the contempt and obstruction which the House had proceeded to punish had been committed by one of its member in the presence of the Assembly itself. They referred to the language of Baron *Parke*, in giving judgment in *Kielley* v. *Carson*, to show that the question under consideration in *Doyle* v. *Falconer*, did not arise in that case, but that he assented to the proposition that "an Assembly had the right to protect itself from all impediments to the due course of its proceedings. To the full extent of every measure which it might be really necessary to adopt, to secure the free exercise of their legislative functions, they are justified in acting, by the principles of the Common Law." They then contended, the power exercised was incident to the House of Assembly as necessary to its independence and security as a Legislative body.

The respondent's counsel contended, even if Colonial Assemblies are entitled to protect themselves from all impediments to the due course of their proceedings, and therefore to remove obstructions offered to their deliberations, that that is a different thing from assuming to punish by imprisonment, which can only be done by a Court of Record, or by the Imperial Parliament by the *Lex Parliamenti*. They referred to *Kielley* v. *Carson*, *Fenton* v. *Hampton*, and *Dill* v. *Murphy*, to show that no such power was possessed by Colonial Legislatures, and *in re Brown* (1) to show that the House of Kings in the *Isle of Man* had not, merely from its being endowed with legislative functions, the power to commit for contempt.

Sir *James W. Colville*, in giving the judgment of the Committee, refers to *Kielley* v. *Carson*, as deciding conclusively that the Legislative Assemblies in the British

(1) 33 L. J. Q. B. 193.

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Colon s have, in the absence of express grant, no power to adjudicate upon or punish for contempt committed beyond their walls. He speaks of the constitution of the Committee before whom it was argued for the second time, as making that case an authority of singular weight, and says, if the elaborate judgment then pronounced had, in terms, left open the question in the case (they were called on to decide), it had stated principles which went far to afford the means of determining that question.

He refers to the privileges of the House of Commons, and says that the power of punishing for contempt belongs to it by virtue of the *Lex et consuetudo Parliamenti*, a law peculiar to and inherent in the two Houses of Parliament of the *United Kingdom*.

That there was no resemblance between a Colonial House of Assembly, being a body which has no judicial functions, and a Court of Justice, being a Court of Record. There was no ground for saying that the power of punishing for contempt, because it is admitted to be inherent in the one, must be taken by analogy to be inherent in the other. He then proceeds to discuss the question, whether the power to punish and commit for contempts committed in its presence is necessary to the existence of such a body as the Assembly of *Dominica*, and the proper exercise of the functions which it was intended to execute. He then proceeds:

It is necessary to distinguish between a power to punish for a contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self preservation. If a member of a Colonial House of Assembly is guilty of disorderly conduct in the House whilst sitting, he may be removed, or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self security is one thing; the right to inflict punishment is

another. The former is, in their lordships' judgment, all that is warranted by the legal maxim that has been cited, but the latter is not its legitimate consequence. If the good sense and conduct of the members of the Colonial Legislatures prove, as in the present case, insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to remove the person offending from the place of meeting and to keep him excluded. The same rule would apply, *a fortiori*, to obstructions caused by any person not a member. And whenever a violation of order amounts to a breach of the peace, or other legal offence, recourse may be had to the ordinary tribunals.

He then refers to the argument that the dignity of an Assembly exercising Imperial Legislative authority in a colony, and the importance of its functions, require more efficient protection than what had been indicated. That it was unseemly and inconvenient to subject the proceedings of such a body to examination by the local tribunals, and that it is but reasonable to concede to it a power which belongs to every inferior Court of Record. He also refers to the objection made to such a power being possessed by these Legislatures,—it is a power of a high and peculiar character, in derogation of the liberty of the subject, and carries with it the anomaly of making those who exercise it Judges in their own cause, from whom there is no appeal, and that, if it might be safely intrusted to magistrates who would all be personally responsible for the abuse of it to some higher authority, it might be very dangerous in the hands of a body which, from its very constitution, is practically irresponsible. He added, that their lordships were not at liberty to deal with considerations of this kind; suggested the possibility of enlarging the existing privileges of the Assembly by an act of the Local Legislature, passed with the consent of the Crown; referred to the case of *Dill* v. *Murphy*, as showing that extraordinary privileges of the kind, when regularly acquired, would be duly recognized, and concludes:

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But their lordships, sitting as a Court of Justice, have to consider not what privileges the House of Assembly of *Dominica* ought to have, but what by law it has. In order to establish that the particular power claimed is one of those privileges, the appellants must show that it is essential to the existence of the Assembly, an incident *sine quo res ipsa esse non potest.* Their lordships are of opinion that it is not such an incident.

In the case of *The Speaker of the Legislative Assembly of Victoria* v. *Glass* (1), decided in 1871, *Kielley* v. *Carson*, *Beaumont* v. *Barrett*, *Fenton* v. *Hampton*, *Doyle* v. *Falconer*, and *Dill* v. *Murphy*, are cited, and the authority of the later cases is not in any way questioned. The case affirms *Dill* v. *Murphy*, and holds that a general warrant, reciting that a person had been adjudged by the House of Assembly to have been guilty of a contempt and breach of privilege, without setting forth specific grounds of such contempt, is good.

The case of *Anderson* v. *Dunn* (2), decided in the Supreme Court of the *United States*, in 1821, followed *Burdett* v. *Abbot* (3), holding that the House of Representatives had, by necessary implication, a general power of punishing and committing for contempts, and was referred to in *Doyle* v. *Falconer*, but the Judicial Committee did not consider themselves at liberty to follow that case, after the decisions of that tribunal in *Kielley* v. *Carson*, and *Fenton* v. *Hampton*.

In many of the States of the American Union, the Legislature have asserted the right to punish for contempts as a power incident to, and necessary to be possessed by, those bodies, in order to the proper and efficient exercise of the powers possessed by them.

In fact, the practice and principles laid down by, and acted on, in the British House of Commons in reference to its privileges, seem to have been instinctively (if I may use the term) adopted by all legislative bodies

(1) L. R. 3 P. C. C. 561. (2) 6 Wheaton 204.
(3) 14 East 1.

modelled on the English system possessing supreme legislative authority, however limited its sphere, as incidental and necessary to the exercise of their high functions; and, I must confess, that it is with the greatest reluctance I recede from the opinion which prevailed so universally and for so long a time, and was sustained by such high authorities. I, nevertheless, feel compelled to yield to the high authority of *Kielley* v. *Carson*, decided by Judges of such very great acumen, on due consideration, and after so full an argument, and followed and approved of, as it has been, by the Privy Council in all the cases brought before that tribunal in which the question has been raised, and by the judicial decisions in all the Colonies that I am aware of, except in the case of *Ex-parte Dansereau* (1), in the Province of *Quebec*, where the decision of the Court of Queen's Bench seems fully warranted by the terms of the provincial statute.

I may mention, that in the case of *The Queen* v. *Gamble* and *Boulton* (2), it was held, that a member of the Provincial Parliament was privileged from arrest in civil cases, and that the period for which the privilege lasted was the same as in *England*, and the learned Judge, who delivered the opinion of the Court, said:

> And while, apart from our own statutes and judicial decisions, I see nothing in the decisions in *Beaumont* v. *Barrett et al*, or the more recent case of *Kielley* v. *Carson*, at variance with the assertion and enjoyment of this privilege by our own Legislature, I am confirmed in my own opinion of its existence by our general adoption of the law of *England*, by the provision for suits against privileged parties contained in our Statute of 1822, and in the Statutes of Canada, 12 Vic., chap. 63, secs. 22 & 23; 13 & 14 Vic., chap. 55, sec. 96; and by the uniform decisions of our Courts since the former act, and also, as I am informed, before it.

He then refers to the conflicting decisions in the

(1) 19 L. C. Jur. 210. (2) 9 U. C. Q. B. 546.

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Court of Queen's Bench in *Montreal*, in the case of *Cuvillier* v. *Monro* (1).

The Legislatures of *Ontario* and *Quebec* seem to have conferred on the House of Assembly in these Provinces extensive powers to enable them effectively to exercise their high functions and discharge the important duties cast on them. It may be necessary still further to extend their powers. The Legislatures of the other Provinces will probably consider it desirable to take the same course, and in that way unmistakably place these tribunals in the position of dignity and power, which it is desirable they should possess.

Looking at the facts of the case before us, the question arises, what was the Defendant doing at the time he was forcibly removed from his seat in the House that justified the use of the force and violence to which he was subjected?

It is not doubted that he had the right to occupy a seat in the House, and the judgments referred to decide that he could not be deprived of that right, unless he was offering some obstruction to the deliberations or proper action of that body during its sitting. The only obstruction that he offered to their deliberations or proper action, and the only disorderly conduct in the House at the time he was removed from it to which the resolutions point, is that he refused to make an apology dictated by the House.

What, then, had the plaintiff done to cause him to be considered as guilty of a breach of the privileges of the House? On the 16th of April he charged a member of the House, who filled the office of Provincial Secretary, with altering certain records of the Crown Lands Department after the patents recorded had been signed by the Lieutenant Governor and the Commis-

(1) 4 L. C. R. 146.

sioner of Crown Lands. If he believed the charge to be true, and had reasonable grounds for such belief, it was his duty to bring the matter to the consideration of the House that it might be enquired into, and applying the same rule that would prevail even in an action for a malicious prosecution, he would be justified in making the charge if he had reasonable and probable cause for doing so. The facts brought out on the trial and enquiry before the committee appointed clearly established, that, in truth, the Hon. Provincial Secretary did not alter the records referred to after they were signed by the Lieutenant-Governor. On the contrary, the alterations were made before being signed, and were not made by the gentleman charged, but, in consequence of his refusal to sign the documents as they were originally prepared; and the alterations were made in the book where the deeds were recorded, at the suggestion of an officer of the department, so as to make them, as registered, correspond with the conveyances as actually issued. The plaintiff's attention had been in some way directed to the matter, and he examined the book and papers in the Crown Lands Office, and saw that the name of Mr. *Esson*, the gentleman who was the grantee in many of the deeds, had been erased and other names written over the erasure. The object originally of inserting the name of Mr. *Esson* in the deeds was, that he might not be obliged to get conveyances from the parties who were the original applicants for the land, but who had transferred their rights to him. The Provincial Secretary would not sign the grants, unless the names of the parties originally applying were inserted.

The grants, as originally drawn up, were destroyed, new ones prepared, and they were the only ones ever perfected by having the great seal affixed to them, or the Governor's signature, or the signature of the Provincial Secretary. The alterations were made

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in the record book, as already mentioned, at the suggestion of an officer of the department, to avoid having the leaves taken out of it, they being numbered; and so the name of the party originally applying for the grant of land was inserted in the place from whence Mr. *Esson's* name was erased. From the evidence, the reasonable inference is, that the Provincial Secretary was aware of this being done, and was an assenting party to it.

Without going into the matter whether the plaintiff did receive information at the Crown Lands Office which went to the extent of affirming that the signature of the Lieutenant-Governor was affixed to the grant on the 20th December, which was, undoubtedly, a considerable time before the name of *Esson* was erased from the record of it in the book, it is obvious, that the documents in the office which he did see gave grounds for believing that something irregular had taken place, and he may have honestly believed that the alterations had been made in the grant after it had been signed by the Lieutenant-Governor, and, if so believing, he would naturally think it was his duty to call the attention of the House to the matter with a view of having it investigated. He was not at that time considered as in any way violating the rules of the House, or entrenching on its rights and privileges. In fact, it was thought necessary to enquire into the matter, and the result of the enquiry clearly shewed, that the grave charge of altering the record of grants after they had received the signature of the Lieutenant-Governor was not correct. After that, it would not be unreasonable to suppose, that the gentleman making the charge would express his satisfaction that the enquiry had shown that it was not well founded, though, at the time he made it, he believed it to be true, and considered he had reasonable grounds for such belief. He does not appear to

have taken this course, which, perhaps, would have satisfied the House, and the difficulty that followed might have been avoided.

But a statement or complaint made by a member of the legislature, in his place in the house, with a view of having an enquiry in any matter in which the public have an interest, or, I apprehend, in which even a private person feels aggrieved, takes higher ground of privilege than an ordinary complaint made in a matter in which a party has an interest, asking to have his complaint legally investigated.

When the member makes his statement, he exercises the right of freedom of speech, and, in making charges against gentlemen holding official positions, very great latitude is allowed in the use of vituperative language. If the language used is unparliamentary, it may be taken down, and the House decides upon it. If not called to order, and the House considers it necessary for its own dignity to enquire into the matter, it takes the initiative and appoints a committee, or institutes an enquiry, as the case may be. The member has only exercised his right of freedom of speech in bringing the matter to the attention of the House. If that body is to be considered as the grand inquest of the Province, who are to devise the means of correcting abuses and insuring good government in matters within their control, it must be the right and privilege of all parties, whether members of the legislature, or private citizens, to place their grievances, or the public wrongs complained of, before the body properly authorized to investigate them and grant redress. The member of the legislature, exercising his right of speech, makes a complaint. If the subject matter of his complaint turns out on an enquiry not to be true, we have not been shewn any authority or precedent where a member can be charged with being

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guilty of a breach of the privileges of the house for so doing. If the house thinks the enquiry ought not to be made, and refuses to take it up, and the member persists in bringing it forward, so as to obstruct the business of the house, it may be that he might then become liable to the censure of the house, and, if he persisted in the interruptions unreasonably, he might, to quote the words used in *Doyle* v. *Falconer*, "be removed or excluded for a time, or even expelled." But the house, having thought it was a matter which required their attention, took it up and ordered an investigation, and, after that, I fail to see how they could properly declare, that what the member had done was a breach of their privileges. It seems to me, therefore, the very foundation of the other proceedings fails, and what was subsequently done cannot justify the expulsion of the plaintiff from the seat which he had a right to occupy. Even in *England*, the courts will see whether what the House of Commons declares to be its privileges really are so, the mere affirmance by that body that a certain act is a breach of their privileges will not oust the courts from enquiring and deciding whether the privilege claimed really exists. That, I understand, is the effect of *Stockdale* v. *Hansard* (1). Lord *Denman* said, at p. 147 :—

In truth, no practical difference can be drawn between the right to sanction all things under the name of privilege, and the right to sanction all things whatever, by merely ordering them to be done. The second proposition differs from the first in words only. In both cases, the law would be superseded by our assembly; and, however dignified and respectable that body, in whatever degree superior to all temptations of abusing their power, the power claimed is arbitrary and irresponsible, in itself the most monstrous and intolerable of all abuses. * * * When the matter falls within their jurisdiction, no doubt we cannot question their judgment; but we are now enquiring whether the subject matter does fall within the juris-

(1) 9 A. & E. 1.

diction of the House of Commons. It is contended, that they can bring it within their jurisdiction by declaring it so. To this claim, as arising from their privileges, I have already stated my answer. It is perfectly clear, that none of these Courts could give themselves jurisdiction by adjudging that they enjoy it.

Taking the resolutions as the ground of the action of the assembly, I fail to see how the matter put forth by them was a breach of the privileges of the house. We must, as the law is now decided to be, examine the validity of the grounds put forth (1).

Under the practice in the English Parliament, or in the Legislature of *Nova Scotia*, as far as I am informed, the making, by one member against another, of an unfounded charge which has been inquired into by the house, does not constitute a breach of privilege. The cases referred to on the argument of Mr. *Dunscomb's* charge against Sir *James Graham*, and Mr. *Cobbett's* against Sir *Robert Peel*, shew the length to which vituperative charges are sometimes made in the House of Commons in *England*, and how they are dealt with; and the recent case of Mr. *Plimsoll* may have some bearing on the subject. But if the house yields to the charge, so far as to order an enquiry, then the matter is pursued by them, and it seems to me that after that they cannot properly say the party giving the information has been guilty of a breach of their privileges. And in the present case none can doubt that it was a matter which properly called for enquiry, though the charge, as made by the plaintiff in reference to it, was not sustained. It would be laying down a very unsatisfactory rule, to make the contingency of a report of a committee being favorable or unfavorable to a charge the ground of declaring a member of the house guilty or not guilty of a breach of its privileges. One of the first and greatest of its privileges is free speech, and one of the advan-

(1) *In re Sheriff of Middlesex*, 11 A. & E. 293, 294.

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tages of free legislative bodies is the right of exposing and denouncing abuses by means of such free speech.

The House, having declared the plaintiff guilty of a breach of its privileges, in making the charge referred to, required him to appear at the bar of the House, with the doors open, and make the following apology, which was dictated by the house, viz.:

> Being convinced that in making the charge I did so without sufficient evidence to authorize me, in my place in parliament, to accuse a member of so serious an offence, I do now apologize therefor to this House, and trust to be excused by this House for having preferred such a charge without sufficient and due consideration.

What right had they to require him to make this apology? Was it necessary to do so in order to go on with the public business? He had made the charge several days before that, so that the offence, if it were an offence at all, had been committed in a way apparently not interfering with the proper action of that body; so there would be no pretence that he was to apologize for that. Then the other alternative is, that this was a punishment inflicted on him by the House for the offence they had declared him guilty of, viz.: a breach of the privileges of the House. *Doyle* v. *Falconer* declares they have no power to punish even for a contempt; therefore, I think it clear they have no such power by resolving that a party had been guilty of a breach of their privileges, when, in truth, they failed to show that any privilege which they possessed had been interfered with. It may be here observed, that many persons would consider being compelled to make an apology of the kind here dictated a greater punishment than being sent to prison for the remainder of the session, and it can hardly be said, that being compelled to make such an apology by order of the House is not a punishment.

They followed up the order requiring an apology,

the plaintiff having declined to make it, with a further resolution, that such refusal was a contempt of the House; that the House could not, consistent with its dignity, admit the plaintiff to take his seat until he complied with the order of the House, and that he be required forthwith to withdraw from the House until the apology was made. He having taken his seat without making the apology, it was resolved, that he be forthwith removed from the House by the Sergeant-at-Arms, and excluded therefrom until he signified to the Speaker that he was prepared to make the apology required by the House; and thereupon the plaintiff was removed from the House by the Sergeant-at-Arms and his assistant, two of the defendants.

It cannot be pretended, that on his removal from the House on the 28th of April, he was then obstructing their deliberations by the charge he had made on the 16th of April, twelve days before, and they do not, in any way, by their resolutions so assert. If he was removed as a punishment for his contempt in not obeying the order of the House as to making the apology dictated, the decided cases show they had not the power to punish for such a contempt, though in the face of the House, as his refusal did not necessarily interfere with or interrupt the business of the House; or, if it did, the interruption arose from the act of the House, and not of the plaintiff.

If it be admitted that the making of the charge, no exception being taken to it at the time, was not a violation of the privileges of the House, it would seem strange indeed, if a refusal to make an apology, based on the ground of the plaintiff having been guilty of such a breach of privilege, could properly be declared a contempt.

It seems to me to be a subtilty and refinement not

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warranted by the facts to hold, that the order excluding him from his seat was not in the nature of punishment, either for the alleged breach of the privileges of the House, or the alleged contempt in not obeying the order of the House to make the apology. If he signified his willingness to make the apology, he would be purged from his contempt.

I do not suppose it is pretended, that if the House ordered the removal of a member from his seat, without assigning any cause therefor other than that the House had ordered him not to appear again in the House, or to occupy his seat, and yet he was in his seat, that that would be a justification for the trespass and force used in removing him from the place which, but for the order, he would have a right to be in, and where it was his duty to attend. So here, the matter suggested as a justification for the plaintiff's removal, according to the principle of the last decided cases, no more authorises it than the disobedience of the order not to appear in his seat would justify it in the case above supposed.

As to the extraneous matter referred to, not recited in the resolutions of the House of Assembly, as the ground on which the plaintiff was removed from his seat, I will only say, that the language used by the plaintiff on several occasions seems to have been peculiarly offensive, but the attention of the House does not appear to have been drawn to it, and I fail to see how that could be a justification of the trespass complained of, and it is not stated in the resolutions as a ground for directing his removal from his seat.

The learned judge who tried the cause left it to the jury to say whether the plaintiff was removed because he obstructed the business, or as a punishment for a contempt in refusing to apologize for a past offence. I quote the following paragraph from his charge:

As the matter stands, you are to consider, whether, on the one hand, turning the plaintiff out at the time and in the manner proved was in point of fact necessary, on the ground that he was an obstruction to the business of the house, in which case he would have no right of action; on the other hand, whether, or not he was removed, not because he was such an obstruction, but merely for a contempt in refusing to make an apology for a past offence. If you find the latter to be the case, that is, that the exacting the apology was a penalty for a past offence, and that the plaintiff was turned out merely because he would not repeat that apology, though not obstructing the business, you ought to give him a verdict.

I think the law thus laid down is correct, and that the finding of the jury ought to be sustained. The jury having found that the plaintiff was removed from his seat, because he would not repeat the apology for the past offence, and not because he was obstructing the business of the house, and as I consider that, in that view of the facts, the plaintiff has made out his case, and in law is entitled to retain his verdict, the tenth plea seems of little consequence. It would seem absurd to send down an issue to be tried when it must fail, either as to the facts or the law. It was stated on the argument, and not denied, as I understood it, that by the practice in *Nova Scotia* pleas may be withdrawn from the consideration of a jury by a judge at the trial, and that an issue so withdrawn from the jury is never sent down for another trial when the facts contained in it have been in effect passed upon by the jury.

I think the appeal should be dismissed with costs.

RITCHIE, J.:—

I think a series of authorities, binding on this Court, clearly establish that the House of Assembly of *Nova Scotia* has no power to punish for any offence not an immediate obstruction to the due course of its proceedings and the proper exercise of its functions, such power not being an essential attribute, nor essentially neces-

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sary, for the exercise of its functions by a local legislature, and not belonging to it as a necessary or legal incident; and that, without prescription or statute, local legislatures have not the privileges which belong to the House of Commons of *Great Britain* by the *Lex et consuetudo Parliamenti.* In this case, to afford a good defence, defendants were bound to allege, and prove, all the circumstances which made it right and proper for them to interfere with the Plaintiff at the time they caused him to be removed from his place in the House of Assembly,—such interference being *primâ facie* against right. The allegations and circumstances shown in this case afford, in my opinion, no justification for Plaintiff's removal; he was not then guilty of disorderly conduct in the House, or interfering with, or in any way obstructing, the deliberations or business, or preventing the proper action of the House, or doing any act rendering it necessary, for self-preservation or maintenance of good order, that he should be removed.

The Defendants cannot condemn and punish for one offence, and justify for another. We cannot look at what the Plaintiff may have said or done on previous occasions. It is possible there may have been occasions when his language and conduct may have been such as would, with a view to the preservation of good order, decorum, and the efficient discharge by members of their legislative duties, have justified action being taken by the House; but whether this may have been so or not cannot affect the present enquiry. The simple question now is, were Defendants justified in removing plaintiff for the avowed cause for which he was removed? The misconduct Plaintiff was charged with was having preferred a charge against the Provincial Secretary "without adequate and sufficient evidence to sustain the same, or the proper or necessary preliminary

investigation requisite to the formation of a correct opinion thereon," and for doing which the House resolved, Plaintiff "had been guilty of a breach of privilege," and adjudged Plaintiff to appear at the Bar of the House, and, with the doors of the House open, make a certain dictated apology; which Plaintiff having declined to do the House then resolved, that it could not, consistently with its dignity, admit Plaintiff to take his seat until he complied with the order of the House, and that he be required forthwith to withdraw from the House until such apology be made. Plaintiff having declined to withdraw, the House then resolved, that Plaintiff be forthwith "removed from the House by the Sergeant-at-Arms and be excluded therefrom, until he shall have signified to the Speaker that he is prepared to make the apology required by the House," and the Plaintiff, in pursuance of such resolution, was removed from the House by the Sergeant-at-arms and his assistant, two of the Defendants.

It appears that rumors were afloat relative to the Crown Land Office, and Plaintiff, as a member of the Legislature, went there for information, and, in consequence of what he there heard and discovered, in his place in the House of Assembly made the charge. If the Plaintiff believed, and had reasonable grounds for believing, the charge to be true, or honestly and fairly believed the public interests demanded that it should be investigated, and, in the *bonâ fide* discharge of his public duty, brought the matter in a decorous and proper manner under the consideration of the House, he was, no doubt, acting in the proper discharge of his duty as an independent representative of the people, and not open to reproach, still less punishment. When the charge was so made the House do not appear to have taken exception to the manner or language in which it

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was made (which under the circumstances might, and very possibly ought, to have been done), nor did the House require the Plaintiff to present a *primâ facie* case, nor require to be stated any ground on which the charge was based, nor was the Plaintiff required to satisfy the House that there was reasonable or probable ground for the charge, nor did the House in any way resolve that the Plaintiff in making the charge, either as to manner or matter, was out of order; but, on the contrary, ordered the charge to be investigated by a committee, which committee, after investigation, found, and no doubt properly found, the charge unfounded, and that the evidence completely exculpated the Provincial Secretary. But a minority report stated reasons which, in the opinion of the member signing it, justified Plaintiff in demanding the investigation which had just then taken place. It is clear, that the mere fact that the evidence did not sustain the charge could not be a breach of privilege. If there were reasonable grounds for making the charge, then the Plaintiff performed but a public duty in laying it before the Legislature. Before the committee the Plaintiff appears to have offered evidence to show the information he received at the Crown Land Office, and which, he alleged, justified him in putting forward the charge and bringing it under the notice of the House; but this evidence a majority of the committee appear persistently and determinately to have refused to permit to be given, and the House, without further evidence or trial, or even calling on Plaintiff for an explanation, as Lord *Denman* expresses it, "with one voice, accused, condemned and executed" the plaintiff in this proceeding.

I can see nothing whatever to justify this action of the House. They undertook to exercise judicial functions they clearly, under the authorities, did not possess. They had no power, for the cause alleged, to adjudge

Plaintiff guilty of a contempt, or breach of privilege, and subject him to the galling punishment of making a most humiliating apology, not as a member in his place in the House, but as a culprit at the bar of the House, with the doors of the House open; still less ought this to have been done without calling on Plaintiff for any explanation, and without any evidence, trial or investigation whatever of the offence of which they adjudged him guilty.

I think the verdict and judgment of the Court below right, and the damages, under the circumstances, moderate.

Strong and *Fournier*, J. J., concurred.

TASCHEREAU, J.:—

I must acknowledge the singularity of the position I occupy in the present case. If I decide in favor of the Appellants, I am consistent with myself, and I can safely say that my opinion is supported: 1st. By numerous judgments rendered in the same sense for the last seventy years without interruption in the Province of *Lower Canada*, now the Province of *Quebec*, by the highest court of law; 2nd. By several judgments rendered in *England* by the highest tribunal of the land; 3rd. By the judgments of the Supreme Court of the *United States of America* (1).

If, on the contrary, and on the strength of several judgments rendered in *England* overruling those hinted at by me as English decisions, I change my opinion, and am induced to reject the present appeal, I consider it would amount to a declaration on my part, that all our decisions in the Province of *Quebec*, as well as all the previous judgments rendered in *England* in the

(1) See *Anderson* v. *Dunn*, 6 Wheaton 204.

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same sense, were against law. This proposition I cannot admit willingly.

A short reference to the cases in which these judgments were rendered will certainly account for my fears of inconsistency with myself.

There were in February, 1832, at the city of *Quebec*, the two cases of the *Queen* v. *Tracey* and *Duvernay* (1), in which the Court of King's Bench unanimously decided, that the legislature of the then Province of *Lower Canada* possessed the power of committing for contempt in a case of libel by the press, and that this power was incident to that branch of the legislature (the Legislative Council) *ex necessitate rei*; that it had in itself the elements of its own preservation, did, in fact, possess those rights which are inherent to similar bodies, and without which it would be constantly exposed to contempt and destruction.

The same decisions as to the Province of *Quebec*, then *Lower Canada*, are to be found in the following cases as reported: 1st. *Exparte Louis Lavoie*, (2); 2nd. *Exparte Monk*, in the year 1817 (3); 3rd. The case of Mr. *Young*, in 1793; 4th. The case of *exparte Dansereau*, in 1875, in which case I sat as a member of the Court of Appeals of the Province of *Quebec* (4).

As to the English cases, I quote *Burdett* v. *Abbot* (5), and *Beaumont* and *Barrett* (6). But these last English cases were, to a certain extent, overruled by the decision of the Privy Council in the case of *Kielley* v. *Carson*, (7).

I, for one, have the greatest respect for all the decisions of the highest court of *England*, and should consider myself bound by the judgment in *Kielley* v.

(1) Stuart's Rep. 478.
(2) 5 L. C. R. 99.
(3) Stuart's R. 120.
(4) 19 L. C. Jur. 210.
(5) 14 East 1.
(6) 1 Moore P. C. C. 59.
(7) 4 Moore P. C. C. 63.

Carson, as one of the last leading decisions, were it not for a material difference I observe between that and the present case, which was one of contempt committed within the House, and during its sittings, and not one merely of contempt committed outside of the House. I infer this difference from the summary of the report and the reasons of Baron *Parke* in *Kielley* v. *Carson*, above mentioned.

The contempt complained of in the present case was committed within the House, and during its sittings. It was incumbent on the House, I apprehend, to notice the contempt, and it was accordingly done. The words made use of by the Respondent on the occasion in question were uttered by him as a member of the House, and were of such a character as to be derogatory to the honor of the House, and particularly to that of one of its members, who was accused by the Respondent of no less a crime than that of forgery. The House could at once pass a sentence of condemnation against him for using such language, so derogatory to its dignity, and so offensive to one of its members, and so calculated to disturb the proceedings of the assembly and to create disorder; but the House thought it more fitting to challenge the accusation by appointing a committee to enquire into and report on the circumstances of the case. The committee reported that the respondent had no grounds whatever to justify such an accusation, and ordered him to make an apology to the House, which, it is true, was a written one, and on his refusal to make the apology he was expelled from the House. Now, I do not think, that should our decision be against the Respondent, it would be contrary to that of the Privy Council in *Kielley* v. *Carson*, which was, as I said, for a contempt outside of the House. Had the House allowed this conduct of the Respondent to pass unchallenged, it would have exposed itself to the mockery of the public,

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it would have been a cruel treatment of one of its members, and exposed the future legislation of the Province to such a danger as to deter candidates for parliamentary honors from coming forward. The sentence of expulsion was not for a past or condoned offence, but for a continuing offence from the first moment of the Respondent's utterance of an unfounded accusation. It was a necessity for the House to resent the charge, and protect one of its members, after enquiry, which was, in fact, due to the Respondent himself, and to the member against whom it was preferred. So far, it seems evident to me, that the case of *Kielley* v *Carson*, far from being adverse to the pretensions of the appellants, does, in fact, support them.

But a new feature, and, I may say, a great complication, has been brought into the case by the judgment of the Privy Council in *England* in the case of *Doyle* v. *Falconer* (1), which judgment is to the effect, that the Legislature of *Dominica* did not possess the power of punishing a contempt, even if committed in its presence and by one of its members. I am forced to submit to this judgment of the highest tribunal of *England* in *Doyle* v. *Falconer*. This judgment being the last on the subject is binding on this court, as much as the ruling in *Kielley* v. *Carson*, before its overruling by *Doyle* v. *Falconer* (2), would have been. I, therefore, declare, though most unwillingly, in favor of a confirmation of the judgment appealed from.

HENRY, J.:—

Whilst agreeing with the general conclusions arrived at by my learned brethren, but holding views in some respects different, I have considered it right to express them. The Law of Parliament is defined by

(1) L. R. 1 P. C. App. 328. (2) L. R. 1 P. C. App. 328.

Coke (1) and *Blackstone* (2), those eminent legal authorities, thus: "As every Court of Justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs; so the High Court of Parliament hath also its own peculiar law, called the *Lex et consuetudo Parliamenti.*" "This law," says *May*, in his treatise on the law, privileges, proceedings and usage of Parliament (3), "is admitted to be part of the unwritten law of the land, and as such, is only to be collected, according to the words of Sir *Edward Coke*, 'Out of the rolls of Parliament and other records, and by precedents and continued experience.'"

"The only method," says *Blackstone* (4), "of proving that this or that maxim is a rule of the common law, is by showing, that it hath always been the custom to observe it,' and "it is laid down as a general rule that the decisions of Courts of Justice are the evidence of what is common law." After quoting the foregoing, *May* says: "The same rule is strictly applicable to matters of privilege and to the expounding of the unwritten law of Parliament;" and adds, "but although either House may expound the law of parliament, and vindicate its own privileges, it is agreed that no new privilege can be created." As far back as 1704 it was resolved and agreed by the House of Lords and House of Commons:

> That neither Houses of Parliament have power, by any vote or declaration, to create to themselves new privileges, not warranted by the known laws and customs of Parliament (1).

The *Lex et consuetudo Parliamenti*, by all the late decisions, have limits. They cannot be added to and *new* cases of privilege adjudged, even by the House of Com-

(1) 4 Ins. 14.
(2) 1 Bl. Com. 163.
(3) 3rd Ed., p. 60.
(4) 1 Com. 58, 71.
(2) 8 Grey's debates, 232.

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mons of *England*. If that body punished for an offence, not one by the law and custom of Parliament, and thereby created a new privilege, is it to be said that there is at the present day no judicial tribunal to give relief, and that the resolution of the House of Commons should be above judicial enquiry? I cannot so think, for such would be contrary to the principles laid down by several learned judges in *England*, and now generally accepted as the rule and law. If the warrant of a Speaker, under an order of the House for the arrest of a member, or other party, disclosed on the face of it the nature of an alleged contempt, all the later decisions of the judges in *England* insist upon the right of the courts to inquire whether the grievance was or was not a contempt under the law and customs of Parliament, and such decisions, most pointedly expressed, have been long submitted to by the House of Commons. Lord *Denman* and other eminent judges held this doctrine, and it is not now questioned, and in one of his highly learned and exhaustive judgments on this point, he says there is no power in *England* above the law. If, therefore, the House of Commons has jurisdiction as a court *only from the law and custom of Parliament, and the right to commit for a contempt is held to rest solely thereon*, whence came the right of the Local Legislature of a Province to try and adjudicate upon a matter of alleged contempt? It cannot be claimed, that what the House of Commons, after centuries of political contests, with the voice of the nation to back it, found it necessary to assume in the peculiar relations existing, in the shape of judicial functions, which the nation ratified as necessary to curb and control judges more immediately under the control of despotic sovereigns, should be at all necessary or proper in regard to Provincial Legislatures. Involved in the latest and most learned decisions of the judges in *England* may be

fairly assumed is the proposition, that the House of Commons depends solely on the law and custom of Parliament for its right to adjudicate for a contempt, and that, as a new privilege, it could not now be assumed. In the one case, the life of the Constitution of the country was often endangered, and might have been wholly lost, but for the assumption of this power by the House of Commons of *England*; in the other, no such consequences could arise. The Constitutions of the Provincial Legislatures were never subject to such perils. Derived from "Orders in Council" and "Instructions" to Lieutenant-Governors, and, of later years, from acts of Parliament, and the Provincial Judges being from the earliest times felt to be independent of executive interference, the same necessity never existed, as it did formerly in *England*, for a legislative balancing power over them.

It is claimed, as necessary to the proper discharge of their functions, that the Provincial Local Legislatures should have the right to adjudicate in regard to cases of alleged contempt in relation to those bodies; and the jurisprudence of the *United States* is referred to as a fitting guide to us; but the reasons that might be sound in regard to Congress and the State Legislatures do not at all justify the adoption of the same power by the Provincial Legislatures. While under the Constitution of the *United States* the General and State Legislatures are each, in its proper sphere, paramount, and have inherent constitutional rights and privileges, the Provincial Legislatures are now the creatures of an act of Parliament by which their functions are comparatively limited and confined to certain subjects, and which, by other acts of Parliament, may be abridged or altered, from time to time.

I cannot discover how any Provincial Assembly could obtain any right to exercise judicial functions, unless

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by legislation; for there are no laws or customs peculiar to each which would give the right by which an alleged contempt could be tried. Without receiving by legislation the same power as is exercised by the House of Commons, and without law or custom of Parliament of their own to warrant such a trial, how did they get it? I have tried in vain for any source from which it could have come.

It is, however, contended, that the power to try one of its own members, or others, for a contempt, is necessary to the due exercise of its functions by a Provincial Assembly. I confess I cannot see it. It is admitted on all sides that such Legislative Assembly can exercise the right of ejection of a member from the legislative hall, if necessary to the carrying on of debate or business, and may continue to exclude him so long as his presence is an obstacle to the exercise of the functions of the body. The body can, for like cause, remove every other impediment to its legitimate business, and if proceedings should be taken to recover damages for such ejection or removal, the justification will depend on the necessity. It is objected, however, that a member may *continue to obstruct*, and it would, therefore, be necessary to have him expelled or ejected for a given time. It is true, that such a contingency might arise, but the same might be apprehended to arise in other bodies where obstruction would be relatively as injurious as in a Provincial Assembly. In the numerous civic organizations throughout the Dominion it is not less necessary that obstructions by members, or otherwise, should be prevented, and the same may be said of church and other meetings where order is to be preserved. In none of these does the right exist to try a member, or another, for a contempt, and still there is no complaint that the functions of any of those bodies have been obstructed in consequence of the absence of

that power. The comparatively few cases that are found in Provincial and Imperial records as to Provincial cases would be a strong argument against the necessity for the exercise of the power to adjudicate upon charges of contempt. One of the most important principles underlying the successful and proper administration of justice is, that those who pass upon the facts, and those who expound the law, should be without interest or prejudice; and how, then, are such principles maintained when the same excited (it might be political) majority occupied at the same time the position of accusers and judges. I am told such is the case in the House of Commons in *England*; but I answer, first, that a body like the latter, numbering hundreds, drawn from the first-class men of the kingdom, actuated by the highest aspirations, and supported, resting on and reflecting, day by day, the *highest toned public opinion*, is not to be compared with a Provincial Assembly, drawn, as a rule, not from the ranks of first-class public men, and whose numbers, being comparatively small, may be expected to become more bitterly excited by political squabbles, and whose supporters on both sides, out of the Legislature, would, in many cases, subordinate their judgments to their political proclivities, and thus a suitable controlling public opinion could not safely be relied on. It is well understood that it is an anomalous power that is exercised by the House of Commons in *England*. It obtained it through the exigencies of stirring political events, running over centuries, no parallel to which can ever arise in any Province under the British Crown, and for which, therefore, neither a preventive or remedy, through a Provincial Assembly, will ever be necessary. The trial of contested elections has, after centuries, been withdrawn from Parliament in *England*, and also in *Canada*,

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and transferred to the ordinary legal tribunals because of the difficulty in obtaining in the former a disinterested and reliable tribunal. The parliamentary records of all countries exhibit ample proof of this. Those records exhibit, however, glaring cases of arbitrary and high-handed injustice to individuals whose humiliation it suited the interest of partizan majorities to procure. Public opinion in *England* long ago frowned down such proceedings, but, I fear, such a public feeling would be found totally inadequate therefor in many Provinces of the Empire for many years to come. I am, from these considerations, strongly of opinion, that to deny to Provincial Assemblies the power to adjudicate on cases of alleged contempts would be, if an evil, a much less one than might result from admitting it.

The case of *Kielley* v. *Carson* (1), referred to by the learned Chief Justice, to my mind, virtually settles this point. It is founded on principles previously expounded and approved, and which have continued to be approved and acted on ever since. I could not, if I would, run in the face of that judgment and the subsequent decisions in conformity with its principles. We might, under the law as now administered in *England*, consider the *nature* of the alleged contempt ; and, I must confess, that were the *jurisdiction* of the Assembly sufficient, I would experience great difficulty in coming to the conclusion that the cause assigned was a sufficient one. I can hardly agree to the propositions that a member making, in his place, a charge against another member who is a public officer—even, if by accident a member of a Local Government—but failing in sustaining it before a tribunal selected at the instance of the accused to try it, would be guilty of a breach of privilege because of such failure ; or, that the House,

(1) 4 Moore P. C. C. 63.

or a majority of it, composed as it might be of the political friends of the accused, on the report of two of a committee of three, which formed the tribunal before mentioned, resolving that such charge was made without sufficient inquiry, could legally require the accuser to adopt, and, at the bar of the House, read and make an apology to the House in certain words and terms prescribed; or, that his refusal to do so was a contempt of the House, and that he should be ejected from and kept out thereof until he informed the Speaker of the House that he was prepared to make that apology. A great deal might possibly be urged on both sides of the propositions just mentioned, but they are subordinate to the question of jurisdiction raised, and our decision as to that renders anything further respecting them unnecessary. I, therefore, agree that the appeal herein be dismissed with costs.

Appeal dismissed with costs.

Solicitor for Appellants: *Robert L. Weatherbe.*

Solicitor for Respondent: *Samuel E. Rigby.*

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Jan. 21, 22.
*April 15.

CONTROVERTED ELECTION OF THE COUNTY OF JACQUES CARTIER.

JAMES SOMERVILLE *et al*.....APPELLANTS;

AND

HON. R. LAFLAMME .....RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT OF LOWER CANADA FOR THE DISTRICT OF MONTREAL.

Admissibility of Respondent's evidence (P. Q.)—Multiplicity of charges—Bribery and undue influence—Agency—Drinking on Nomination and Polling days.

The petition was in the usual form, charging bribery and corruption on behalf of Respondent and of his agents; and treating by Respondent's agents on the nomination and polling days. In the bill of particulars, the petitioners formulated ninety-eight different charges, but, in appeal, they only insisted upon seventeen charges, seven of which attached personally to the Defendant, and ten to his agents. The Respondent was examined on his own behalf, and there were, in all, 280 witnesses heard.

The judgment of the Superior Court of the District of *Montreal*, dismissing the petition on all the charges, was unanimously affirmed, except as to the charge of bribery and undue influence by one *Robert*, hereafter more particularly referred to; and it was

Held: 1st. That the evidence of a candidate on his own behalf, in the Province of *Quebec*, is admissible.

2nd. That when a multiplicity of charges of corrupt practices are brought against a candidate, or his agents, each charge should be treated as a separate charge, and, if proved by one witness only and rebutted by another, the united weight of their testimony, without accompanying or collateral circumstances to aid the Court in its appreciation of the contradictory

*PRESENT:—Sir William Buell Richards, Knt., C.J., and Ritchie, Strong, Taschereau, Fournier and Henry, J.J.

statements, cannot overcome the effect of the evidence in rebuttal, and that, in such a case, the candidate is entitled to the presumption of innocence to turn the scale in his favor.

3rd. That drinking on the nomination or polling day is not a corrupt practice sufficient to avoid an election, unless the drink is given by an agent on account of the voter having voted or being about to vote.

(39 Vic., ch. 9, sec. 94 D., compared with 17 & 18 Vic., ch. 102, ss. 4, 23 & 36 Imp.)

4th. That a candidate, charged by his opponent with having no influence, is not guilty of a corrupt practice, if, in a public speech, in reply to the attack, he states "that he had had influence to procure more appointments for the electors of the County than any member."

The evidence on the *Robert* charge was to the following effect: *Robert*, long before the election was thought of, together with members of his family (the *Paré* family), exhibited a strong desire to obtain an employment for his brother-in-law, one *Edouard Honoré Ouellette*. *Robert*, being a political supporter, a client and a personal friend of Mr. *Laflamme*, asked him on different occasions if he could procure his brother-in-law (*Ouellette*) a place. The first time he spoke to him with reference to it was about a year previous to the election; but he did not say anything to him on that occasion about his father-in-law (*Paré*). *Robert's* evidence on this part of the case then goes on as follows: "Q. On what occasion did you speak to him (Mr. *Laflamme*) about it? A. It was when the question of an election arose that I spoke to him about it. Q. Last fall? A. Yes. Q. What was the date at which you spoke to him regarding the *Paré* family? A. I cannot positively say, but it was four or five weeks before there was question of the election. It was then spoken of in the County and out of the County. Q. That was during the election? A. Yes. Q. At all events, it was at the time the election was spoken of? A. Yes. Q. What did you say to him regarding your brother-in-law and your father-in-law? A. I went to see Mr. *Laflamme* on different occasions, when I had some accounts to give him to collect, and I said to him: 'It would greatly please the *Paré* family if you could procure a place for my brother-in-law.' Q. Did you say to Mr. *Laflamme* in what way it would please the *Paré* family? A. I said this to him: 'It might, perhaps, prevent them from voting at the coming election.' Q. When you told Mr. *Laflamme* that the *Paré* family could be useful to him by not voting, what

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did Mr. *Laflamme* say? A. He simply told me 'that he would think of me, and that if a vacancy occurred, he would do his best for me." Mr. *Laflamme,* on the other hand, states: "He (*Robert*) had asked me, not during the election, but many months before, I believe, so far as my memory goes, a year before there was any talk of an election, to try and secure some office or occupation, with a slight remuneration, for his brother-in-law (Mr. *Ouellette.*) I told him that I would consider his claims; that he was one of my best supporters; and, if I saw any occasion where it would be possible for me to support his claim, I would do so. The thing remained in that way; and previous to the election particularly, there was never one word said or breathed on that subject between Mr. *Robert* and myself. I never asked him to use this promise, and never intended to do so; it was merely because he was a personal friend of mine and a man of respectability and importance that I promised to consider his claim, as I was justified as the Representative of the County in doing."

Evidence was given that *Robert* attended three or four meetings of Respondent's Committee, organized at *Lachine*; that he checked lists and reported his acts to some of the members of the Committee.

Before the election, *Robert* repeated to the *Paré* family what had taken place between him and Mr. *Laflamme.* At the time of the election, *Robert,* while conversing with the *Parés* in the family circle, was informed by one of them " they would vote for *Girouard* (the defeated candidate), but that they would not make use of their influence." He then told them " Do as you please; they will use your votes as an objection to giving Mr. *Ouellette* a place." This conversation was not reported by *Robert* to any member of the Respondent's Committee.

Held: 1. That the Respondent, having a perfectly legitimate motive in promising *Robert* to try and get an office for his brother-in-law —his desire to please a political friend and supporter—was not guilty of a corrupt act in making such promise; and further, that the act of *Robert,* in relation to the votes of the *Paré* family, even if a corrupt one, was not committed with the knowledge and consent of the Respondent.

2. That whether *Robert* was Respondent's agent or not, the conversations which took place between him and the *Paré* family do not sufficiently show a corrupt intent on his part to influence their vote, and that he is not guilty of bribery or undue influence within the meaning of the Statute. [*Richards,* C.J., and *Strong,* J., dissenting.]

Per *Richards*, C. J. and *Strong*, J., that there was sufficient evidence to declare *Robert* to be one of Respondent's agents. [*Henry*, J., dissenting.]

APPEAL from the judgment of Mr. Justice *Dorion*, of the Superior Court for *Lower Canada*, district of *Montreal*, dismissing the election petition against the return of the Honorable *R. Laflamme* as the member elect representing the County of *Jacques Cartier*, in the House of Commons of the Dominion of *Canada*.

The election took place on the 28th November, 1876, and the petition against the return of the Respondent was fyled on the 8th day of January following; and on the 8th of July the judgment of the learned Judge in the Court below dismissing the petition was delivered.

The petition was in the usual form, charging bribery, corruption and undue influence on behalf of Respondent and of his agents.

In their bill of particulars, and the additions which they made to them during the trial, the Petitioners brought ninety-eight special charges against the Respondent or his agents.

Evidence in support of these charges was given by one hundred and eighty witnesses on behalf of the Petitioners, and over one hundred were heard on behalf of the Respondent. On the argument the Petitioners abandoned 77 of their accusations, and insisted upon 21 charges, eight of which attached personally to the Defendant, and thirteen to his agents.

Before the Supreme Court the Appellants confined themselves to seventeen charges, which are more fully set out in the judgment of the Chief Justice, and were known as:—1st. *Paquin's* case. *Paquin* was a ferryman and conductor of the mails between *Isle Bizard* and *Ste. Geneviève*, upon whom Respondent was alleged to have exercised undue influence in a conversation with reference to the mail; 2nd. *Foley's*

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case—a day laborer employed by the Public Works Department on the *Lachine* Canal, whom the Respondent is accused of having sought to intimidate for having answered him "it is all right," when informed by *Foley* that he did not intend to work for or against him, or to vote for him; 3rd. *Chaurette's* case—a charge of personal corruption against the Respondent for having had *Chaurette* appointed returning officer; 4th. *Lafleur's* case—a voter, who was advised by Respondent to vote if his name was still upon the voter's list, although actually possessing no other qualification to be a voter, accused of personation; 5th. The *Ouellette* case—the only charge on which the Court was not unanimous in affirming the finding of the Court below. In the bill of particulars the charge is in these words:—"Pending the said election at *Lachine*, the said *Placide Robert*, grocer of the same place, and agent of the Respondent, acting with his special knowledge and instruction, promised a situation to *Francois Paré* and *Alphonse Paré*, both electors at *Lachine*, for the said *Edouard Honoré Ouellette*, son-in-law of the said *Francois Paré*, and also to the latter personally, if the said *Francois* and *Alphonse Paré* would refrain from voting at the said election, and if the said *Edouard Honoré Ouellette* would use his influence in favor of the Respondent; and that, in fact, the said *Francois* and *Alphonse Paré* refrained from voting at the said election." 6th. Corrupt treating by Respondent and his agents, under which charge arose the question if treating by agents on the nomination or polling day is a corrupt practice when the drink has not been given on account of the voter having voted or being about to vote; 7th. Speeches by Respondent, 1st at *Pointe Claire*, 2nd at *Ste. Geneviève*, 3rd at *Isle Bizard*, 4th at *Ste. Anne*, 5th at *St. Laurent*, and 6th at *Lachine*; 9th. Speeches by

agents; 10th. Cases of *Deschamps* and *Clement*—charge of bribery and intimidation by one *John O'Neil*, collector of tolls of the *Lachine* Canal as agent of the Respondent; 11th. *Hurtubise* case. *Justinien Bélanger*, as agent of Respondent, is accused by one *Augustin Hurtubise*, of having offered him the keeping of lighthouses, if he would be in favor of Respondent's party; 12th. *Boudrias* case—an alleged offer of money by one *Latour* at the lock in *St. Anns*; 13th. *Cooke's* case—*Cardinal*, as Respondent's agent, is charged with bribery for an alleged offer to help *Cooke* in a contract he had with the Government; 14th. *Cousineau's* case—Defendant's agents are charged with having promised to pay this person money and with having paid him money, given him goods and other effects, and offered him other advantages to induce him to vote or prevent him from voting; 15th. *Gravel's* case—*Mr. Gohier*, as Respondent's agent, is charged with having corruptly given drink to one *Jean Baptiste Gravel*, to such an extent as to render him entirely insensible, with a view to prevent him from voting; 16th. *Brunet's* case—agents of Respondent, charged with having taken electors from *Montreal* to *Ste. Geneviève* in their vehicle, and treated and paid money to induce them to vote for Respondent; and lastly, 17th. The *Ste. Geneviève* quarry case. The charges of this case are as follows: "1st. Conspiracy between Defendant's agents and Mr. *Rodgers*, proprietor and workers of the quarry, to threaten the quarrymen employed there with immediate dismissal if they voted against the Defendant, and to send to *Pointe Claire* on voting day those who persisted in voting against the Defendant; 2nd. Employment given to *François Meloche* in the quarry to influence his vote; 3rd. *W. S. Hemming*, *Antoine St. Denis* and *Edouard St. Jean*, Defendant's agents, threatened to turn out from their work in the quarry the voters who worked under their

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control, with the object of aiding the Defendant's election; 4th. The same agents, on the eve of voting, tried to send to *Pointe Claire* those men who persisted in desiring to vote against the Defendant, or in not abstaining from it.

The material facts of the charges above set out fully appear hereafter in the judgment of the learned Chief Justice; and as the evidence given in support and against these charges is reviewed at length in the judgments of the Court a separate statement is unnecessary.

Mr. Dalton McCarthy, Q.C., and *Mr. C. P. Davidson, Q.C.*, for the Appellants, argued that the Respondent's evidence in his own behalf was inadmissible under the laws of the Province of *Quebec*, citing and commenting on 38 *Vic.*, cap. 8, s. 56, Q.; 37 *Vic.*, cap. 1, ss. 45, 49, D.; Art. 251, C. C. P.; *Taylor* on evidence (1); *Gilbert sur Sirey* (2); *Soulanges, Shefford* and *Jacques Cartier* election cases (3); and that treating by agents on the nomination or polling day, is a corrupt act sufficient to avoid an election, and referred to the *Bodmin* case (4); *Carrickfergus* case (5); The *North Wentworth* case (6); The *North Grey* case (7); The *South Essex* case (8); The *Montreal West* case (9); Mr. Justice *Caron's* opinion in the *Portneuf* case (10); and The *Bonaventure* case (11). They also contended upon the facts that the Respondent was guilty of corruption, undue influence and bribery through his agents, and cited the following authorities:—1st. With reference to *Foley's*

(1) s. 1241, p. 1194.
(2) Codes Annotés, on Art. 268.
(3) Not reported.
(4) 1 O. & H. 122; 20 L. T. (N.S.) 989.
(5) 1 O. & H. 265; 21 L. T. (N.S.) 352.
(6) 11 C. L. J. 198 & 298.
(7) 11 C. L. J. 242.
(8) 11 C. L. J. 247.
(9) 20 L. C. Jur. 22.
(10) 2 Q. L. R. 268.
(11) 3 Q. L. R. 75.

case: *Bradford* case (1); *Coventry* case (2); *Westbury* case (3); *Blackburn* case (4); *North Norfolk* case (5); *Galway* case (6); *Northallerton* case (7).

2nd. *Lafleur's* case: The *Coventry* case (8); *Oldham* case (9); *Gloucester* case (10); *Dominion Elections Act* (11).

3rd. *Ouellette's* case: *Sligo* case (12); *Blackburn* case (13); *Westbury* case (14); *Halton* case (15).

4th. *Ste. Geneviève* Quarry case: *Staleybridge* case (16); *Blackburn* case (17); *North Norfolk* case (18); *Cox & Grady* (19); *Parsons* on Contracts (20); C. C. L. C. Art. 995; 1 Demolombe No. 158.

5th. Speeches by the Respondent and his agents: *Launceston* case (21); *Deakin* v. *Drinkwater* (22); *Simpson* v. *Yeend* (23); *Dublin* case (24); *Worcester* case (25); *Hertford* case (26); *Dover* case (27); *Reg.* v. *Gamble* (28); *Petersfield* case (29).

6th. On the question of agency: *Staleybridge* case (30);

(1) 1 O. & H. 32, 40; 19 L. T. (N.S.) 278, 721.
(2) 1 O. & H. 97; 20 L. T. (N.S.) 405.
(3) 1 O. & H. 50; 20 L. T. (N. S.) 22.
(4) 1 O. & H. 203, 204; 20 L. T. (N.S.) 823.
(5) 1 O. & H. 241; 21 L. T. (N.S.) 264.
(6) 1 O. & H. 305; 22 L. T. (N.S.) 75.
(7) 1 O. & H. 167.
(8) 1 O & H. 105; 20 L. T. (N.S.) 405.
(9) 1 O. & H. 152.
(10) 2 O. & H. 63.
(11) Sec. 74, 75, 76, 92, 98.
(12) 1 O. & H. 302.
(13) 1 O. & H. 205; 20 L. T. (N.S.) 264.
(14) 20 L. T. (N.S.) 16—23.
(15) 11 C. L. J. (N.S.) 273.
(16) 1 O. & H. 70; 20 L.T. (N.S.) 75.
(17) 1 O. & H. 205; 20 L. T. (N.S.) 823.
(18) 1 O. & H. 241; 21 L. T. (N. S.) 264.
(19) Pp. 324, 325. See 1 O. & H. 173.
(20) P. 395.
(21) 2 O. & H. 130.
(22) L. R. 9 C. P. 626.
(23) L. R. 4 Q. B. 628.
(24) Com. Journals, vol. 86, part 2, Pp. 30, 33; Chambers Dict., Vo. Ministers.
(25) 3 Doug. 239.
(26) Perry & Knapp, 541.
(27) Wolferstan & Bristow, 128.
(28) 9 U. C. Q. B. 536.
(29) 2 O. & H. 94.
(30) 1 O. & H. 70; 20 L. T. (N.S.) 75.

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Bewdley case (1); *Blackburn* case (2); *Taunton* case (3); *Taunton* case (4); *Wakefield* case (5); *Durham* case (6); *Bolton* case (7); *Dublin* case (8); *Barnstaple* case (9); *Lichfield* case (10); *Cox & Grady* (11).

7th. As to appeal on questions of fact: 38 *Vic.*, ch. 11, ss. 48, 22; *Symington* v. *Symington* (12); The *Glannibanta* (13); *Bigsby* v. *Dickson* (14).

Mr. *E. C. Monk*, *contra*, contended that all members of the House of Commons were to be tried by the same law; and that if the evidence of a Member was admissible in the Province of Ontario when his seat was contested, the evidence of a Member representing a County in the Province of *Quebec* was also admissible. He referred to and commented on *The Dominion Controverted Elections Act*, 1874 (15); C. C. L. C. (16); C. C. P. L. C. (17).

The learned counsel then commented at length on the facts, and maintained that the judgment appealed from was based upon the most reliable appreciation of the evidence adduced, and that the numerous authorities cited by the Appellant's counsel were not applicable. The following, among many other statutory provisions and authorities, were also cited and relied on:

1st. As to the *Ste. Geneviève* Quarry case—*St. Denis'* Agency: *Windsor* case (18); *Londonderry* case (19); *Taunton* case (20); *Shrewsbury* case (21); *Staleybridge*

(1) 1 O. & H. 18; 19 L. T. (N.S.) 676.
(2) 1 O. & H. 200; 20 L. T. (N.S.) 823.
(3) 1 O. & H. 185; 21 L. T. (N.S.) 169.
(4) 2 O. & H. 73.
(5) 2 O. & H. 102; H. of C. returns, 1874.
(6) 2 O. & H. 136.
(7) 2 O. & H. 141.
(8) 1 O. & H. 273.
(9) 2 O. & H. 105.
(10) 1 O. & H. 25.
(11) P. 221.
(12) L. R. 2 S. App. 424.
(13) L. R. 1 P. C. 283.
(14) L. R. 4 C. P. D. 35.
(15) S. 45.
(16) Art. 1254.
(17) Art. 448.
(18) 2 O. & H. 1.
(19) 1 O. & H. 274.
(20) 30 L. T. 125.
(21) 2 O. & H. 36.

case (1); *Bolton* case (2); *Westminster* case (3); *Wigan* case (4).

Intimidation must be continuing at time of election: *Windsor* case (5); *Bushby's* Election Manual (6).

2nd. *Ouellette's* case: *Sligo* case (7).

3rd. *Lafleur's* case: *Oldham* case (8); *Gloucester* case (9); *Westminster* case (10).

4th. As to treating by Respondent and his agents: *Leigh & LeMarchant* Elec. Man. (11); *Portneuf* case (12); *Dominion Election Act*, 1874, Sec. 94.

5th. Speeches by the Respondent and his agents; *Phillips* on Evidence (13); *Greenleaf* on Evidence (14); *Taylor* on Evidence (15); *Launceston* case (16); *Muskoka* case (17).

6th. As to accumulation of charges and appeals upon questions of fact: *Muskoka* case (18); *Gray* v. *Turnbull* (19); *Gray* v. *Turnbull* (20).

Mr. *Dalton McCarthy*, Q. C., replied.

THE CHIEF JUSTICE:—

This is an appeal from the judgment of the Honorable Mr. Justice *Dorion*, of the Superior Court of the Province of *Quebec*, dismissing the petition of *James Somerville* and others complaining of the undue election and return of the Hon. *Rodolphe Laflamme* to the House of Commons of the Dominion of *Canada*, for the electoral district of *Jacques Cartier*, in the Province of *Quebec*.

(1) 1 O. & H. 70.
(2) 2 O. & H. 141.
(3) 1 O. & H. 92.
(4) 2 O. & H. 91.
(5) 2 O. & H. 91.
(6) Last ed. 145.
(7) O. & H. 302.
(8) 1 O. & H. 152.
(9) 2 O. & H. 63.
(10) 1 O. & H. 91.
(11) P. 37.
(12) 2 Q. L. R. 262.
(13) Vol. I, 730.
(14) Vol. I, 282.
(15) Pp. 649, 655.
(16) 2 O. & H. 129.
(17) 12 C. L. J. Pp. 200, 203.
(18) 12 C. L. J. 200, 203.
(19) 1 L. R. 2, S. App. 54.
(20) L. R. 2 S. C. App. 55.

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Before this Court, the charges were formulated under seventeen different heads; and, I have no doubt, in bringing the case before us, the parties have endeavored, as well as they could, to arrange and distribute the large mass of evidence in the best manner to facilitate the consideration of it by us. And I think they are entitled to the further credit of eliminating and discarding a large mass of evidence given in the Court below, which has relieved this Court from plodding through lengthy depositions (made longer and less intelligible by being taken down in the form of question and answer) the contents of which, when understood and mastered, would have been entirely useless.

After the experience of nearly a quarter of a century in the judicial office, I may be permitted to say, that no cases have come before me which have caused the amount of labour, care and perplexity that election cases have. No doubt one great cause of the difficulty to the Judge arises from the circumstances under which the witnesses give their evidence in these cases.

An election has been held, the passions and feelings of the electors of, perhaps, a large section of country have been excited to an extent which rarely prevails in this country, except during election contests. The supporters of either party have exerted their energies to the utmost for the success of their candidate, and the result is the return of a candidate as a member by a small majority. The friends of the unsuccessful candidate are at once impressed with the idea that they have been defeated by illegal and disreputable means, and they immediately endeavor to have the decision against them, obtained by such means, reversed as speedily as possible. They file their petition, and then proceed before the election court to have the case tried. The heat and the excitement which prevailed in the electoral division is then transferred to the election court.

The witnesses are too apt to shew, by their conduct and their manner of giving evidence, that they are actuated by the same partizan feelings as witnesses that influenced them as voters ; and some of them act as if they thought they ought to support their party by their oaths as zealously as they did by their votes. The audience is often numerous and composed of partizans, whose feelings enter more or less into the legal contest as they did into the political one. All this adds much to the perplexity and difficulty of the Judge in evolving the truth from the testimony given by the excited witnesses. This difficulty is expressed in the language used by an election judge in *Ontario*, which I extract from a case now lying before me :

> The difficulty which I have experienced in evolving truth from the greater part of this mass of evidence has been great beyond what can be conceived, arising from the fact that the manner in which many of the witnesses gave their evidence—who, from the intimate connections with the Respondent in his business relations, and in connection with the canvass on his behalf, should reasonably be expected to be able to place matters in a clear light—has left an impression on my mind that their whole object was to suppress the truth (1).

But the Judge who tries the cause in the first instance has many advantages over those who are called upon to review his decision. He sees the witnesses, hears their answers, sees whether they are prompt, natural, and given without feeling or prejudice, with an honest desire to tell the truth ; or whether they are studied, evasive and reckless, or intended to deceive. As the case goes on the Judge is able to form a conclusion (oftentimes difficult to arrive at) which is more satisfactory to him than if he had been deprived of the opportunity of seeing or hearing the witnesses. Then again, if any misunderstanding arises as to what the

(1) *Lincoln* case, 12 C. L. J. 166.

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witness has said, it can be put right at once. The object for which a witness is called, and the point to which his evidence is directed, is understood. If any doubt arises in the mind of the Judge as to what particular part of the case the testimony of the particular witness is to be directed, on application to the counsel, that doubt can at once be solved. The views and opinions of the Judge in disposing of a case, who has these advantages in considering the evidence, are more likely to be correct than those of an Appellate Court who have not those advantages. I have endeavored to point out how profitable it is to have the living rather than the dead testimony, as to which I shall presently give the language of the late Sir *J. Coleridge.* As I have already observed, these election cases impose great trouble and perplexity on the Judge, even under the most favorable circumstances. But when Courts are called upon, on appeal in these cases, to reverse the decisions of the Judge who tried the case on matters of fact, their labour and perplexities are, as far as my experience goes, very much increased. After the testimony has been taken down, it may be submitted to the consideration of parties not engaged in the first trial, who may see points and discrepancies in the evidence not suggested at the trial; matters omitted, or rather not proven by evidence, which were taken for granted, and as to which, if attention had been drawn to them, the difficulty could have been removed at once, these are brought forward, and the Appellate Court must consider them, and also the conflicting evidence, without the advantage possessed by the Judge below. His views as to the proper decision arising from the effect of the whole of the evidence on his mind, the manner of giving that evidence by the witnesses being an important element in leading his mind to the proper conclusion; and yet, perhaps, he could not say he

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believed one particular witness more than another; and when the testimony is read, one witness would appear as much entitled to credence as the other. The difficulty of understanding and rightly appreciating a large mass of evidence, when it is only read, is thus referred to by the late Sir *John T. Coleridge*, in giving the judgment of the Judicial Committee of the Privy Council, in *The Queen* v. *Bertrand* (1).

> Those of their Lordships who have been used, on motions for new trials, to hear the Judge's notes of evidence read, probably know well by experence how difficult it is to sustain the attention, or collect the value of particular parts, when that evidence is long. *** But this is far from all. The most careful notes must often fail to convey the evidence fully in some of its most important elements, those for which the open oral examination of the witness in presence of prisoner, Judge and Jury, is so justly prized. It cannot give the look or manner of the witness, his hesitation, his doubts, *** his confidence or precipitancy, his calmness or consideration; **** nor could the Judge properly take on him to supply any of these defects. *** It is, in short, or it may be, the dead body of the evidence, without its spirit which is supplied, when given openly and orally, by the ear and eye of those who receive it.

In addition to this, when the evidence is taken down, as it has been in this case, in the form of question and answer, it swells to an enormous bulk, and the labour and perplexity of the Judge in understanding it is enormously increased. I think I can truly say, that I have spent more time in endeavouring to master the details of the evidence in this case than in any that has ever come before me, and I have been compelled in doing so to transcribe nearly the whole of what is really the evidence that pertains to the case.

At the same time, as I have already intimated, it is but justice to the parties to say, that they have really endeavored to place the case before us relieved, as much as they could relieve it, from a mass of matter which

(1) L. R. 1. P. C. 550.

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would have further increased our labours; and by the arrangement of the evidence under the different heads they have very much facilitated the reference to it, as applicable to each particular case.

The first question for consideration is, whether the Respondent could, on the trial of the petition, give evidence for himself. As I understand the matter, after the evidence in the cause was given, the Respondent appeared before the Court on the second day of June, and, being duly sworn, made the following declaration, which is set out in the case as filed in this Court. After referring to many of the circumstances detailed in the evidence, and denying the statements made by some of the witnesses and explaining others, he concludes:

> These are the only facts upon which I intend to offer any explanations, but I am ready to answer any questions that may be put to me.

Respondent's own counsel put a question. It was objected to by petitioners, on the ground of Respondent not being examined as a witness, but merely tendering his own declaration. The objection was over-ruled and the question answered. The Petitioners declined to put any question to Mr. *Laflamme*, he not being a witness in the case. The statement of his evidence then concludes, as that of all the other witnesses; "And further, deponent saith not."

Under sub. sec. 7 of the 3rd section of "*The Dominion Controverted Elections Act of* 1874," it is provided that, subject to the provisions of that act, the Courts shall have the same powers, jurisdiction and authority, with reference to an election petition and the proceedings thereon, as if such petition were an ordinary cause within its jurisdiction. In any election case in the Superior Court of the Province of *Quebec*, I apprehend that the usual practice in suits in that Court would be

pursued, except when the provisions of the Controverted Elections Act may make a difference. In relation to the examination of the parties to the suit in an ordinary case, they cannot, as I understand, in the Province of *Quebec*, offer themselves as witnesses; and if that practice is to be followed in election cases in that Province, the Petitioners may properly urge that the evidence of the Respondent should be excluded.

No one at all familiar with these cases can doubt, that it is of the greatest importance that the Respondent should be able to give testimony on his own behalf on the trial of an election petition. Many circumstances during the progress of an election contest arise which can only be satisfactorily explained by the Respondent; and it is certainly desirable that his testimony should be heard as well on his own behalf as against himself. The history of the legislation on the subject is a brief one. The statute for trying election petitions before judges was passed in *England* in 1868. The Dominion Statute for the same purpose was passed in 1873, adapting the English Statute to the state of things existing in the Dominion. The Legislature of *Ontario* adapted the English Act to the circumstances of that Province, and passed their Statute in 1871, in February; and the general election for that Province was held in the month of March of the same year. A number of cases arose out of that election, and were tried before the Judges of the Superior Courts of Law and Equity in *Ontario*. So that at the time of the passing of the Dominion Statutes in 1873 and 1874, the course of procedure in the trying of these petitions in *England*, and which was followed in *Ontario*, must have been known to the framers of those statutes; and it seems to me that they intended that the same course should be followed here that prevailed in *England*, so far as could be consistently with the Act and the rules to be made

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under it. Now, the practice which prevailed in *England* at that time on these trials before the Judges was to hear the parties as witnesses; and the reading of the cases there decided shows how desirable it was that they should be witnesses. I think the reference in the Statutes to the manner in which these election petitions, touching the election of the members of the House of Commons, are dealt with in *England*, shows that it was intended the same course should be followed here. Under the 44th section of the Dominion Statute of 1874, power is given to the Courts to make general rules and orders for the effectual execution of the Act and the intention and object thereof, and the *regulation of the practice and procedure* and costs with respect to election petitions, and the certifying and reporting thereon. And the 45th section provides, that until the rules have been made by the Judges of the several Courts in pursuance of the Act,

> *And as far as such rules* do not extend the principles, practice and rules on which *election petitions*, touching the election of members of the House of Commons in *England*, are at the time of the passing of this Act *dealt with*, shall be observed by the Courts and Judges thereof.

It will be observed that the authority to make rules refers to the regulation of the practice, procedure and costs. But the 45th section refers to the principles as well as the practice, and I think contemplates something beyond the new rules that were intended to be made.

There has been some discussion as to the effect of this word *principles* in the section of the English Statutes which refer to the decisions of election committees, but I cannot say that it throws much light on the subject we have now to consider. I think we will not be going beyond what the legislature had in view, by requiring the Courts to observe the practice and

principles on which election petitions were *dealt with* in *England*, in holding that the parties to an election petition, touching the election of a member of the House of Commons of the Dominion of *Canada*, can be witnesses on the trial of the petition and examined on their own behalf. I believe that practice has prevailed in the cases tried throughout the Dominion, and, as far as I understand the question, has never been raised, either in the Province of *Quebec*, or any other Province, until it was brought up in this case.

The Local Act, (1) for the trial of controverted elections in the Province of *Quebec*, provides that the rules of evidence in the local election cases shall follow the English Law.

I do not think the provisions of the Dominion Statute, relative to preliminary examination of parties, and the production of documents, afford any argument against a party being called as a witness or examined on his own behalf. It merely enables a party to be examined before the trial, and the information so obtained may induce the petitioner to abandon his petition, or the facts elicited may be of such a character that the Respondent will be advised to abandon the seat. It is similar to proceedings which may be adopted in Chancery and under the Common Law Procedure Act, but these proceedings do not in any way interfere with the party so being examined becoming a witness on the trial. I, therefore, think we may consider the Respondent's declaration under oath properly receivable in this case.

The first case referred to in the factum is *Paquin's case*.

The evidence is to the effect, that

Mr. *Laflamme* asked him (*Paquin*) what he intended to do about the election. He answered: "I cannot do anything, for I have already

(1) 38 Vic., Cap. 8, Sec. 56.

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had troubles about that." Whereupon Mr. *Laflamme* said, "I have already been the means of establishing a post office at *Isle Bizard*, and you have been appointed mail carrier; if you do not sign for me, do not sign against me." "He then asked me," says *Paquin*, "if I was going to sign at all. I answered I was not, and that is all that was said."

Mr. *Trepannier*, a witness, said:

Mr. *Laflamme* asked him, *Paquin*, "what are you going to do this year?" He answered: "I have already had troubles; I don't vote this year." Mr. *Laflamme* said, "if you do not vote for me, you will not hurt me by not voting at all." Mr. *Paquin* said, "I will not vote at all." Mr. *Laflamme* said to him: "it was through me that you got the mail."

I do not consider these words, used by Respondent, were calculated or intended to intimidate; at most, they seem to me to be addressed to the man to convince him he ought not to vote against him (Mr. *Laflamme*), because he, as representing the County, had got the mail established at that place, and that it was through him that he got the mail. I have seen no case going so far as to say, that this is intimidation or undue influence. I, therefore, think in this matter the decision of the learned Judge was corret.

Foley's case.

Foley's evidence is to the following effect: *Michael Conway*, the Superintendent of the *Lachine* Canal, came to his (*Foley's*) house in *Lachine* on Saturday afternoon, and informed him that he understood that a party had made a complaint in Mr. *Laflamme's* office about his (*Foley's*) working for the government, and not supporting the government candidate. *Conway* said he must come in and make it all right with Mr. *Laflamme*, or he would have to discharge him. *Foley* said he was not going to take any part in the election. He had always worked on the Conservative side. He did not take any part in the election.

On re-examination, *Foley* repeated:

He told me he heard I was going to be discharged, and that I had better go and see Mr. *Laflamme*. I said, I did not know where Mr. *Laflamme's* office was. He said he would meet me at the station, which he did on Monday morning, and we both went down to *Laflamme's* together, and he (*Conway*) introduced me to Mr. *Laflamme*.

Conway sat down and remained during the interview. He (*Foley*) said he went to Mr. *Laflamme's* office to tell Mr. *Laflamme* he need not thank him for coming there, as he was not going to vote for or against him. In reply to a question, he said:

I told him, of course, that I was working for the government, and did not want to take any part in the election, and that I was not going to vote for him. I said if that would do, it would be all right, but if it was not they could do as they pleased about discharging me. He said that would do.

In answer to another question, he said:

I did not tell him how I was going to vote. I told him I was not going to vote for him; that I would not work on either side. I think he said it was all right if I did not work on either side, but remained quiet.

He thought Mr. *Laflamme* knew he was a Conservative, and that he had voted against him at a former election.

He added:

What *Conway* said to me was told as a friend.

Michael Conway said:

I heard it reported that *Foley* was going to take an active part against the Government candidate, and as he was employed under the Government, I thought it my duty, as a friend of *Foley*, and as a Superintendent of the Canal, to tell him, that, as he was making his living there, I did not think it was wise for him to take an active part against Mr. *Laflamme*, and that if he took my advice he would vote for whom he pleased, and not take an active part in it at all. I make it a point to make my men attend to their business, and not take active parts in elections. I made no objection to his working in the election whatever; I simply gave him my advice. It was rumored around he was going to take an active part in the election. I swear I did not advise him not to vote. The promise I got from *Foley* was, that he was going to

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see Mr. *Laflamme*, and see what he was going to do. He suggested it himself, and I went with him to introduce him to Mr. *Laflamme*, and to show him that the man did not intend to interest himself in the election, but attend to his work.

No person, to the knowledge of the witness *Conway*, made any complaint against *Foley*. It was rumored. He said:

I introduced him to Mr. *Laflamme*, and he told Mr. *Laflamme* he was employed by the Government, and that he heard he was going to lose his place. He told Mr. *L.* he did not intend to work for or against him; or to vote for him. I think Mr. *Laflamme* said he was perfectly satisfied.

In answer to a question, he said:

When I first saw him (*Foley*) I went to his house, and told him there was a great deal of noise about his going to take an active part in opposition to the Government candidate; and, as he was employed by the Government, I thought it would not be advisable for him to take an active part in the matter more than to vote for whom he pleased. *Foley* said: I will go and tell Mr. *Laflamme* that I am not going to work for or against him; or vote for him.

On cross-examination, he said:

I did not tell *Foley* that I heard he was going to be turned off. I told him, I heard it rumored he was going to take a very active part on the other side; and, he being employed by the Government, I told him, as a friend, not to interfere, but to attend to his work, and vote for whom he pleased. It was not the purport of what I said to him—that it was reported in the office that he was going to be discharged if he took any part in the election. I did not say so, nor did I mean it.

Foley states he voted at the election.

In relation to this case, we must confine ourselves strictly to what took place in Mr. *Laflamme's* presence. If *Foley* had said to Mr. *Laflamme*, "Mr. *Conway* informs me a complaint has been made against me in your office about my working for the Government and not supporting the Government candidate, and that I must come and make it all right with you, or he will discharge me;" and had further said, "he did not want to take any active part in the election, but he was not

going to vote for him ; and, if that would do, it would be all right; but if it did not, they could do as they pleased about discharging him." If Mr. *Laflamme* had, after that, boldly said "that would do," I think that would afford strong grounds for assuming that he knew and approved of the threat that *Foley* would be discharged if he exercised his franchise. I doubt if what he did say ought fairly to lead to the same conclusion. Mr. *Laflamme* might have thought this man had some idea that if he did not support the Government candidate he would be dismissed, and came to him to tell him what he intended to do, and to see what Mr. *Laflamme* would say to that. The answer "that would do," I do not think necessarily implies if he did vote he would be dismissed.

Conway's account of what took place in Mr. *Laflamme's* office does not differ much from that of *Foley*.

If Mr. *Laflamme* had been made aware that direct threats had been made to discharge *Foley*, if he did not satisfy him, it would have been his duty to have informed *Foley* that he had not authorised any such threats to be made, and that he entirely disapproved of them. Whilst the law would not require him to tell an elector, situated as *Foley* was, to do all he could against him, it required that he should not approve of threats being used to deter the elector from the exercise of his franchise.

I think it would not have been out of place for him to have told Mr. *Conway* it was not his duty to bring the workmen on the canal to his office to explain what they intended to do, to see if that would be satisfactory. If, as a friend of *Foley*—the latter having been represented as an active partizan against Mr. *Laflamme*—he thought it was unseemly for him in the position he occupied to take an active part in politics, and as his friend advised with him, *not threatening him*, not to

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make himself conspicuous; if, on such friendly advice, *Foley* had assured him he did not intend to take a part in politics, he might, as such friend, have assured Mr. *Laflamme* that the representation that *Foley* was active against him was untrue. But bringing *Foley* to Mr. *Laflamme's* office to answer, as it were, a charge against him, certainly looks as if it was intended he should be impressed by the interview. *Conway* denies having told *Foley* that, if he did not make it all right with Mr. *Laflamme*, he would discharge him. If the case were to turn on what *Conway* told *Foley*, I would hesitate before giving credence to *Conway's* rather than *Foley's* account of it. *Foley* did go to Mr. *Laflamme's* office. *Conway* did accompany him, and he did explain to Mr. *Laflamme* that he did not intend to take any part in the election, and he did allude to the circumstance that his course as to the election might lead to his discharge, "to losing his place." The demeanor of the two men would, of course, assist in determining which of the two statements should be most relied on. *Conway*, according to his account of the transaction, was a high toned public officer, who, whilst allowing every man to exercise his right of voting freely, thought it unseemly for persons in the employ of the government to take an active part in politics; and having heard that *Foley* was taking an active part against the government candidate, as his friend, went to *advise* him not to render himself obnoxious by such a course; and, as his friend, and at *Foley's* request, went with him to show him where Mr. *Laflamme's* office was, to enable him to explain to that gentleman the course he intended to pursue; and that he did not threaten to discharge him if he did not make it all right with Mr. *Laflamme*. I must confess, on reading the whole of the evidence given by *Foley* and *Conway*, that this view of the case did not seem to me the most correct one to take.

I do not see, however, that I can, on the evidence, consider *Conway* Mr. *Laflamme's* agent. It is true he was in favor of Mr. *Laflamme*, and probably brought some voters to the poll for him, and asked others if they were going to vote for him. I do not consider *Conway* bringing *Foley* to Mr. *Laflamme's* office so made him aware that *Conway* was acting for him, as to constitute him an agent for whose acts he was responsible.

I therefore, as to this charge, think we should decide in favor of Respondent.

Chaurette's case.

In his evidence *Chaurette* says he met Mr. *Laflamme* at *Pointe Claire* on the nomination day, and he said to him:

I have heard that you would not put your name to propose me. I answered, "it is true." He then said to me: "I have appointed you Deputy Returning Officer.

Further on he said, in answer to the question:

Did you tell him that you could not vote for him? Answer—"You know that I have always been for you."

The next question was:

Was it upon that that he told you he had appointed you Deputy Returning Officer? Answer—Mr. *Laflamme* and Mr. *Anthime St. Denis* coming on one side of the side walk and I on the other, on nomination day, in passing Mr. *Laflamme* stopped and told me "I have heard that you would not put your name to propose me," and I said to him: "*Yes*, I do not like my name to appear." Upon that he told me "I have appointed you Deputy Returning Officer," and I answered him, "that will be the way to keep me quiet;" because I was appointed Deputy Returning Officer, and being appointed as such I remained quiet, but I did not lose my right of voting. Nevertheless, one may get excited during elections and be glad to find friends.

On cross examination he stated:

Before the nomination day I did tell some of Mr. *Laflamme's* friends that I would vote for him, but that I would not sign his nomination ticket. I did not like to come forward. Mr. *Laflamme* might have known before the nomination day that I was for him. I told him to leave me alone, and that I would always be the same

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man, but that I would not work. My appointment as Returning Officer did not change my opinion.

It does not strike me that this evidence shews that *Chaurette* was bribed to support Mr. *Laflamme* by his being appointed Deputy Returning Officer. The difficulty has arisen from Mr. *Laflamme* saying he had appointed *Chaurette* Deputy Returning Officer. I should have thought it was the duty of the Returning Officer to appoint his deputies, under the 28th section of *The Dominion Elections Act of* 1874, and that it was a matter in which the candidates would not interfere. The law casts the duty on the Returning Officer, and he ought to make the selection of proper, qualified persons, without reference to the candidates. It is of great importance that these officers should be men who would not be influenced in the discharge of their duties by political feeling or prejudice; and if it is understood they are to be the nominees of a candidate, the public will not have the same confidence in them as if selected by the Returning Officer himself from those he consider qualified by intelligence and honesty to discharge the duties properly. It seems to me the Returning Officers ought to make their own selections of their deputies, and be held responsible for their selections.

Lafleur's case.

This voter, who is accused of personation, is an advocate and resides in *Montreal.* His father, of the same name, is a farmer and resides at *Ste. Geneviève.* In 1875, the son was the owner of property in the parish, and voted at the election for the Local Parliament. The father had property in the village of *St. Geneviève,* and in the parish, and his name was on the *two* lists of voters. The son sold his property which was in the parish in the fall of 1875, and the question arose, whether, having sold his property, he could vote supposing his name to be on the list, and whether his

name was really on the list, though the person whose name was mentioned on the list was described as a *farmer*, the voter being an advocate. It appeared from the evidence that the land which the younger *Lafleur* had owned was on *Main Street*, and that of the elder *Lafleur* was described "Property on the *Main Street*;" and the property formerly owned by the younger *Lafleur* would be described in the same manner, but the name would not be the same. I suppose this means the father would be "farmer." The property was sold to Mr. *Gauthier*. His name was not on the list. The Secretary-Treasurer of the Corporation, in reply to a question, said this property, which did belong to Mr. *Lafleur*, advocate, was not mentioned on the list. I think by this is meant, unless coming within the description put opposite the elder *Lafleur's* name. One of the questions referred to was, whether the younger *Lafleur's* name, having been on the list for 1875, it could properly be removed without giving him notice. It is not contended that the young man pretended to be the father, but that he pretended to be the man whose name was on the list, and he was not that man. The man named on this list was either his father or himself; he, in fact, contended it was himself. If there had been a mistake in putting *farmer* as the matter of description of the person, then young *Lafleur* might honestly have supposed he had a right to vote; and if the name was not intended for him, then the land he had owned was not assessed at all, as I understand it. I do not think it appears in a manner at all satisfactory that these parties did not believe young *Lafleur* had a right to vote. He thought so himself, and swore in his vote; and I do not think, under the head of *personation*, the legislature intended to deter a man from voting who claimed the right to vote on his own behalf, and believed he had that right. If this young man had never owned

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this property, had never had a right to vote, and merely, because the name of his father being the same as his own, would insist on voting, though he was an advocate and his father a farmer and the *Lafleur* named was described as farmer, then it might be said in one sense he had been guilty of personation; or if the property were assessed to the man to whom he had sold it, and the entries had been all properly made, and the description of the land could only apply to his father, there would then be more ground for imputing wilful fraud. But I do not feel warranted in deciding against the Respondent as to personal complicity in the matter, or that the election should be avoided on account of anything done by his alleged agents in respect of this vote.

As to treating on election and nomination days.

Section 94 of *The Dominion Elections Act of* 1874, 37 Vic., cap. 9, substantially re-enacts sections 4 and 23 of the Imperial Statute of 17 and 18 Vic., cap. 102. Section 4 is similar to the first paragraph of sec. 94 of the Dominion Act, and the last paragraph of that act is similar to sec. 23 of the Imperial Statute. Under sec. 36 of the Imperial Statute, corrupt treating avoided the election; and though under that act the candidate was not eligible for re-election for the same constituency during the existing parliament, and is still punishable in the same way for corrupt treating, yet he is not declared incapable of voting and holding certain civil offices, as he is by the subsequent act of the Imperial Parliament (1), for seven years when found guilty of bribery. But under, sec. 23 of the Imperial Statute of 1854, the persons giving refreshments to voters on polling days are only liable to the penalty of 40 shillings for each offence. Sec. 98 of the Dominion Statute declares any

(1) 31 & 32 Vic., cap. 125, sec. 43, 1868.

wilful offence against, amongst others, sec. 94, shall be a corrupt practice within the meaning of that act. Sec. 101 declares the election void when it is found on the trial of an election that any corrupt practice has been committed by any candidate or his agent at an election, and sec. 102 further punishes the candidate when such practices have been committed by or with the actual knowledge and consent of any candidate at such election. The fact that a corrnpt act has been committed must, of course, be proved at the trial of the election petition or of an indictment.

Mr. Justice *Willes* in the *Bodmin* case (1) refers to what he supposes was the reason of the 23rd section being introduced into the English Statute, when the 4th section referred to corrupt treating and punished it under the 36 section. The learned judge said:

It would seem to have been usual in former times, and no doubt was the practice, at least up to the year 1854, when the Corrupt Practices Act was passed, without any improper design upon the voters, and with a view to profusion, which some might dignify by the name of hospitality, to give every voter who came up pledged for a candidate, at the election, or who voted for candidate, refreshment, either by opening a common table at some inn, where the voters breakfasted before they went to the poll, or where they had refreshments before they left the town after polling, and before they returned to their homes.

The learned Judge then referred to *Bodmin's* case (2), where it was reported to the House that a system was pursued (which the learned Judge had no doubt was general) as soon as a voter had polled his vote of giving him a ticket for 5*s*. worth of refreshments. He then proceeds:

I cannot help thinking that that was the sort of corrupt practice with which—whether corrupt or not—the Legislature was dealing in the 23rd section of the Statute; and, also, I am inclined to believe, though I cannot precisely cite my warrant for believing it, that where

(1) 1 O. & H. 122; 20 L. T. (N. S.) 990.

(2) 1 Power, Rodwell & Drew, 129.

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a farmer, for instance, came from a distance to vote at a County election, it was not uncommon to have such an open table as that to which I have referred, not for the purpose of catching people's vote by the attraction of the meal, but simply, as it was then thought, reasonable, and was not uncommon. If to give a voter something to eat on the day of polling had been in itself treating, the 23rd section would have been unnecessary—the 4th section, dealing with corrup-treating, would have been sufficient to dispose of the case. More over, if it had been intended by the Legislature in making that sort of practice which prevailed here and elsewhere illegal, as no doubt it is now, by the 23rd section, to make it also amount to corrupt treating within the meaning of the 4th section, the Legislature would have so declared itself in the 23rd section.

This seems to me to explain the origin of the 23rd section of the English Statute, and the reason why it was passed. It is substantially re-enacted under the last paragraph of the 94th section of the Dominion Statute, and made a corrupt practice, but to make it a corrupt act the meal, drink, or refreshment, must be given on the day of nomination, or on the polling day, and *on account of the voter having voted, or being about to vote.* This, perhaps, would make the illegal act a corrupt practice, though the refreshment was not given with a corrupt intent. The observations of Mr. Justice *Willes* shew clearly that it was not enacted for the purpose of preventing drinking on the nomination or polling days. The provisions in the *Ontario* Statute compelling the closing of taverns and shops where liquors are sold on election and nomination days, and the furnishing and selling or giving away of liquors to any person within the municipality during the period mentioned, were evidently framed for a different purpose from the paragraph under discussion in the Dominion Statute.

The drinking on the nomination or polling day not being a corrupt practice, unless the drink was given on account of the voter having voted, or being about to vote, and the evidence not shewing that the alleged

drinking on those days was for any such reason, the question raised on that ground must be decided in favor of the Respondent. This view, I think, accords with the opinion expressed by Chief Justice *Meredith* in the *Portneuf* case (1), to which we were referred, and does not conflict with the decision of Mr. Justice *Torrance* in the case tried before him—as I understand, the drink given in that case was on account of the voters having voted or being about to vote.

Corrupt treating by Respondent and his agents.

I have gone over the evidence carefully as to the treating by Respondent, and I do not think there is any case made out against him.

The first case referred to is treating on the nomination day at *Charlebois'* tavern, *Lachine*. I have already expressed my opinion that the last paragraph of sec. 94 of the Statute refers only to furnishing refreshments to electors, *on account* of the electors *being about to vote or having voted.* There several electors being present treated each other in turn. There is nothing to show it was done on account of their being about to vote within the meaning of the Statute. It is not pretended that Respondent treated, but that the treat was with his consent and approbation. The law applicable to the *North Wentworth* case was different. I don't think it appears that the drinking was with his consent or approbation, and if he had attempted to interfere he might have been properly told it was a matter which did not concern him; that is, if these gentlemen chose to ask each other to drink, because they are friends and neighbours, and it was considered as a mere act of courtesy, which seems to have been the case.

I fail to see that the Respondent drinking at *Bellair's*

(1) 2 Q. L. R. 268.

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on the evening of the 22nd (if he did drink, which is not shewn with positive certainty,) was corrupt treating. Mr. *Rodgers*, who was a contractor, choose to treat *all round*, as he says, and it does not appear that his doing so would in any way corrupt the electors as to voting, or that it was intended for that purpose. I should not infer from reading the evidence of what occurred on that occasion, that there was any corrupt intent on the part of *Rodgers*, who was particularly referred to, nor any thing to show that in accepting the treat Mr. *Laflamme*, if he did drink with the rest, *corrupted* anybody or intended so to do.

As to corrupt treating by persons alleged to be Respondent's agents, though there appears to have been more or less drinking during the canvass and about the time of the election, much of it appears to be of the character which prevails through the country when a number of people meet for purposes other than elections, such as horse races, and other meetings where there is a good deal of talking and discussion going on, and in the interludes between conversations some man calls for liquor, a short time after another does the same, and, if the number of persons assembled is not too great, the habit, I apprehend, is to ask all who are near to join in drinking. If there are a great many people present they are apt to form into small knots, and so join in drinking. I do not think drinking under such circumstances can be called corrupt treating. There was not during this election, as far as I can understand, that profuse expenditure for drink that used to prevail to the great injury of all concerned in it. From the perusal of the whole of the evidence, I do not think there can be any pretence that what would be called *general treating* prevailed at the election or during the canvass, and certainly none to the extent which would justify the setting aside the election on that ground. The

amounts charged by *Belair*, the hotel-keeper at *Ste. Geneviève*, and *Sauvé*, at *Pointe Claire*, for board of parties acting on behalf of Mr. *Laflamme*, seems rather extravagant, and some money may have been spent there for drink during the election day. Mr. *Doyon*, whose expenses were paid by Respondent, and was one whose board he paid, speaks of treating, taking a couple of glasses of wine with whom he did not know on nomination day, it may have been that he treated when *Perry* and *Howard* were at *Ste. Geneviève*, and treated a few friends at *Sauvé's* on nomination day. He does say he never treated an elector during the whole time of the contest. He says he took some of the election money to pay those expenses (that is for treating). He, I assume, may have treated electors without knowing it. Without being quite satisfied with the explanations given by the witnesses as to this treating, particularly by persons who were strangers in the county and were there to act on behalf of Mr. *Laflamme*, yet, considering the custom of the county to which I have referred, I do not feel warranted in holding that the treating proved to have taken place was *corrupt* within the meaning of the Statute. Nevertheless, it cannot be too seriously impressed on all those who may be in any way acting to further the election of a candidate, and who can properly be considered agents, the absolute necessity of avoiding the furnishing of refreshments to electors during the contest, whatever may be their motive in doing so. When a course of conduct, which, in view of surrounding circumstances, *may* bear a favorable construction, but is considered open to serious objection, is followed after repeated warnings, Courts and Judges will feel less inclined to put the favorable construction on such conduct, and will have less hesitation in deciding that parties who will persist

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in acting recklessly after repeated warnings intend to act illegally.

I do not, therefore, think the charge of corrupt treating by Respondent or by his agents is made out.

I understand the view I take as to corrupt treating is similar to that cited by Mr. Justice *Patterson* in the *Lincoln* election case, which has been so long pending in *Ontario*, and that I expressed in the *Kingston* case.

Speeches by Respondent :—

As to the speeches by Mr. *Laflamme*, I have gone over the evidence very carefully more than once, and am not prepared to say, taking it as a whole, that we would be warranted in setting aside the election, in consequence of what he said in addressing the electors on various occasions, after the finding of the learned Judge who tried the case.

I have considered the powerful arguments of Mr. Justice *Wilson* in the *Muskoka* case, and others that were addressed to us by Mr. *McCarthy* in the discussion of the matter before this Court, and must say that speeches, pressing on the consideration of the electors that a particular candidate ought to be supported, because he has the power to distribute patronage, and because, as a Minister of the Crown, he has the power of conferring material benefits upon a constituency, he ought, therefore, to be preferred and supported rather than a candidate not possessing such advantages, are calculated to influence the electors in the choice of their members, and in that way interfere with the freedom of election. At the same time, the fact exists, when the candidate before the people has that power ; and to say that he has it can hardly be said to be more than recalling to mind any other fact. When done openly, can it be said to be done corruptly ? Besides, it is one of the features of our representative system that as to some matters, those of a local charac-

ter, a representative is bound to attend to the interests of his constituents; and, when he can do so consistently with his duty to the whole country, his constituents may expect him, and, perhaps, demand of him to do so. I do not know that the candidate would be going much beyond the proper line, if he were to say that if occasion offered he would exercise his influence in favor of his constituents, whether in the bestowal of offices or in other matters in which they were interested. If in his speeches he were to limit his favors to those only who would support him, it might then be said he left the proper path and held out direct inducements to each to vote for him, and in that way was endeavoring to corrupt the constituency; and yet, promising to do what he could for his constituents in general terms, would, to most minds, imply quite as much as the more direct offer to give offices to those who helped him.

One difficulty in the case of speeches is, that you have not the exact words uttered by the candidate, and each listener puts his own peculiar construction on the language used, and, when the lines of permissible speech and self-laudation and of corrupting appeals approach each other so nearly, it is not always safe to rely on the impressions parties have as to the effect of a speech.

I take it for granted, Mr. *Laflamme* might have said, without incuring legal censure, "you ought to support me; I am a member of the Government—a Minister of the Crown—and have more influence than my opponent. I can do more good for the county—more good for you—than the gentleman opposed to me. As your member, it is peculiarly my duty to look after your interests, and I will do so." Would not this language, in fact, have the same tendency to prevent the freedom of choice by the electors between the two candidates, as the more pointed and objectionable language referred to?

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I understand the matter is put in this way on behalf of Mr. *Laflamme*. He was charged with being a man without influence, that he had failed as a member to take the position he ought to have taken, that he had done no good for the county, that all he had done was to get his friends a few offices. In reply to this attack, he said his opponents had charged him with doing no good to the county, with being *without influence*, and yet he had influence to procure more appointments for the electors of the county than any member who had preceded him, and if he had been able to do this for his constituents as a private member, as a minister of the crown he would be able to do more. Several of the witnesses on his behalf stated he in no way promised to give offices, that he was merely repelling the attack made on him, and shewing the people that as a minister he would possess more power to serve them than his opponent and more than he had as a private member. This is the view, as I understand, that the learned Judge takes of the effect of the evidence, and I cannot say he is not justified in doing so. If I entertained a stronger opinion than I do of the legal view to take of these election speeches, I should hesitate to declare the Respondent guilty of corrupt practices against the views of the Judge who tried the case as to the facts, and against the view the Court of Appeals in *Ontario* have expressed as to the law. I do not wish it to be understood from what I have said on this subject that candidates may, with impunity, make all kinds of appeals of a corrupting tendency to their constituents, and I think a careful perusal of the evidence will show that Mr. *Laflamme*, in taking the course he did, was, to use the words of one of his own witnesses, "travelling on delicate ground." As I have had occasion to say in most of the election cases which I have unfortunately been compelled to consider when corrupt practices were

charged against a candidate, when there is a reasonable doubt if a party has brought himself within the clear terms of the law, you ought not, when the effect of the finding is so grave and serious, to decide against him.

I am not prepared to reverse the decision of the learned Judge as to the speeches made by Respondent.

As to Speeches by Agents:—

After what I have said about the Respondent's speeches, I have but to say that the only speech by an agent, which would call for further remark, was that made by Mr. *Duhamel* at *St. Anne*, to the effect, that if they elected Mr. *Laflamme* he would have at his disposal as many places as they would want. They would be greatly in the wrong to prefer any other, for he had already obtained places for some, and would be able to obtain some more. He also referred to the canal passing in front of the village, and said, if he was elected, he might tell them as a sure fact he would cause a few millions to be spent in deepening and widening it.

The speech of Mr. *Duhamel* was made in the presence of other gentlemen who had spoken, or who were about to make speeches; the latter could, of course, reply to any statement he made, and if he said anything questionable or improper, could have replied to it. Putting improper motives before the people to influence them would naturally draw down censure and remark, and ought rather to injure than benefit the party on whose behalf they were put forward. Mr. *Duhamel* did not, as appears by the evidence, promise these places to any particular class of the inhabitants—say those who supported Mr. *Laflamme*. What he said was to the effect, that if elected he (Mr. *Laflamme*) would be able to obtain more places for them, that is, for the people. As to the reference

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to the expenditure of money to improve and widen the canal, that was a matter which, of course, could be responded to, as the improvements had been provided for before Mr. *Laflamme's* time—as one of the gentlemen who was present when this speech was made mentions in his evidence.

Though by no means free from doubt, I do not feel warranted in setting aside the election in consequence of the speeches made, either by Respondent or his agents.

The question how far a candidate and his friends may go in this kind of speaking is a very perplexing one, and if it is found that great evils result from such speeches the Legislature may interpose. Judges may also feel warranted, if it is found that these addresses of candidates and their agents go further in the objectionable direction, in declaring the same a violation of the law relating to the freedom of elections, though up to the present time they have not been able, satisfactorily, to come to such a conclusion.

There was little or no *direct* evidence that these speeches had a corrupt influence. One man speaks of being inclined to act from the corrupt motives placed before him, but, on further reflection, concluded not to do so. Several of the witnesses mentioned that it was spoken of amongst the people that Respondent and his friends had promised offices; but it seemed as if this was done more to express disapproval of such conduct than to show they were influenced by it.

The enquiry before the learned Judge did not take the direction of showing the corrupt effect on individuals, but rather left it to be inferred that such must have been the case.

I do not feel that we would be warranted in finding such general corruption resulting from the speeches complained of as to set aside the election on that ground.

The learned Judge, in the Court below, when discussing the question as to speeches by Respondent, refers to the *Montmagny* case, and shows, I think, satisfactorily, how that case differs from this as to the matter under discussion, and concludes:

Here we have a serious conflict of testimony as to the effect of the expressions of which the Respondent made use, and we have his declaration upon oath, in which he says he only spoke about places in reply to the attacks made upon him by his adversaries, and in no way with a view to exercise any influence over the electors.

Clement and Deschamps cases.

The witness *O'Neill*, collector of canal tolls, said:

My sympathies were with Mr. *Laflamme*, on account of being under a personal obligation to him for a year and a-half before the election, of which fact Mr. *Girouard* was well aware for a year previous to the election. The only work I did on behalf of Mr. *Laflamme*, after the writ of election was issued, was to send a message to *Deschamps* that I wished to see him to ascertain if it was true that he had gone out to *St. Laurent* to propose a candidate to oppose Mr. *Laflamme*, after he had promised Mr. *Laflamme* that he would not work in the election.

I myself, after Mr. *Geoffrion* resigned, was satisfied Mr. *Laflamme* would succeed him, and I wrote a note to a friend in *Lachine* to ask *Clement Deschamps* and *Israel Clement* to see me at my office in town when they came in. I had conversations with them a year and a-half previous to the election with reference to Mr. *Laflamme*. My friends thought Mr. *Laflamme* was an enemy of mine, I was satisfied he was not, and I considered it my duty to tell my *Lachine* friends, of *whom I have many*, that Mr. *Laflamme* was not my enemy.

When *Clement* and *Deschamps* came into town (after the issuing of the writ of election) I asked them if they had made up their minds not to interfere against Mr. *Laflamme*, which I was satisfied they would not, from conversation I had with them previously, one of them a year before that, before Mr. *Geoffrion* got sick at all. They told me they would not interfere against Mr. *Laflamme*. I asked them to come and tell Mr. *Laflamme* so in his office. They came up and told Mr. *Laflamme* in my presence that they would not interfere against him. My object was that I knew they were politically opposed to him, and if they thought he was an enemy of mine, they would still be. I am satisfied my having told *Clement* and *Deschamps* that Mr. *Laflamme* was not an enemy of mine, tended to induce them

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not to oppose him. During the local election in 1875 I met *Deschamps*, who said there was a vacancy in the canal office, at *Lachine*, in consequence of the death of a sub-collector; that he had applied for the position on behalf of his son. Mr. *Laflamme* had refused it to him, he said, for the reason that he had not been a political supporter of his. I did not promise then to get a situation for his son. I did get a situation for him eight years ago. *Deschamps* appeared to feel bad against Mr. *Laflamme*. I told him I would ask Mr. *Laflamme* why he did not give his son the position, and if he would call in a few days I would give the answer. He called afterwards. I told him Mr. *Laflamme*'s reply was he could not give situations to opponents, whilst his friends wanted them. I was anxious to know if they would carry out their promise not to oppose Mr. *Laflamme*, as they were influential men. I thought it would tend to let him in without opposition. At the same time Mr. *Laflamme* never asked me to support him in any manner or form. I did this voluntarily, in consequence of a favor he did me in 1875. In the conversation with Mr. *Deschamps*, when he told me he would not interfere in the election against Mr. *Laflamme*, I took the precaution to tell him I did not wish him to have any misunderstanding relative to any conversation we might have had regarding his son *Clement*. He said it is not on account of any promise that we came here, " for you have not made any. I came here of my own accord; and if they ask me the reason I did not interfere in it, I will show an insulting letter, in my pocket, I received from one of the Local Ministers."

It strikes me that in May, 1875, or sometime in 1875, I told him there might be changes in the Department which would create a vacancy. I may have used language, when speaking to him in a friendly way, which would lead him to believe I would interest myself on behalf of his son, but not in the sense the question suggests—of making a direct promise to his son with reference to the situation. When at Mr. *Laflamme* office, I said, "this is Mr. *Deschamps* of *Lachine*." He said he knew Mr. *D.* very well. I said, " Mr. *D.* has come up with me, as I told him there was a possible election contest shortly in the county, and he did not intend to interfere in the election. Mr. *Laflamme* said he was thankful to him, and they got into a general conversation about a previous contested election.

I asked Mr. *D.* if his son *Jean Baptiste* intended to interfere in the election. He said *Jean Baptiste* could do as he pleased; he would not interfere.

When I saw *Israel Clement*, I asked if he would come up and tell Mr. *Laflamme* he would not interfere against him. I asked him in presence of Mr. *Laflamme* if he would be for him, and he said he

would not be against him. He told me afterwards he would be for him; this was between the time of Mr. *Geoffrion's* resignation and the issue of the writ for the new election. About a year before the election I sent word to *Israel Clement* to come in and I would try and get a situation for his son *Louis*. I saw him some weeks after. He said he did not want *Louis* to get a situation, as he wanted him to help him at *Lachine*. He said he had a very bad memory, but he kept the books very correctly.

I would have done the same thing in relation to *Clement*, if there was no election for two years. I took *Clement* to Mr. *Laflamme's* office, introduced him to Mr. *L.* Something occurred pretty much the same as in *Deschamps'* case. He said he would not interfere against him, only *Deschamps* was more positive he would not interfere in the election. I have never since the election told Mr. *Laflamme* that *Clement* or *Deschamps* wanted situations for their sons. I told Mr. *Laflamme*, when I brought them, that I was satisfied these two gentlemen would not oppose him, and I asked them to come up and tell him so. It was me that brought them up. Mr. *L.* never mentioned anybody's name to me. My object in having the personal interview was so that they would not interfere against him (Mr. *L.*) Question: To choke him? Answer: Unquestionably. These were the only two men whom I had canvassed for a year and a-half. I spoke to my friends in *Lachine* as occasion presented itself, telling them that Mr. *Laflamme* was not an enemy of mine. What I did I did of my own free will, and not prompted by Mr. *Laflamme*, to let him know that I could treat him honorably as he had treated me.

Clement Deschamps said:

He *voted* at the last election, but did not work. During the last local election, was the official agent of Mr. *Le Cavalier*. Before the last election, can't say how long, there was no mention of election at the time, Mr. *O'Neill* sent me a message to call at his office in *Montreal*. The first time I went to the city, I did so. I think he said to me he had heard that I did not intend to work in the coming election. Cannot swear positively I told him I would not work for one party or the other. He asked me to call at Mr. *Laflamme's* office. I said I had no business with him. He asked if I had any objection to go. I said not, and we went. He asked if my son was yet in the fur trade at *Labrador*. I think he asked me if I had applied for an appointment for my son. I answered him I had not. He asked if my son had applied himself. I answered yes, but he had not received an answer. I asked him if there were to be any changes in the government. He answered there was none, but if the Ministers thought proper to make changes in the spring,—they might do

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so. Mr. *O'Neill* told me, in case there would be a situation for my son, he would do his best as he had done in the past. This was said in the street in my carriage. We arrived at Mr. *Laflamme's* office. We waited there some time. Mr. *Laflamme* spoke for a time with Mr. *O'Neill* in my presence. He introduced me to Mr. *Laflamme;* said he had come to the office with me, knowing well I was not going to work during the contest. Mr. *Laflamme* asked me if it was certain I would not work neither for one side nor for the other. I answered him that I would not work. He asked me if I would vote. I said yes. I think Mr. *O'Neill* asked me if I would vote for the same party I always voted for, and I said yes. I don't remember that any mention was made at Mr. *Laflamme's* office of a situation for my son.

When it was decided that an election would take place, a meeting was called at *St. Laurent.* I went to that meeting of the Conservative party. A few days after that *O'Neill* sent me a telegram asking me to call at his office the next time I went to the city. I called at his office. He said he heard I was working, that I had been at the *St. Laurent* meeting. I said I was not going to deprive myself from going to any meeting, nor any where I pleased, and that I was only not to work at the election. (Don't think Mr. *O'Neill* or any one else would take the liberty of influencing me.) My son's name was not mentioned in the second conversation. Mr. *O'Neill* only wanted to find out if I was going to work in the contest.

I don't think this evidence sufficiently makes out a case of a corrupt offence, or intimidation, or of agency on behalf of *O'Neill.*

The impropriety of *O'Neill,* holding an important situation in connection with the canals, busying himself so far about election matters as to take electors to Mr. *Laflamme's* office has, in effect, been referred to when discussing the case of *Foley.* The fact that an active partizan at the recent local election had ceased to *work,* as the phrase is, was significant, and likely to cause grave suspicion; and, however imprudent it was on Mr. *Laflamme's* part to allow persons in the situation of *O'Neill* and *Conway* to bring parties to his office to be interrogated about election matters, I do not think what occurred sufficient to sustain a charge of an *illegal practice,* nor that there is sufficient evidence of agency if such charge had been sustained.

Hurtubise's case—As to getting appointed keeper of a light house.

I have gone over the evidence in this matter and see no reason to disturb the finding of the learned judge as to it. The evidence is conflicting, and *Belanger's* agency not sufficiently shown.

Boudrias' case:

The alleged offer of money by *Latour* at the lock in *St. Anne* is not stated by *Boudrias* himself to be corrupt, or for the purpose of corrupting him. He said:

I did not understand that it was with the intention of buying me over, I had no thoughts of it. * * * It is very probable that he would give it to me in this manner. If I did not return it to him he would have charged it on accoupt of what he owed me. I think that he offered it to me with that intention.

The offer was to give him money to pay his passage to *Lachine*. *Latour*, who is said to have made the offer, contradicted him.

As to the threat by *Lebau* about the shop, I do not think the evidence as to the threat satisfactory, and I infer that the learned judge who saw the witnesses did not credit the statements of *Boudrias* or *Dunberry* about the matter.

Cooke's case:

Richard P. Cooke, contractor on the *Carrillon* Canal, in his evidence said:

Mr. *Regis Cardinal* brought me a letter from Mr. *Laflamme* three or four days before the polling day. It was handed me on board the *Prince of Wales*. I was going down at the time. *Cardinal* was paymaster; was on his official duty at the time. The letter was introducing Mr. *Cardinal* as his friend, asking me to assist him at the election. Mr. *Cardinal* said it would be better to give the letter back to him, and I destroyed part of it. I met him first at *Carrillon*. I said I was going to *Montreal*, but I did not know what I could do in any case, as the men I had employed in the county were all French, and I could not speak that language. He said he would call at the hotel with Mr. *Laflamme* and see me next day. Mr. *Cardinal* asked me to do what I could to help him. He said if I did Mr.

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Laflamme would be able and willing to help me in my contract if I wanted assistance. He said he would call at the hotel next day with Mr. *Laflamme* and see me. I don't think there was any further conversation. I don't think I said I would take any part in the election. I said I would not do it. I had men in my employ at *Isle Bizard* quarrying and cutting stone. The foreman was Mr. *McAdam*. I told him I wished to keep out of the thing altogether; those were my instructions to him, at the same time he need not show that I did not want him to have anything to do with it. I had this conversation with *McAdam* the day before the election I think. We had about fifty men at the quarry where the conversation took place. I was aware *McAdam* was on Mr. *Laflamme's* side of politics, but I was not aware he was working. I don't think the men were paid for their work on the polling day. I was told in *Montreal* that *Cardinal* had been looking for me, but I did not see him there. Mr. *Perry* told me in *Montreal* he would meet me at *Ste. Geneviève*. I saw him there.

I preserved a portion of the letter, because I thought it suspicious looking that he wanted to get it back again. It was simply a letter of introduction, introducing *Cardinal* as a friend. My contract is a large one. It is, of course, a matter of some moment to me as to the terms on which I am with the government of the day. An offer like *Cardinal's* would be of considerable moment if carried out.

The only thing I said to *McAdam* was that I did not wish to be mixed up in it as a contractor, and my own natural feelings were the other way, and I did not know either of the candidates. I said, of course, you will be civil to them. I introduced him to Mr. *Stewart* as my foreman. As far as I was concerned the men were at liberty to do as they pleased. I brought no undue influence to bear on them. The letter was a letter of introduction, asking what assistance I could give in the contest. I suppose the usual kind of letters sent out during elections, introducing this gentleman as his friend, and stating that any help I could give him in the contest he would be thankful for. It was the third day before the election. He paid me on the day he gave me the letter for some coals the engineer had got. The meaning of *Cardinal's* words was that one good turn would deserve another, and that if I would help him then he would help me in my contract. The meaning was that he would be ready and willing to help me in my contract if I wanted help. I am not prepared to say whether it was *might* help at some future time.

Regis Cardinal, Paymaster of the *St. Lawrence* canals, said:

I did all I could at the last election. It is probable Mr. *Laflamme*

must have known it. I think it probable Mr. *Leopold Laflamme* knew it, and it was publicly known at *Lachine*, and in the county that I was working for him. Mr. *Laflamme* gave me a letter to Mr. *Cooke*, because I asked it from him. I was going up to pay the men on the *Grenville* canal at *Carrillon*, and I asked Mr. *Laflamme* for a letter of introduction to Mr. *Cooke*. My object in asking for that letter was to request Mr. *Cooke* to come down and help us if he was one of Mr. *Laflamme's* partizans. It was unsealed—a letter of introduction, in which he said to Mr. *Cooke* that I was one of his political friends. He did not ask Mr. *Cooke* in that letter to help me. My object in going to Mr. *Cooke* was to ask him what party he belonged to, and if he had been of our party to ask him to come down in the county and help us, seeing that he had a quarry at *Isle Bizard*. When I gave him the letter he shook hands with me, and after reading the letter said: "I will do all in my power to help him; I have a contract from the Government. Mr. *Laflamme* is a Minister, and I do not see why I should work against the Government. I have not much influence. I do not know whether the men working in my quarry are voters or not; I will get a list to see those who have a right to vote, and those who have not. I will do all in my power for Mr. *Laflamme*." Seeing he was so much in favor of Mr. *Laflamme*, I did not make any proposition to him. Mr. *Cooke* said he would like to be introduced to Mr. *Laflamme*. I said I would take him to Mr. *L's* office and introduce him, or I would arrange to have Mr. *L.* call on him and introduce him at the St. Lawrence Hall. The hour was fixed between 12 and 1 o'clock. I called on Mr. *Laflamme*, reported the interview with Mr. *Cooke*, and told him Mr. *C.* wished to be introduced to him. Mr. *L.* said "we will go and see him." I told Mr. *L.* that Mr. *Cooke* seemed to be in his favor, and that he had said to me he would be happy and pleased to make his acquaintance. It is likely I told him Mr. *Cooke* would do all he could for him. The day Mr. *L.* was to call on Mr. *Cooke* was the day fixed for a meeting at *Lachine*. A great many people came to Mr. *Laflamme's* office and detained him until he was obliged to start for *Lachine*, and could not keep the appointment to meet Mr. *Cooke*. I had before that been to the St. Lawrence Hall to report to Mr. *Cooke* that Mr. *Laflamme* was leaving by the 12 o'clock train. I did not say to Mr. *Cooke* that Mr. *Laflamme* might be of some use to him in his contract with the Government. I never alluded to his contract with the Government.

Cross-examined: I asked the letter of introduction to Mr. *Cooke* from Mr. *Laflamme*. It was unsealed. I asked Mr. Cooke to tear it up, for this reason, that a letter of introduction in election times—supposing

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Mr. *C.* would have shown it to his friends—might have given them cause to suppose I had gone up to Mr. *Cooke's* with the view to bribe him. I asked him that in my own interest, in order that no remarks should be made about my visit to Mr. *Cooke*. Mr. *C.* did not destroy the letter in my presence; he put it in his pocket. When I saw that, I did not insist upon his destroying it. I knew Mr. *Cooke* well enough not to mention to him what he said here. I swear positively that I made no promise whatever to Mr. *Cooke*; it was himself who said that he would be pleased to see Mr. *Laflamme*; that he had a contract from the Government, and that he did not see why he should not work for him, considering that Mr. *Laflamme* would be a Minister.

Perry's evidence:

He (*Cooke*) said he did not speak French, and did not think it was his proper place to interfere in the election. All I asked him to do was to allow the men to vote, and when I got that promise it was all I wanted.

If the learned Judge, after hearing the evidence and his attention being drawn to the surrounding circumstances, had decided that he believed the statement of Mr. *Cooke*, that *Cardinal* had asked him to do what he could to support Mr. *Laflamme*, and if he did, Mr. *Laflamme* would be able and willing to help him in his contract if he wanted assistance; and the learned Judge had rejected *Cardinal's* statement as not truthful, I should not, I think, have felt warranted in disturbing that finding—because it was shown that *Cardinal* had denied that such a conversation had taken place---on the ground it was simply oath against oath. It might be that the manner in which the witnesses gave their evidence and a consideration of the other circumstances induced the learned Judge to decide in that way. I think so much is due to the opinion of the learned Judge that, before it can be set aside, we must be satisfied that he is wrong. In a matter of this kind, when the two witnesses appear to be equally respectable, and they positively contradict each other, and the surrounding circumstances do not lead the Judges in the Appellate Court clearly to the conclusion that the decision

in the Court of First Instance is wrong, the Appellate Court ought not to interfere, though they might have decided differently if they had seen the witnesses.

If he had a reasonable doubt about the matter—believed both men to be honest, but one or the other mistaken (and he could not say which); in that state of mind, as it was thrown on the Petitioners to prove the case to the satisfaction of the Judge, and as it was not proven to his satisfaction, the Judge was bound to find as to it for the Respondent; or, in other words, if the evidence was equally balanced, he ought to find for the Respondent, as the presumption of innocency would naturally arise.

It is true, in one sense *Cardinal* may be considered as the party accused, and *Cooke* as the witness sustaining the accusation; that the party accused would wish to purge himself, and therefore his evidence must be viewed with suspicion. The same may be said of a person charged with perjury, as the late learned Chief Justice of the Court of Appeals in *Ontario* gives the illustration in one of the cases referred to; then it is oath against oath, and it requires further evidence to sustain the charge. The circumstances referred to by the Petitioners' counsel and in the factum go more to *Cooke's* general truthfulness than to his statement in the particular matter which requires confirmation, namely, the promise that Mr. *Laflamme* would aid him (*Cooke*). It is not at all improbable that Mr. *Cooke* felt that as he had no personal knowledge of either candidate, though probably he might have a preference, yet the contest was not likely to cause him to feel so much interest as to take an active part; and being ignorant of the French language, he could personally accomplish very little. He said he would not take part in the contest, and he did not, in fact, inter-

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fere; his conduct does not appear to have been influenced by anything *Cardinal* said.

When there is no result from an improper attempt at influencing, say a promise to give or do something, and nothing was in reality given, and no corrupt influence exercised, the evidence of the corrupt act, it is said, should be satisfactory beyond a reasonable doubt. I do not feel that on this charge, after the opinion expressed by the learned judge as to the uncertainty which prevailed in his mind, that we can properly say that he should have given faith to *Cooke's* statement and disbelieved *Cardinal;* and, if not, then I do not think we should reverse his decision in this matter.

It seems to me to have been, in the most favourable view in which it can be put, a very imprudent act for a Minister of the Crown to write a letter to a contractor soliciting his aid in a pending election contest, and still more imprudent to select as the bearer of that letter a subordinate officer in the employ of the Crown, a paymaster connected with the canals, whose active employment as a political partizan would naturally excite attention and create feelings of annoyance on the part of those against whom he was acting. I may be permitted to hazard the opinion, that the sooner the subordinate officers of the government act on the principle that they are not to be active politicians for either party, the better it will be for all parties.

Cousineau's case—as to treating and getting him a place:

I do not think on the evidence that the charge is sustained. The judge, no doubt, believed (and was quite justified in doing so) the evidence offered on behalf of the Respondent, and I don't think we ought to interfere.

Gravel's case:

Gravel says one *Gohier* gave him 25 cents. He said to

him, "if you hinder your father-in-law from voting, here is some money for that purpose," and on the evening before the election he bought some liquor and got his father-in-law drunk. *Laframboise*, another witness, said he was present when *Gohier* paid *Gravel* his wages for his week's work, and gave him 25 cents extra. When he received the money, *Gravel* said he would use it in making his father-in-law drunk, because his right to vote had been taken from him. *Gohier* said he could do as he pleased about that. I am not prepared to say that the view taken of this case by the learned judge is wrong. I see no reason for interfering with the decision.

Brunet's case:

Messrs. *Venance* and *Eustache Lemay* are charged with having taken electors from *Montreal* to *Ste. Geneviève* in their vehicle, with having treated and paid money to induce them to vote for Respondent. There were several persons in Mr. *Lemay's* waggon. One of the number, the witness said a stranger in the county, but whom Petitioner alleged was *Toussaint Meloche*, treated before setting out and afterwards produced a bottle of liquor and treated on the way. It is said he was the driver. On their return, after the voters had voted, they stopped at *St. Laurent*, but did not get off. *Meloche* asked if they had any money, the answer was they had none; then he put a half dollar in the witness's hand and said, "here is a half dollar, you can take a mouthful as soon as you will be out of the county, do not stop in the county to take anything." They stopped at *Cote des Neiges*, at a tavern outside of the county and took a drink. It was very cold. *Meloche* is now in *California*. *Lemay* was not in the wagon on the return, when the driver gave *Brunet* the half-dollar. He was present at the treating on the road. Another witness stated it was

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not *Meloche* who paid for the drink before they started. It was a man whom he had never seen or known who drove in the wagon with them, and the treat out of the bottle was handed them by the same man who had paid for the treat at the hotel. It was not *Meloche*.

I do not see any evidence to connect Mr. *Laflamme* with this matter. If it be contended that *Meloche* (the driver) was in Mr. *Lemay's* employ, and being under his control, if he treated electors, then, as Mr. *Lemay* was an active friend and supporter of Mr. *Laflamme*, and might be considered his agent, as he did not prevent the driver from treating, he, in effect, treated himself, and therefore Mr. *Laflamme* is liable to the extent of having the election set aside. It is by no means certain that *Meloche* was the person who treated. The witness who says it was not *Meloche*, speaks more decidedly than the one who says he thought it was *Meloche*. The learned Judge evidently believes it was the stranger (the unknown man), and not *Meloche*; and I am not inclined to differ from him. When the money (the half-dollar) was given for the treat on the way home, *Lemay* was not present, and therefore could not be held to be in any way connected with that matter.

It is doubtful if the treating would be considered as contrary to the intention of the Statute already referred to and discussed.

Ste. Geneviève Quarry case:

As a matter of fact, it is not shown that any man who worked in the quarries was influenced by the alleged threats that they would be dismissed if they voted against Mr. *Laflamme*. Most of the voters to whom the language is said to have been addressed actually did vote, and those who did not state that they were not in any way influenced by what *St. Denis* is alleged to have said. Then there is the direct denial of *St. Denis* as to having used the language which some of the wit-

nesses say he used; and several of the parties who worked in the quarry, who were addressed at the same time by *St. Denis* as those who gave this evidence, confirm the statement of *St. Denis*, that he wanted to ascertain for whom they were there; that is, for whom they intended to vote, not for the purpose of influencing them (as they were told they could vote for whom they pleased), but with a view of ascertaining who were voters and for whom they intended to vote. Mr. *Lanthier*, who does not appear to have been a partizan, as well as several of the quarrymen, confirm *St. Denis'* statement as to what occurred in his and their presence.

All the witnesses seem to have known that *St. Denis* had no control of the men in the quarry; and all the workmen, as I understand, concur in the statement made by *St. Jean*, who was the man in charge, and who, it is contended, was also an agent of Respondent, that he told the workmen to vote as they pleased. "Go and vote for whom you like—you are not hindered." "Vote for him you think best." To one elector, who said he intended voting for Mr. *Girouard*, he said, "vote for whom you like; but you must vote." It is suggested that *St. Jean* in this matter was not acting in good faith; that though he used the language indicating that any man should vote as he thought right; yet, he really meant them to understand if they voted against Mr. *Laflamme*, they would be dismissed from the quarry. I cannot say that I am free from doubt, as to the fact that *St. Denis*, at some time after the election was spoken of, may have said or done something to intimate to the parties working at the quarry, that if they voted against Mr. *Laflamme* they would be dismissed. But, whatever he may have said or done, I do not think that any threat made by him operated on the minds of any voter, so as to influence him to vote or not to vote at the time of the election.

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The evidence of what took place at the house of *Legault*, when *St. Denis* was addressing *Rodin*, puts a different phase on the transaction from what *St. Denis* himself states it to be; but this conversation occurred some time before the polling, when an excited discussion was going on between them. It does not appear to have had any effect on *Rodin*, for he continued to work at the quarry, and left when the cold weather set in, probably after the election, and he voted at the election. I am not disposed to set aside an election on a threat made under such circumstances, which alarmed no one or produced no effect.

In setting aside an election, it is always more satisfactory to place the ground of your decision, if possible, on a basis more free from doubt than I think it would be on this latter charge, as to the conversation with *Rodin*.

But considering the whole evidence as to these threats, alleged to have been made as to dismissing the men from the quarry, and suppose it be admitted that *St. Denis* did threaten that the men should be dismissed unless they supported Respondent, he not at the time having power to dismiss, and his threat, in fact, known to be powerless and really causing no apprehension, and then Mr. *St. Jean*, who really possessed the power, and who, it is contended, was an agent of Respondent equally with *St. Denis*, assured the workers in the quarry that every man was at liberty to vote as he thought proper, and every man did so vote, would it not seem to be a straining of the law beyond all reasonable limits to set aside an election on that state of facts. I think I should hesitate in doing so; but when, in addition to that, it is by no means clearly shown from the evidence that either *St. Denis* or *St. Jean* was an agent of the Defendant of the kind necessary to justify us in holding the election void for *St. Denis'*

improper act, I should further hesitate as to setting aside the election.

I have gone over the evidence very minutely, and after giving it my best consideration, I can only say that I do not feel that I can properly set aside the election on this charge.

Pointe Claire case—As to the attempt to induce men to go to Pointe Claire to work, so that they might not be present to vote at Ste. Geneviève:

As a matter of fact no voters were sent to work there, and if they had gone there to work, it appears from the evidence, that it was so near the polling place, that if they had desired very much to work and to vote also, they could have gone and cast their votes and returned to their work within the hour allowed them at noon. As indicating the improper attempt to influence these men, it was suggested that there was no such necessity of proceeding in haste as pretended, that the work at *Pointe Claire* was not commenced until long after; but the evidence shows that that work was begun on the th6 December, and the election was on the 28th November—not very long before. It is not improbable that there was some intention of trying to do what was suggested, but there was nothing done; and if the men had actually been sent there, the reasonable inference is, that if they had really desired it they could have voted without losing any time. One of the men was not a voter; he declined going to *Pointe Claire*, because he wanted to be at the polling; he liked to be there. I am not prepared to avoid the election on what is said to have occurred about sending the voters to *Pointe Claire*, through the instrumentality of *St. Jean* and *St. Denis.*

Ouellette's case:—

From the evidence relating to this case, I understand that some time in April, 1876, Mr. *Caisse*

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the postmaster at *Lachine* resigned his office, and Mr. *Robert* was offered the situation. He was inclined to refuse it, but his father-in-law, Mr. *Paré*, wished him to accept it for the the purpose of giving employment to *Ouellette*, another son-in-law, who was in comparatively indigent circumstances. *Robert* agreed to do this; but for some cause *Caisse* withdrew his resignation, and Mr. *Laflamme* asked Mr. *Robert* to withdraw his acceptance, which he did, and it was said amongst his (*Ouellette's*) friends that a better place would be procured for him. After this, probably in the month of May, *Robert* asked Mr. *Laflamme* to do something for his brother-in-law *Ouellette*—to procure a place for him. Mr. *Laflamme* on that occasion, I presume, as well as all other occasions when he spoke on the subject, said, as *Robert* puts it:

> He would think of me, and if a vacancy occured, he would do his best for me.

At this time nothing was said of the *Paré* family. There is no doubt, that Mr. *Robert* was a warm political, if not personal, friend of Mr. *Laflamme*, as well as his client, and that it is more than probable he would feel inclined to carry out the wishes of Mr. *Robert* in a matter of this kind. There could be no objection to it on political grounds, for I infer that *Ouellette* was politically in accord with Mr. *Laflamme's* party, and there is no reason to suppose that in acceding to Mr. *Robert's* request there would be a corrupt motive. It has never yet been seriously contended, that a member of Parliament, who wishes to aid a warm political and personal friend in the procurement of an office for himself or a friend, must, in doing so, necessarily be considered as guilty of a corrupt act. In fact, if he refused to aid a political friend, when the request that was made to him to do so was reasonable, his refusal would suggest the idea that he was becoming false to his

friends and his party, and it might be charged against him that he was then acting from corrupt motives. Up to this time, I apprehend, what was said by Mr. *Laflamme* would not be considered improper. Afterwards, *Robert* says, that in again speaking to Mr. *Laflamme*, he suggested that if he got the appointment for *Ouellette* it would greatly please the *Paré* family ; that it might be useful to him later on ; it might, perhaps, prevent their voting at the coming election. *Laflamme's* answer, as stated by *Robert*, was :

He would think of me ; and if a vacancy occurred, he would do his best for me.

It is not clear the exact time this particular conversation took place. At first, in reply to a question, *Robert* said it was during the election ; at all events, it was at the time the election was spoken of. Then immediately following, he says :

Mr. *Laflamme* did not tell me that it was probable there would be an election, nor did I say so myself.

Further on, when asked, " when you told Mr. *Laflamme* that the *Paré* family might be useful to him, did you say so at the time of the last election ?" he answered, " yes." The next question was :

When you had that conversation with Mr. *Laflamme*, did you understand he was a Minister, or was to become one ; and that there was to be a new election ?

The answer was :

Yes ; but there was then no question of the *Paré* family.

Then followed the question as to the date he spoke to him about the *Paré* family. The answer was :

I cannot say positively ; but it was four or five weeks before there was question of the election. *It* was a matter discussed in the County and out of the County.

"*It*," I suppose, means question of election.

He said :

During the election and during the public discussions had no conversation with Mr. *Laflamme* concerning the same subject.

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There seems some ambiguity about this. Now, turning to Mr. *Laflamme's* account of the matter, he says:

> Mr. *Placide Robert* is one of the most honorable men in the County. He had asked me, not during the election, but many months before —I believe, so far as my memory goes, a year before there was any talk of election—to try and secure some office, or position, or occupation, with a light remuneration, for his brother-in-law (*Ouellette*). I told him I would consider his claims; that he was one of my best supporters; and if I found any occasion when it could be possible for me to support his claim, I would do so. The thing remained in that way; *and previous to the election, particularly*, there was never one word said or breathed on that subject between Mr. *Robert* and myself. I never asked him to use this promise; and never intended to do so. It was merely because he was a personal friend of mine, and a man of respectability and importance in the County, that I promised to consider his claim, as I was justified, as the representative of the County, in doing. He was one of my best supporters; and, I think, I was in duty bound, when occasion offered itself, to give him a situation such as he desired for one of his relatives. During the contest, I carefully avoided even allowing myself to speak about any situation or office.

I suppose, by the expression "previous to the election," is meant immediately preceding the election which took place in November. An election might have been talked about, as no doubt it was, before that, but Mr. *Laflamme*, from what he says, does not seem to have anticipated, until October, that an election would take place from his acceptance of office.

The evidence does not show, nor is it contended before us, that the influence it would exercise on the *Paré* family to give *Ouellette* an office, was referred to in any way by Mr. *Laflamme*. It was a suggestion made by *Robert*, and may have been made to induce Mr. *Laflamme* to give the office. It was the procuring of the place that was to influence the *Paré* family—not the promise to do his best to procure it. Mr. *Laflamme* does not, in any way, appear to have desired *Robert* to tell the *Paré* family of his assurances as to what he would do. As he had given the same assurance before the *Paré*

family were mentioned, he might have supposed *Robert* had spoken of it, and that they had knowledge of it; and it might not, therefore, have occurred to him to have said to *Robert* that the pleasing of the *Paré* family was not the motive which induced him to promise to use his efforts to get a place for *Ouellette*.

I can well imagine a public man, having promised a political friend and supporter to endeavor to procure an office for another friend, meeting with him, and the matter being referred to and spoken of between them, the latter saying, in the course of conversation: "It will be a good thing if the applicant gets the office; he is a popular man, well liked, and his selection will please his friends and strengthen your influence." The fact that it is called to his attention: that the result of that which he has promised to try and do for the purpose of gratifying his political friend may bring him more influence, ought not to prevent him from doing that which he has promised to do, and which he promised to do from quite another motive. His carrying out his original promise could not fairly be charged against him as a corrupt act. The promise Mr. *Laflamme* made—at the time it was made—was unobjectionable. Can what occurred afterwards, on his saying in effect that he would do what he had promised to do before, (and which we have no reason to suppose he would not have done, if it had not been suggested it might please the *Paré* family) be a corrupt act, unless he intended it to corrupt them, and intended that they should be informed of his promise for that purpose. I think, to hold this against a man who, under oath, denies such intent, would be dealing harshly with him, and not according to the spirit in which the Statute has been interpreted.

Mr. *Laflamme's* statement, under oath, is that he never asked him to use the promise; never intended

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him to do so ; and if *Robert* used it, as he appears to have done, for corrupt purposes, Mr. *Laflamme* ought not to be found guilty of the corrupt act, if he did not intend that use to be made of it.

The matter then assumes this form: When Mr. *Laflamme* first made the promise it was unobjectionable, as a promise made to a political friend to oblige him, and was harmless and not improper. When referring to the matter again, a reason was suggested, for doing the act he promised to endeavor to have done, which might make the act a corrupt act, if done for the corrupt reason. Mr. *Laflamme*, in effect, swears it was not for the corrupt reason, but to gratify a political friend and supporter who had claims to his consideration.

Must we then necessarily assume the reason for making the promise was a corrupt one?

In an election case tried before me in *Ontario*, it appeared that meetings were frequently held in public houses with the knowledge of the Respondent, and it was contended that the holding of such meetings so often and in so many public houses was calculated and intended to make the proprietors of these houses give their support and influence to the Respondent; that these were corrupt acts to Respondent's knowledge, and that he should be declared guilty of them. The Respondent, in giving reasons for holding these meetings at public houses, and so frequently, said, amongst other things:

> The calling of meetings at public houses was to have people to talk to. Innkeepers are, of course, a power in these localities, and that may have been a reason amongst others for holding meetings there, and another to prevent the other side from getting them.

He was not aware of any meetings of his friends at any inn where the party was not a supporter of his. He said,

> Of course when you get a supporter, you want to keep him.

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In another part of his testimony he added:

I did not consider holding meetings in the taverns and paying for the use of the rooms would be a violation of the law.

In disposing of the question being a corrupt act, I came to the conclusion that there was a legitimate motive for hiring the rooms, though there might have been other motives not so legitimate influencing Respondent and his friends, if they had stood alone.

Baron *Bramwell*, in his judgment in the *Windsor* election case (1), to which I referred in the case before me, laid down the doctrine: that there is no harm in it, if a man has a legitimate motive for doing a thing, although in addition to that he has a motive which, if it stood alone, would be an illegitimate one. I am not aware that the view that I took in the case to which I have referred has been disapproved of in any way, or that the doctrine laid down in the *Windsor* case has been questioned in any subsequent case either in *England* or this country. It is mentioned and not disapproved of in one of the latest works on the subject of elections.

Now, here I think the Respondent had a perfectly legitimate motive in promising *Robert* to try and get an office for his brother-in-law,—his desire to please a political friend and supporter. He does not, as the Respondent in the case tried before me, suggest another motive which might be questionable, but, on the contrary, as I understand his evidence, he repels any such imputation.

I see no reason to change my opinion as to the doctrine I acted on in the case I have referred to, and I therefore think the charge that the corrupt act of *Robert*, in relation to the votes of the *Paré* family, was not a corrupt act committed with the knowledge and consent of the Respondent.

(1) 31 L. T. N. S. 135.

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The next question is, was it a corrupt act on the part of *Robert?* He says:

I reported to the *Paré* family simply what I had said to Mr. *Laflamme*, and what he had replied to me.

Keeping in mind that what he had said to Mr. *Laflamme* was "It would greatly please the *Paré* family if he could procure a place for *Ouellette*; that, possibly, it might be useful to him later on; it might, perhaps, prevent them voting at the coming election; and Mr. *Laflamme's* reply—"he would do his best for him";—afterwards, and during the election—during the time of the meetings of the candidates at the church doors—*Robert* asked the Messrs. *Paré* their opinion. They said they would vote for Mr. *Girouard*, but that they would not make use of their influence. *Robert* says:

I told them it would be better not to vote, as they wanted a place for *Honoré Ouellette.*

Q. Did Mr. *Robert* tell you anything relating to your vote? A. He told me it was best not to vote, in order to get a place for *Honoré Ouellette.*

Further on, he said, in answer to a question of how many days before the polling *Robert* told him it was best not to vote, to get a place for *Ouellette*, he answered:

I do not know that he spoke of that to me. I told my sons it was better not to vote, as we wanted to get a place from Mr. *Laflamme.* One of the three of us voted.

He is again pressed as to *Robert's* having told him it was better for him not to vote. His answer is:

I have no knowledge of that; it is myself who said so to my sons.

This does not seem to be the same matter or time referred to by *Robert*, who says he made the statement in reply to a suggestion made, that they would vote for Mr. *Girouard*, but not work against Mr. *Laflamme.* The fact that he (the elder *Paré*) also made the suggestion,

can make no difference, if it arose from the act of *Robert* putting it as an inducement to vote, or not to vote, that the place for *Ouellette* would be in jeopardy.

Alphonse Paré states he did not vote at the last election; and explains the reason why. After referring to Mr. *Robert's* conversation with Mr. *Laflamme* about the place for *Ouellette*, and his writing to Mr. *Laflamme* about it also, and stating they would not use their influence against him if he would give *Ouellette* a place, he adds: "But we did not say we would not vote." He then says:

> At the time of the election Mr. *Robert* told us it would be better not to vote. We told him that we would vote. He told us: "Do as you please; they will use your votes as an objection to give Mr. *Ouellette* a place." That is the reason why we did not vote at the last election.

He then says, they were known at *Lachine* as Conservatives, and had great influence there. Further on in his examination, in reply to a question, if Mr. *Robert* at the time of the election spoke to him about his vote, the answer is: "He spoke of it to my brother, and my brother told me." He further says:

> Some two or three weeks before the polling day—after what my brother had told me—I said to *Robert* I wanted to know if our *abstention* from voting was required. He told me to do as I thought fit; but that it was better for us not to vote. By those answers, I imagined that the fact of our voting would be an objection to Mr. *Ouellette* getting the place. The question came also before the family circle of which Mr. *Robert* was a member; and he told us about the same thing. It was referred to in the family circle a second time, a few days before the election.

There is no doubt two of the *Parés*, in consequence of what Mr. *Robert* said to them, abstained from voting, and the motive restraining them was the expected place for *Ouellette*.

The fact seems to have been presented to the minds of the *Paré* family from the beginning, from what

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Robert said to them, that their conduct in relation to the elections would have an effect in getting the place for *Ouellette*. Can there be any reasonable doubt that he intended it should have that effect? He was a strong friend and partizan of Mr. *Laflamme's*, anxious for his election, and he himself first suggested that their conduct as to election matters might be influenced by *Ouellette's* getting the office; and he seems not to have omitted presenting the fact to them whenever a convenient opportunity occured of doing so. The significant question put him, if their abstention from voting was required, shewed the impression that the language and conduct of *Robert* had produced on their minds, and it had the effect of preventing their voting. I do not doubt, therefore, the act was corrupt and within the meaning of the Statute.

Ouellette himself had the idea that his father might be influenced in his conduct by the expectation of his son getting a situation, and the son warned him against working for Mr. *Girouard*, as it might injure his prospects. Two of Mr. *Laflamme's* prominent supporters also stated they had heard the elder *Ouellette* was not to work very hard during the contest, shewing, for some cause, not unlikely the expectation of the office for *Ouellette's* son, they thought the elder *Ouellette* was not intending to exert himself against Mr. *Laflamme*.

I think *Robert's* assurance that Mr. *Laflamme* had promised would have probably satisfied the *Pares* without informing them that he had told Mr. *Laflamme* he thought it would have an effect on their voting. I think it not an unfair inference from the evidence that from the *first* his object in referring to their voting was to induce them not to vote. In any view in which the subject was presented to the *Parés*, it was with a corrupt intent. There was no other reasonable ground suggested to them to abstain from voting, but the in-

fluence it would have on *Ouellette's* getting the situation; it was many times pressed upon them with that object. If some other motive had been presented to them which was legitimate and proper, and in addition it had been said their doing so might also have a good effect as to *Ouellette* getting the office, then it might be urged that there was a legitimate motive presented to them. But that is not so now, but the corrupt motive was presented and it had the effect intended.

From beginning to end, as far as the *Parés* were concerned, the motive as presented by *Robert* was illegitimate and corrupting in its tendency, and I think he should be bound by it, and Mr. *Laflamme* also, if he was his agent.

If Mr. *Laflamme* had directed *Robert* to say to the *Paré* family: "if you will abstain from voting at the coming election, I will endeavour to procure a place for *Ouellette*," there can be no doubt but that would have been a corrupt act which would have set aside the election and disqualified Mr. *Laflamme*. Was what was done by Mr. *Robert* not, in effect, the same thing, though not authorized to say what he did by Mr. *Laflamme*.

As to Mr. *Robert's* agency—Mr. *Laflamme* in his evidence says:

> The moment I was called upon to come before my constituency, the different friends who offered their services were informed by me, in the most imperative manner, to avoid anything in the style of treating, or promises, because I was surrounded in every direction by people who wanted to secure the election by this means or that means. First, I selected an agent from outside of the County, Mr. *Adam*, knowing that he would be well surrounded by witnesses in my office, and I disclaimed to have any connection with any other party than him. Some friends, without my knowledge and concurrence, organized a committee of volunteers to assist me in the election. They formed themselves into a committee at the *National* office. I never set my foot inside of that committee room, only after the voting had taken place, after I had returned from *St. Laurent*, on the polling day, and when I waited the returns of the different

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polls. Whoever was employed in that election besides Mr. *Adam* was employed without my knowledge. The only person I asked to come with me into the County was Mr. *Eustache Lemay*, because I determined to have a witness with me wherever I went in order to avoid any false testimony being brought against me on any subsequent period. Mr. *Lemay* was the only man, except on one or two occasions, when I had to take some other gentlemen.

In another part of his evidence he speaks of leaving *Belaire* with Mr. *Doyon*. I do not know if the learned judge before whom this petition was tried entertained the opinion that Mr. *Laflamme* had no agents in this election, whose conduct, if corrupt, without his knowledge, would justify setting aside the election. From a careful perusal of his judgment I do not infer that he entertained that opinion. He speaks of *Cousineau* as a spy, who went to *Migneron's* to endeavor to compromise Mr. *Laflamme's agents*, who were there. These persons referred to as agents were Messrs. *Madon* and *Forget*. *Forget* says he was sent to *St. Laurent* to prepare the lists and helped to organize the *two* committees, and young *Madon* helped him. *Forget* speaks of *his instructions* as to compromising themselves as well as Mr. *Laflamme*, and appears to have represented Mr. *Laflamme* on the day of polling. The learned judge also speaks in respect to corrupt acts alleged to have been committed by agents; not that the parties could not be agents, because Mr. *Laflamme*, under the circumstances, could not have any agents but those named by himself; but the fact of a person being an agent is not clearly established. He refers in a part of his judgment to the full opportunity given to the petitioners to enquire into all the details of the election, and says: "They have entered the private apartments of the Respondent, into *his committees*. They have visited the offices of the telegraph company and brought hither its employees." It seems to me the learned judge must have had the impression that Mr. *Laflamme* must have had some committees,

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the members of which aided him in his election, and, if so, I think the doctrine is pretty firmly established — if he takes the assistance of the members of a committee, he must be responsible for their acts to the extent of having the election set aside if those acts are corrupt within the meaning of the law applicable to elections.

I think we may assume, as a fact, that a contested election in this county, extending, as I understand, from *Lachine* to *St. Annes*, containing some populous villages, could not be conducted by a candidate with any hope of success unless there was some kind of organization amongst his frends to ascertain who were the voters—the probability of the contest being a close one—to ascertain if their friends were likely to turn out on the day of election; to make efforts to give energy to the indifferent; to watch their opponents; to see that no improper efforts were used to induce their friends to absent themselves from the polls, or to vote against them; and to see that all reasonable and proper efforts were used to secure the attendance of their friends at the polls on the day of voting. Mr. *Laflamme*, personally, made no attempts at an organization of this kind. It does not appear that he had any committees in the different parishes to canvass votes, or in whose hands *he* placed lists; or, where the ordinary precautions were taken to detect bad votes, to ascertain who had votes, and to prevent fraudulent voting, unless the committees that were organized, as far as we can see, by persons sent from the Central Committee, were his committees for the purposes I have mentioned.

I do not understand Mr. *Laflamme*--when he uses the language: "Some friends, without my knowledge and concurrence, organized a committee of volunteers to assist me in the election; they formed themselves into a committee at the National office"—to mean that he did not know, before the polling, that such an

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organization existed; but rather, that they formed the organization "without his knowledge or concurrence," and that afterwards he did not visit it during the election and had not knowledge of those who were *employed* in the election.

Mr. *Doyon*, who was sent by the Central Committee in *Montreal* to *Ste. Geneviève* and *Isle Bizard* to organize the contest, communicated with Mr. *Laflamme* before going, and his expenses were paid by Mr. *Laflamme's* election agent. He also met Mr. *Doyon* there. It seems to me he must have known that Mr. *Doyon* was acting on his behalf there. He was not an inhabitant of the parish, and had been sent from *Montreal*. I think, therefore, that it is the proper inference to draw, that Mr. *Laflamme* must have known that there was some organization for the contest, and that it must have been made through his Central Committee.

If he did not intend to rely on the efforts of this committee to aid him in his election, why did he not have an organization of his own different from that? If he did not intend to avail himself of the assistance of these *volunteers*, as he calls them, why did he not provide other and more legitimate assistants to do the work? If he had, then he might possibly have held these volunteers at arms-length (as the phrase is sometimes used), and so not have been answerable for their acts. It seems to me, if we hold that a candidate may in this way do nothing to secure his own election, when he knows that *his friends* are organizing for the purpose of doing that which he has a direct interest in seeing properly done, with a view of his being elected, that he must be held as placing himself in their hands to the same extent as if he had himself been present at, and aided in, the organization.

If we hold that a candidate, elected through the efforts of a committee thus formed and acting, can retain

his seat, when the persons selected by them to organize the contest and conduct it to a close have been guilty of corrupt acts, I think the rule considered so essentially necessary to the purity of elections, that a candidate shall not avail himself of the services of those persons, (call them agents, or what you please) unless he is responsible for their corrupt acts, will be of little or no use in preserving the purity of elections.

In that state of the law, all that would be necessary for a candidate to do would be simply to appoint one agent to pay his bills, and let his friends do the rest—organize committees, name canvassers and others to assist in managing the election and bringing it to a close ; and then, if corrupt acts are done by these active and necessary conductors of the canvass for his benefit, he is not in any way to be put to inconvenience ; and unless a sufficient number of corrupted votes can be discovered and struck off from his side, he will retain his seat. I think this would be a very undesirable state of things to exist.

Besides this, I do not consider the candidate the only party who is interested in the result of the election, independent of the broad ground that the public have an interest that no candidate should be returned by undue means. His friends, or his political party, are also interested ; their zeal ought not to be encouraged to run into corrupt channels ; and considerations of public policy will be served in shewing the friends of a candidate, or a party, that they cannot insure success by improper means used by agents for their candidate, though such agents have been selected by them for him instead of being selected by himself.

Can Mr. *Placide Robert*, then, be considered a person for whose acts, if corrupt, Mr. *Laflamme* can properly be considered responsible, so far as to warrant the election being set aside ?

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Let us first see what Mr. *Robert* says himself. As to agency, *Robert* says:

Q. Did you take much interest in the last election? A. *Pretty much*, spoke to voters about their votes in many instances. I made reports to Mr. *Gariepy*, to Mr. *Cardinal*, and, I believe, to Mr. *Prevost* also. I attended election committees. Not all, but some only. My name was put on one of the committees as one of the members, and I attended now and then. I attended three or four sittings of the committee. I met *Wilfred Prevost* and Mr. *Gariepy* also, Mr. *Cardinal* once. It was a private committee, but was attended by Conservatives as well as Liberals, the door was opened to all. We used to check the list of electors, which I helped to do. I *was at the organization of that committee*; was a member of it from the time of its organization, but only attended three or four times as I remember. To the best of his knowledge they had neither President or Secretary. We prepared lists; cannot say they were intended for canvassers, but they were for men who called on the electors and solicited for their vote. We had printed lists of electors at one time, and we checked the same at the committee. We got the list at the committee room—the list of the voters for the town and parish of *Lachine*.

Cross-examined:—Q. Were you requested to act as you did, or did you act from your own accord? A. I have acted from my own free will. Q. Were you considered an election agent? A. I think not. Q. You acted without being requested by any one? A. I was never asked by any agent to use my influence. Q. Amongst the persons who were there, did you see any political opponent? A. All those who were present were above suspicion. From what I saw, Dr. *Lefebre* worked a good deal during election. I *think he belonged* to the *committee*. I cannot say if he canvassed votes. I have myself driven a vehicle on the day of polling, and I brought in some voters for the party.

Dr. *Lefebre* stated he was Secretary-Treasurer of Mr. *Laflamme's* committee at *Lachine*. He speaks of receiving $30 or $40, as coming from the Central Committee at *Montreal*, through Mr. *Leopold Laflamme*.

Mr. *Gariepy* solicited votes for Mr. *Laflamme*, who must have been aware he was working for him. Mr. *Gariepy* said: "I must tell you it was an understood affair between us."

Mr. *Jetté* was president of Mr. *Laflamme's* General

Committee at *Montreal.* Amongst other subscribers to the fund to pay expenses of the election, Mr. *Wilfred Prevost* has subscribed $100. These subscriptions were made without the knowledge of the candidate. Of these monies received by him, he gave Mr. *Adam* $340 and paid $50 to deposit with the Returning Officer. $200 more were paid *Adam* of the funds subscribed as above, but not directly by Mr. *Jetté.* Mr. *Jetté* thinks from $500 to $600 were subscribed and paid through the committee to aid Mr. *Laflamme.* The committee corresponded in *Ste. Geneviève* with Mr. *Doyon. Rodrique* was considered a messenger not an agent at *Ste. Geneviève.*

I have already referred to *Doyon* having been sent to *Ste. Geneviève* and *Isle Bizard* by the Central Committee *to organize the contest;* and also to *Forget* and *Madon* helping to organize *two committees* in *St. Laurent;* and *Forget* was also paid his travelling expenses for representing Mr. *Laflamme* on the day of polling.

Mr. *Wilfred Prevost* took a very active part in the election; was not entrusted with the *general organization* of the election; had not special charge of the several parish lists; had *special charge* of the *town* and *parish* of *Lachine.* He said he did not recollect of seeing *Jashman Belanger at the committee rooms,* his absence was felt there. Mr. *Prevost,* it will not be forgotten, was a subscriber of $100 to the fund raised by the Central Committee, and, no doubt, was a member of it.

Mr. *Bienvenu* was Secretary of the *Central Committee* at *Montreal.* There were other parties who, it was probable, were sent by this committee to aid in some way in the election, and they were afterwards paid their expenses through the election agent.

I think we, from this evidence, must assume that Mr. *Laflamme* had a committee at *Lachine,* and it was organized through the means of the Central Committee,

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probably by Mr. *Prevost;* that Mr. *Robert* was one of the members of that committee from its organization, attended its meetings, assisted as much as he could as a committee man; list of voters were there made out for canvassers, or, as he says, for men who called on the electors and *solicited for their vote.* Mr. *Robert* was not a mere clerk there, he was a member of the committee. Mr. *Laflamme* speaks of him as being one of his best supporters. He (*Robert*) speaks of making reports to *Gariepy*, who was especially a friend of Mr. *Laflamme*, and who it was understood (between him and Mr. *Laflamme*) was to work for him; to Mr. *Cardinal*, no doubt equally in his interest with his knowledge, as Mr. *Laflamme* had given him a letter to Mr. *Cooke*; and Mr. *Wilfred Prevost*, who, I assume, was the organizer of the committee; and that *Robert* met him at the committee. It seems to me, that Mr. *Robert* was an active, energetic and *trusted* supporter of Mr. *Laflamme;* and if the Central Committee could give him authority to act, as I think they could, he must surely have had authority.

Mr. *Leopold Laflamme* says *Robert* took a part in the contest in the interest of Respondent, who could not well help knowing it; that he was certain he was a devoted partizan of his brother.

I shall refer to a few of the election cases decided in *England*, as shewing the general grounds on which the question of agency is discussed, and the conclusion which is arrived at; that no *certain* rule can be laid down as to what constitutes agency, and that the uncertainty arises from the different conclusions that may be drawn from the evidence when it is presented to different minds. The *common sense* of the Judge, so frequently referred to by Lord *Blackburn*, not being regulated by a fixed standard, does not conduce to uniformity of decision. The views of the Judges, in some

of the decided cases, as to the *sufficiency* of the evidence to establish agency, would justify a difference of opinion on the question whether the Petitioners have proved enough to establish *Robert's* agency in this case. To some minds, the facts necessary for that purpose may appear not to have been sufficiently brought out on the trial. I think differently, and that the weight of authority and of reason sustains my view.

As a Judge, I have no doubt if the matter were triable before a jury, that there is evidence as to *Robert's* agency, which it would be necessary to submit to the jury. Then, sitting in place of a jury, I must say the evidence to which I have referred satisfies me beyond a reasonable doubt that *Robert* was Mr. *Laflamme's* agent; and that the latter knew—or must, under the circumstances of this case, be presumed to have known—that he was acting in that capacity for him and on his behalf.

In referring to election matters, I think it may be stated as an axiom, that the law of bribery, and in relation to corrupt practices, is not framed so much with the object of punishing the briber as to secure purity of election.

The question as to agency in election matters was a good deal discussed in the case of *Duffy* v. *Ryan*, in the Supreme Court of *New Brunswick* (1); and my brother *Ritchie*, in giving the judgment of the Court in that case, refers to many of the cases where the question of agency arose.

In the following extracts, which I have made from the decided cases, I have had more thought of the general principles laid down than of particular circumstances of each case, as it is so manifest that as to this matter of agency each case must, as already intimated, be decided on its own peculiar circumstances.

In the *Norwich* case (2), heard before *Martin*, Baron,

(1) 3 Pugsley 110. (2) 1 O. & H. 10.

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this doctrine was laid down, which I think is now firmly established, that the law of agency which would vitiate an election, is utterly different from that which would subject a candidate to a penalty or indictment; and the question of his right to sit in Parliament has to be settled upon an entirely different principle. The relation is more on the principle of master and servant than of principal and agent.

In the *Hereford* case (1) Lord *Blackburn* uses this language:

> It would not be possible to unseat a person for corrupt practices, if he were permitted, by the means of persons who acted for him, or who brought him forward, either one or the other, to obtain the benefit of their aid, if he were not to be also responsible to the extent of losing his seat for the corrupt practices that were done by them for his benefit. That is one of the great reasons for which, as a matter of public policy, it was thought necessary in order to correct corrupt practices to establish that principle. * * * I apprehend that, in a case where corrupt practices are shewn which the candidates themselves are not cognizant of, you must bear these two principal reasons in mind; and then, exercising what may be called common sense, you must see does the particular corrupt act come within the rule as an act done by an agent. If it does not, then though the person may have been canvassing the town or speaking on one side or the other; still we could not say the candidate should be unseated on that account. Every bit of canvassing and acting for a candidate is evidence to show agency, but the result cannot depend upon any present rule that I could define. It comes to be a question of degree, of more or less, and of common sense. It happens that from the nature of things, when you come to a question of degree, of more or less and of common sense, and leave it in that way to a jury, if there were a jury, the jury would determine it sometimes in one way and sometimes in another. Unfortunately, when judges are obliged to be judges of that question of degree and common sense, there is this unavoidable uncertainty, because it is quite clear that the common sense of one judge will differ from the common sense of another. To use the old simile that was used by Mr. *Selden* many years ago, and which is none the worse for being old, the standard of common sense would be as

(1) 1 O. & H. 194; 21 L. T. N. S. 119, 120.

uncertain as a measure of length, the unit of which should be the judge's foot; because one judge's foot would be longer and another shorter. We cannot help that. I wish with all my heart that the Legislature would find out some test to relieve us from that uncertainty.

Lichfield case (1)—Mr. Justice *Willes* said:—

I think it may be taken that those who have hitherto had the decisions of election cases, have held that an agent to canvass would be an agent within the statute.

It having been stated on behalf of the Respondent that he employed no committee, but there were persons who acted in drawing up cards, &c., Mr. Justice *Willes* said:

That is the modern fashion apparently; *but persons who do what committeemen formerly did, and are seen taking an active part, are just as much committeemen* as if they were called so.

Windsor case (2)—Mr. Justice *Willes* said he did not think a mere card messenger could be said to have been an agent.

I have stated that authority to canvass—and I purposely used the word "authority" and not "employment" because I meant the observation to apply to persons authorized to canvass, whether paid or not for their services—would, in my opinion, constitute an agent; and that authority for the general management of an election would involve authority to canvass. I do not say that there may not be instances of agency on behalf of a candidate besides those of authority to canvass, and authority for the general management of an election.

He thought an agent for election expenses might be, but a mere messenger could not be, regarded as an agent.

In the *Taunton* case, 1869 (3), the question as to the effect the illegal act of a volunteer association may have on the status of a candidate, is a good deal discussed. One of the head notes of the case is:

The managers of the Conservative Association, having circulated

(1) O. & H. 25. (2) 1 O. & H. 3.
(3) 21 L. T. (N. S.) 169.

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addresses and papers issued by the candidate, will be presumed to have done so with his knowledge, or with that of his agents, so as to constitute the association an agent for such candidate, and to make him responsible for any illegal acts of its managers.

That case was also tried before Lord *Blackburn*, and he referred to the question of agency very much as he did in the *Hereford* case (1). He uses this language:

If there is evidence to show that the party is acting for the member who is returned, I think one should consider him to be an agent. If, taking the spirit and object of the rule, you think, bringing *your common sense* to bear upon it, that he was substantially an agent, I think it is all I could say to a jury; and then, as the Legislature have thought fit to make me both judge and jury, I must apply that guide as best I can myself. I at once see the great inconvenience of such a rule being laid down in this: if that be the proper guide to be taken, the law must be very *uncertain*.

In the concluding part of his judgment, he uses these words:

The candidate may show that the body acting in that way was acting officiously for him, as I may call it; that it was not with his consent, and was against his will; but the presumption does arise, I think, that it was done in his favor—done for him—unless there be something to show to the contrary. Then taking it, as I said before, as a matter of common sense, looking to the substantial degree to which they went, I think the degree goes very far. I think in this case such a degree of benefit would be derived from their assistance, that their assistance was so important to the candidate, that it fairly establishes this, that if he took their assistance, did not hold them off, or repudiate them, he must abide the consequences and be responsible for their malpractices.

The same learned judge tried the *Staleybridge* case (2). In one part of his judgment he said:

Each case must be considered with reference to the whole facts taken together and be delivered by the solution of the question, whether the relation between the person guilty of the corrupt practice and the member was such as to make the latter fairly responsible for it.

It was then held, as laid down in the head note of the case:

(1) 1 O. & H. 10. (2) 1 O. & H., 70; 20 L. T. N. S. 75.

If the services of a volunteer are accepted, the candidate will not invariably be responsible for his acts. Where the heads of a committee were *bonâ fide* voters, not chosen by the Respondent, but by *bonâ fide* voters amongst themselves in a business-like way, it was held, that a messenger sent by one of those heads was not so connected with the sitting member, as to make him responsible for his acts.

The corrupt act was in the person sent to buy up votes offering to pay them their day's wages if they would come and vote for Respondent. There the Respondent had a committee of his own. But the evidence showed that the sitting member's people did request the volunteer committees there to bring up votes, when they could. He thought many of the volunteer agents who were heads of committees might, or might not, be so far connected with the Respondent that he would be responsible for them. In this case he was convinced they were real *bonâ fide* volunteers, voters acting for themselves, not selected by the member, or chosen by him at all, but really *bonâ fide*, in a business like manner, the voters of the district choosing *Jobin*, and respectable men in whom they had confidence, to be the head of their own department, and acting together. A messenger who is sent by one of them is not so directly connected with the candidate, or any of his recognized agents, as to make him responsible for his misconduct in offering a bribe.

The same learned judge said in the *Bewdley* case (1):

No one can lay down a precise rule as to what would constitute evidence of being an agent. Every instance in which it is shown, that either with the knowledge of the member himself, or to the knowledge of his agents, who had employment from him, a person acts at all in furthering the election for him, in trying to get votes for him, is evidence tending to show that the person so acting was authorized to act as his agent. It is by no means essential that it should be shown that a person so employed, in order to be an agent for that purpose, is paid in the slightest degree, or is in the nature of being a paid person.

(1) 1 O. & H. 17.

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In the *Boston* case (1), Mr. Justice *Grove* says, on the subject of agency:

But with regard to the election. law, the matter goes a great deal further, because a number of persons are employed for the purpose of promoting an election, who are not only not authorized to do corrupt acts, but who are expressly enjoined to abstain from doing them; nevertheless, the law says, that if a man chooses to allow a number of people to go about canvassing for him, generally to support his candidature; to issue placards; to form a committee for his election, and to do things of that sort, he must, to use a colloquial expression, take the bad with the good. He cannot avail himself of these people's acts for the purpose of promoting his election, and then turn his back, or sit quietly by and let them corrupt the constituency; therefore, the law carries the responsibility of a member of Parliament for the acts of the agents, who are instrumental—with his assent—in promoting his election, a good deal further than the mere common law of agency.

In the *Wakefield* case (2), decided in 1874, the same learned Judge refers to certain facts which *prima facie* would bring the case within the law of agency, and would be sufficient to satisfy a tribunal that the Respondent had put himself, or allowed himself to be, in the hands of certain persons, or had made common cause with them, so as to make himself liable, if they, for the purpose of promoting his election, committed acts of bribery. Further on, he says:

A candidate is responsible generally, you may say, for the deeds of those who, to his knowledge, for the purpose of promoting his election, canvass or do such other acts as may tend to promote his election, *provided that the candidate, or his authorized agents, have reasonable knowledge that those persons are so acting with that object.* * * *

He alludes to the impossibility of laying down such exact definitions and limits as should meet every case, and says:

It is well it should be understood, that it rests with the Judge, not misapplying or straining the law, but applying the principles of the law to the changed states of facts, to form his opinion as to

(1) 2 O. & H. 167. (2) 2 O. & H. 103.

whether there has, or has not, been what constitutes agency in these election matters.

Acting on the rule thus laid down by Mr. Justice *Grove*, I have arrived at the conclusion that *Robert* was Mr. *Laflamme's* agent, and that for the corrupt act done through him, the election should be set aside. I think Mr. *Laflamme* received most important and effective aid by and through the central committee. I think it is probable he would not have been elected if he had not had that aid. I think Mr. *Robert* was a member of the *Lachine* committee, which was organized through and acted in concert with the Central Committee, from whom they received material aid. That Mr. *Robert* was an active and effective member of that committee, and that Mr. *Laflamme* must have known, or must be presumed to have known, that Mr. *Robert* was actively engaged in furthering his election. I think he cannot be allowed to avail himself of all these important aids to his success, and then repudiate them, so far as to say he is not responsible for the illegal acts of those who have thus aided him.

STRONG, J., concurred.

TASCHEREAU, J. :—

L'exposé clair et précis que le Juge en chef de cette cour vient de faire de tous les faits de la cause et des prétentions des parties, me dispense complètement d'y référer.

Nous nous accordons tous à dire que de tous les reproches faits à l'Intimé sur sa conduite et celle de ses agents avant et pendant l'élection dont il s'agit en cette cause, il n'y en a qu'un seul qui puisse en ce moment attirer notre attention, c'est celui indiqué par le Juge en chef; et il s'agit en conséquence de savoir si le nommé *Placide Robert*, dont il est question comme agent de M. *Laflamme*,

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était véritablement tel agent ou non, et s'il a commis un acte de corruption tel que prévu par l'acte des élections de la Puissance du *Canada*.

Qu'a fait cet homme, *Placide Robert* ? Le voici en quelques mots. Voulant obtenir de M. *Laflamme* un emploi ou place pour son beau-frère *Edouard Honoré Ouellette*, il demande à l'Intimé, environ un an avant qu'il fût question de l'élection dont il s'agit en cette cause, de tâcher de procurer un emploi à son beau-frère *Ouellette*, en lui disant qu'il pensait que cela ferait plaisir à la famille de *Pierre Paré* dont *Ouellette* était le gendre. M. *Laflamme* lui dit qu'il y penserait et qu'il se rappellerait cet homme et tâcherait de le placer s'il se présentait une vacance. M. *Laflamme* répète cela plusieurs fois et même jusqu'à une époque de deux à trois semaines avant l'élection. Comme les juges en première instance, nous ne trouvons aucun reproche sérieux à faire à l'Intimé d'avoir tenu ce langage, bien naturel envers un de ses constituants, car il est indubitable qu'un représentant peut et doit voir au bien-être des habitants de son comté en général, et je dis que refuser à un représentant le patronage de sa position serait une absurdité. Notons que cette promesse est faite sans condition, sans promesse de son accomplissement. Nous sommes donc tous d'opinion que l'Intimé n'a encouru aucune responsabilité à cet égard ; mais plus tard, ce monsieur *Placide Robert*, agissant de son seul chef, a dit à plusieurs reprises à ses beaux-frères de la famille *Paré*, à l'approche de l'élection qu'ils feraient mieux de ne pas voter, et qu'en votant on pourrait s'en prévaloir pour refuser de placer *Ouellette*.

Voilà donc le reproche fait à M. *Laflamme* sous le prétexte que *Placide Robert;* 1. avait engagé quelques membres de sa famille à s'abstenir de voter ou de cabaler en faveur du candidat opposé. 2. Que *Placide Robert* était l'agent de M. *Laflamme* et pouvait le compromettre.

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Je suis d'opinion que *Placide Robert* n'a pas fait un acte de corruption en disant confidentiellement dans le cercle de sa famille "qu'il serait mieux pour eux de ne pas voter." Il n'exprimait qu'une idée, qu'une opinion plus ou moins rationelle ; il ne faisait aucune menace de la part de M. *Laflamme*, il ne faisait que ce que tout homme sensé ferait dans l'intimité de sa famille au bien-être de laquelle il voudrait contribuer comme bon fils et comme bon frère.

Je considère que pour sauvegarder la pureté des élections, il ne faut pas pénétrer dans le sein des familles et tâcher de trouver un crime dans l'expression bien naturelle du désir chez un homme de voir son frère recevoir un léger emploi. S'il fallait interpréter de telles observations, de tels conseils comme synonymes de corruption, je demanderai combien de nos élections seraient à l'abri de tels reproches.

Dans mon opinion, il manque à ces conseils de *Placide Robert* pour en constituer un acte de corruption, bien des éléments, savoir, les menaces, les reproches grossiers, l'expression exagérée des conséquences de la conduite de sa famille, et surtout l'information donnée à cette famille que M. *Laflamme* n'avait fait la promesse que sous la condition qu'elle s'abstiendrait de voter. Je ne vois rien de semblable dans le témoignage, je n'y vois que des conseils entre parents désireux de se protéger. Je remarque au dossier la preuve que ce M. *Edouard Honoré Ouellette* n'a jamais reçu de place. En conséquence je suis d'opinion que *Placide Robert* n'a pas commis un acte de corruption dans ses conversations ci-dessus rapportées et qu'il n'a fait encourir aucune responsabilité légale à l'Intimé en supposant même qu'il pût être considéré comme agent.

Etant d'opinion que *Placide Robert* n'a pas commis d'actes repréhensibles au point de vue légal, il est inutile pour moi de discuter la question d'agence, et en

1878 conséquence, je suis d'opinion de renvoyer l'appel avec
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FOURNIER, J. :—

La cour étant unanime à confirmer le jugement prononcé par l'honorable juge qui a décidé cette cause en première instance, à l'exception seulement de la partie renvoyant l'accusation de corruption personnelle contre le membre siégeant au sujet de la promesse faite à *Robert* de faire obtenir une situation à son beau-frère *Ouellette*, c'est à ce chef d'accusation que je limiterai mes observations sur cette cause, ainsi qu'aux témoignages sur lesquels les appelants s'appuient pour en faire la preuve.

Le témoignage de *Robert* étant le plus important de tous, je crois devoir en donner une analyse, afin de mieux faire comprendre le véritable caractère des faits reprochés à l'Intimé.

Ce témoignage peut se résumer comme suit :—

Robert est un client et un ami politique du membre siégeant. Dans bien des circonstances, il a parlé à des électeurs de leur vote, mais il n'est pas allé à leurs résidences pour connaître leur opinion. Plus d'un an avant l'élection se trouvant au bureau de ce dernier, il lui demanda une place pour son beau-frère. Le membre siégeant lui répondit que s'il se présentait une vacance il ferait son possible pour *lui*, *Robert*. Dans une autre entrevue (niée par l'Intimé), ayant renouvelé sa demande pour son beau-frère, il aurait ajouté : "ça ferait bien plaisir à la famille *Paré* si vous pouviez procurer une place pour mon beau-frère,—peut-être cela pourrait vous être utile plus tard ; cela pourrait peut-être les empêcher de voter à l'élection prochaine." Il ne fut pas parlé d'élection entre-eux, mais il en était question. La famille *Paré* avait voté contre le ministre de la Justice en 1872, et appartenait au parti Conservateur.

Sans pouvoir en préciser l'époque, c'est trois ou quatre semaines avant qu'il fut question d'élection qu'il a parlé au membre siégeant, de la famille *Paré*. Celui-ci a répondu qu'il penserait à *lui*, (*Robert*), et que s'il se présentait quelque vacance, il ferait tout son possible pour *lui ;* il dit avoir compris par cette réponse, que c'était pour son beau-frère. Il n'a pas du tout parlé de ce sujet au membre siégeant durant l'élection.

Ayant demandé aux *Paré* leurs opinions, ils lui dirent qu'ils voteraient pour *Girouard*, mais qu'ils n'emploieraient pas leur influence,—ce à quoi il répondit que ce serait mieux de ne pas voter puisqu'il était question d'une place pour *Honoré Ouellette*.

Il n'a pas dit au membre siégeant ni à aucun de ses agents ou amis qu'il avait parlé à la famille *Paré* pendant l'élection. A communiqué à *Ouellette* ses entrevues avec le *M. S.*, mais ne se rappelle pas lui en avoir parlé pendant l'élection. A vu le *M. S.* à la *Pointe Claire* le jour de la nomination, l'a salué et lui a donné la main ; ne lui a pas parlé pendant l'élection, ne lui a jamais fait de rapport de ses chances à *Lachine*. A fait des rapports à MM. *Gariépy*, *Cardinal*, peut-être même à M. *Prévost*. Son nom ayant été mis sur la liste d'un comité, à *Lachine*, comme membre, il a assisté à trois ou quatre séances ; y a rencontré MM. *Prévost*, *Gariépy* et *Cardinal*, une fois. C'était un comité privé, mais il y assistait des libéraux comme des conservateurs ; la porte était ouverte pour tout le monde. On vérifiait les listes ; a participé à ce travail. Il n'y avait ni président, ni secrétaire, suivant lui. Des listes étaient préparées pour des gens qui allaient voir les électeurs pour les solliciter à venir voter. Il a eu une liste d'électeurs qu'il a vérifiée au comité. Deux mois environ après l'élection il a fait au M. S. la même demande à propos de *Ouellette* et en a reçu la même réponse.

Voici tout ce qu'il y a d'important dans ce témoignage

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concernant la promesse d'une place alléguée comme acte de corruption personnelle de la part du membre siégeant.

Si respectable que soit ce témoin, il ne serait cependant pas juste d'accepter comme exacts tous les faits dont il a déposé, sans les accompagner des correctifs que l'on trouve dans sa déposition, et sans non plus les comparer avec le témoignage de l'Intimé et ceux particulièrement des deux *Paré*, au moyen desquels les appelants prétendent compléter la preuve de l'accusation en question. Entre ces divers témoignages et celui de *Robert*, il se trouve des divergences sur plusieurs points importants qui méritent d'être signalées.

D'après sa propre version, *Robert* aurait eu avant l'élection plusieurs conversations avec l'Intimé au sujet d'une place pour *Ouellette*; la première, plus d'un an avant l'élection, les autres, dans l'automne de 1876, lorsqu'il s'agissait d'élection.

Sur ce point il est d'abord contredit par lui-même, et ensuite par l'Intimé. La question suivante lui ayant été faite : Q.—"Pendant l'élection, pendant les discus-" sions, aviez-vous eu une conversation avec M. *La-*" *flamme* à propos du même sujet ? (une place pour " *Ouellette*). R. Pas du tout." Il a eu avant cela, le soin de dire que par élection il entend la discussion publique qui se fait à ce sujet.

S'il est correcte dans cette partie de son témoignage, il ne peut pas l'être dans celle où il a dit qu'il a eu de ces conversations *pendant l'élection*. Ce qui rend encore plus certain le fait qu'il est tombé en erreur à cet égard, c'est que dans une autre partie de son témoignage où on lui demande " s'il a vu le membre siégeant pour lui parler," il répond seulement qu'il *l'a vu à la Pointe Claire, le jour de la nomination, l'a salué et lui a donné la main.* Ailleurs, il dit l'avoir vu à bord de l'*America*, mais ne lui a pas parlé non plus. A part de son propre

témoignage pour le contredire sur ce point, il y a encore celui de l'Intimé qui dit à ce sujet dans sa déclaration après avoir rapporté leur entrevue, concernant *Ouellette* :

The thing remained in that way, and previous to the election particularly there never was one word said or breathed on that subject between *Robert* and myself.

Cette assertion qui s'accorde avec les deux dernières de *Robert*, suffit pour démontrer qu'il a commis une erreur lorsqu'il a dit qu'il avait été question de ce sujet entre eux pendant l'élection. La chose est impossible puisqu'il ne se sont pas parlés du tout, et qu'ils n'ont fait qu'échanger une poignée de main, le jour de la nomination.

Quant aux différences importantes entre ce témoignage et ceux de *Paré*, il y sera fait allusion plus tard.

Le résultat de cette confrontation de *Robert* avec lui-même et avec l'Intimé prouve d'une manière satisfaisante qu'il n'y a eu entre lui et l'Intimé, avant l'élection, qu'une seule entrevue dans laquelle il a été question de cette promesse. Si les paroles de *Robert* au sujet de la famille *Paré* sont correctes elles doivent avoir été dites dans la seule entrevue dont parle l'Intimé—laquelle a eu lieu plus d'un an avant l'élection, et dans un temps où il n'en était nullement question.

En admettant même pour l'argument qu'il y ait eu deux entrevues, la première, dans laquelle il n'a été question que de *Ouellette*, la deuxième, trois ou quatre semaines avant l'élection, dans laquelle il aurait été question de la famille *Paré*, il est clair que dans la première, il ne s'est rien passé qui fût de nature à compromettre l'Intimé. La promesse alors faite ne peut pas être considérée comme entachée de corruption puisqu'elle n'a pu être faite en vue de l'élection dont il n'était alors nullement question. On ne peut certainement pas prétendre qu'un député ne peut faire honnêtement et légalement à un de ses constituants une

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promesse de ce genre. Une telle promesse ne peut devenir illégale que si elle est faite pour des motifs et sous des circonstances prohibées par la loi. Il ne se rencontrait aucune de ces circonstances lorsque celle dont il s'agit a été faite à un ami politique et personnel qui avait droit à la considération et à la protection de son représentant dans une demande parfaitement honnête et légitime.

En supposant que dans la deuxième entrevue, *Robert* ait dit à l'Intimé ce qui est rapporté ci-dessus concernant la famille *Paré*, l'Intimé a-t-il dit ou fait quelque chose dans cette circonstance qui puisse être considéré comme un acte de corruption.

Qu'a-t-il répondu à la considération que *Robert* faisait valoir en faveur de *Ouellette*, savoir : " que ça pourrait " peut-être lui être utile plus tard—que ça pourrait " peut-être empêcher les *Paré* de voter ; " a-t-il dit quelque chose qui puisse faire voir qu'il acceptait le raisonnement de *Robert* et que la promesse déjà faite, longtemps auparavant, a été alors renouvelée pour le motif suggéré ? Non, l'Intimé répond exactement dans cette circonstance comme il l'avait fait auparavant, " qu'il fera son possible pour lui (*Robert*) lorsqu'il se présentera une vacance." Il ne s'engage à rien ni envers *Ouellette*, ni envers les *Paré*. Il ne pouvait renier la promesse antérieurement faite ; il ne pouvait faire qu'elle n'existât point, il se borne à la répéter dans les mêmes termes et sans aucun égard au nouveau motif qui lui a été suggéré. Rien, absolument rien, ne fait voir non plus que l'Intimé en répondant ainsi, le faisait dans l'intention de gagner un avantage quelconque en vue d'une prochaine élection, puisque *Robert* admet que cette deuxième entrevue a eu lieu trois ou quatre semaines avant qu'il fût question d'élection.

Si la promesse faite dans la première entrevue (ce qui est admis de toutes parts) n'était pas illégale à son ori-

gine, peut-elle l'être devenue sans que l'Intimé y ait lui-même apporté quelque modification ? Peut-on, en donnant un effet rétroactif à des faits auxquels il est tout-à-fait étranger, changer la nature de cette promesse, d'abord tout-à-fait innocente, de manière à en faire une offense de la plus haute gravité ? C'est ce que les appelants prétendent pouvoir faire en prouvant que *Robert* était devenu pendant l'élection un des agents de l'Intimé, et, qu'en cette qualité, il aurait fait allusion à la promesse en question de manière à influencer la famille *Paré* dans le but de l'empêcher de voter.

Je ne puis, avant d'aller plus loin m'empêcher de faire observer à propos de cette accusation, ainsi que l'a fait l'honorable juge qui a décidé en première instance, que l'Intimé n'est pas accusé d'avoir fait cette promesse avec l'intention d'influencer qui que ce soit dans le but de les empêcher de voter. Malgré un examen minutieux des "particularités," je n'ai pu y trouver d'allégation à cet effet. Sans doute une telle omission ne pouvait empêcher l'investigation d'avoir lieu, mais elle n'aurait dû être faite qu'après avoir obtenu du juge une permission, qui n'a pas été demandée, d'amender les particularités afin d'offrir la preuve de ce fait.

Mr. Justice *Blackburn* said that all through these cases had gone upon this principle, namely, that he should not allow any inquiry to be stifled, as not being in the particulars; but at the same time he could not allow any respondent to be taken by surprise without having fair warning. If therefore the petitioners relied upon this evidence, and had not given notice, they must apply (1)

Bien que l'on ait irrégulièrement laissé faire cette preuve, je ne crois pas toutefois que cette irrégularité soit suffisante pour nous empêcher d'en prendre connaissance et de prononcer notre opinion sur sa valeur.

L'appréciation que je fais des rapports de *Robert* avec la famille *Paré*, me portant à conclure qu'il ne s'est

(1) *Staleybridge case* 1 *O. & H.* 72.

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rendu coupable d'aucune offense contre les lois électorales, il serait inutile à mon point de vue de prendre en considération la preuve qui a été faite pour établir sa qualité d'agent de l'Intimé. Je passerai donc de suite à l'examen de ces rapports.

On a vu par son témoignage que *Ouellette* est, comme lui, gendre de M. *F. Paré*, et que malgré la différence d'opinions qui existent entre eux, les membres de cette famille paraissent vivre en très bonne intelligence.

Il n'est pas douteux que *Robert* avait communiqué à la famille *Paré*, ses démarches auprès de l'Intimé dans l'intérêt de *Ouellette*. Quoique l'époque de la première communication ne soit pas bien établie, il est certain qu'elle a eu lieu au moins six mois avant l'élection, puisque à cette époque, *Alphonse Paré* écrivait lui-même à l'Intimé, sur le même sujet. Mais il est bien plus probable que cette communication a eu lieu immédiatement après la première entrevue de *Robert* avec l'Intimé. Mais il paraît certain qu'il en aurait aussi parlé pendant l'élection. Voici ce que lui-même rapporte à ce sujet :

Il croit avoir parlé pendant l'élection même, aux messieurs *Paré* du vote qu'ils devaient donner, leur a demandé leur opinion, et ils lui ont dit qu'ils voteraient pour M. *Girouard*, mais qu'ils n'emploieraient pas leur influence. A cela il a répondu que ce serait mieux de ne pas voter puisqu'il était question d'avoir une place pour *Honoré Ouellette*.

Sur ce fait important, *Robert* n'est pas d'accord avec *François Paré*, père, qui a été entendu comme témoin. Il est vrai qu'il dit d'une manière générale qu'il croit en avoir parlé aux messieurs *Paré*. A part des deux qui ont été examinés il y en a un troisième, *François Paré*, fils, auquel il en aurait aussi parlé, mais celui-là n'a pas été entendu comme témoin. Nous n'avons donc de cette conversation que les versions de *François Paré*, père, et d'*Alphonse Paré*. Voici ce que dit à ce sujet le père :

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Q. How long before the voting day did Mr. *Placide Robert* tell you not to vote in order to get a place?

A. I cannot tell. I think it was a long time before the election. I know that the affair about the Post Office took place in the month of April of last year.

C'est en avril ou en mai qu'avait eu l'affaire du bureau de poste à laquelle il est fait allusion, plus de six mois avant l'élection.

Q. How many days before the polling day did Mr. *Placide Robert* make the remark that it was best for you not to vote in order to get a place for *Honoré Ouellette*?

A. *I do not know that he spoke of that to me.* I told my sons that *it was better not to vote*, as we wanted *to get a place from Mr. Laflamme.* One of the three of us voted. * * *

Q. While the Election was spoken of, did Mr. *Placide Robert* say that it was better for you not to vote?

A. *I have no knowledge of that; it is myself who said so to my sons, and one of them voted.* * * *

Q. *It was you who said it was better to abstain* from voting? A. *Yes.*

Il semble clair d'après ce témoignage que *Robert* n'a exercé aucune influence sur *Frs. Paré*, père, et que c'est plutôt ce dernier qui aurait recommandé à ses fils de ne pas voter.

Alphonse Paré dit sur le même sujet :

At the time of the Election, Mr. *Robert* told us that it would be better not to vote; we then told him that we would vote. He told us: "do as you please, they will use your votes as an objection to give Mr. *Ouellette* a place." That is the reason why he did not vote. * * *

Q. At the time of the Election, did Mr. *Robert* speak to you about your vote? A. He spoke of it to my brother, my brother told me.

Si cette réponse signifie quelque chose, elle veut dire que *Robert* ne lui a pas parlé à lui-même, mais à son frère qui le lui a répété.

Evidemment ce qu'il a dit auparavant n'est fondé que sur le rapport que lui a fait son frère *François* de sa conversation qu'il avait eue avec *Robert*. Ce rapport est-il correct ? *François Paré*, fils, qui seul aurait pu le

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prouver, n'a pas été entendu comme témoin. Mais chose assez singulière après cette réponse qui ferait croire que c'est à son frère seulement que *Robert* a parlé, il fait mention, presque immédiatement d'une conversation dans laquelle il était le principal interlocuteur.

Some time before the polling day, two or three weeks before the election after what my brother had told me, I told *Robert* that I wanted to know if our abstention from voting was required.

Il parait clair par cette question que *Robert* n'avait fait aucune tentative pour l'empêcher de voter, et il est également clair par sa réponse qu'il n'entendait rien faire pour les y engager, puisqu'il leur dit de faire comme bon leur semblera.

He told me to do as I thought fit, but that it was better for us not to vote. By that answer I imagined that the fact of our voting would be an objection to M. Ouellette getting a place.

De ce témoignage il ressort deux faits principaux, le premier, que *Robert* aurait dit au temps de l'élection que c'était mieux de ne pas voter. Le deuxième qu'en réponse à la question au sujet de l'abstention, il aurait dit de faire comme on le jugerait à propos..

C'est à cela que se réduit toute l'intervention de *Robert* auprès de la famille *Paré*, c'est-à-dire à une simple expression d'une opinion sur une affaire à laquelle la famille s'intéresse depuis longtemps. *Robert* me paraît en cela avoir joué un rôle plutôt passif qu'actif La première fois il se contente de faire l'observation qu'il serait mieux de ne pas voter ; la deuxième, il répond à son interrogateur de faire comme bon lui semblera. Sa conduite en ces deux circonstances ne constitue pas même le *canvassing*, tel que défini dans la cause de *Westbury* (1).

Canvassing may be either by asking a man to vote for the candidate for whom you are canvassing, or by begging him not to go to the poll, but to remain neutral and not to vote for the adversary.

(1) 1. O & H. 56.

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Il ne demande pas le vote des *Paré*, il ne les sollicite pas non plus de s'abtenir de voter. Il ne fait aucune promesse de situation et ne s'engage pas non plus à en procurer. Ce qu'il dit alors paraît bien moins inspiré par l'idée du succès de l'élection que par celle de servir les intérêts de *Ouellette*, qui n'est pas même voteur et dont il s'occupe depuis plus d'un an avant l'élection. Il est certain qu'en faisant cette observation il n'avait aucune intention de corrompre les *Paré*. C'est évident, du moins quant au père, puisque celui-ci déclare formellement que ce n'est pas *Robert*, mais lui-même qui a dit à ses fils de ne pas voter. Il est vrai que *Alphonse Paré* ajoute que d'après les réponses de *Robert :*

I imagined that the fact of our voting would be an objection to Mr. *Ouellette* getting a place.

Robert lui-même n'a jamais fait cette observation qui, certainement, si elle eût été faite par lui serait grave et pourrait donner un tout autre caractère à sa conduite. Il faut remarquer de plus que *Alphonse Paré* ne dit pas avoir exprimé cette pensée à *Robert*, il dit seulement qu'il a fait en lui-même cette réflexion,—"I imagined, &c."

D'après la loi ce n'est pas ce qui peut s'être passé dans l'esprit des *Paré* qui pouvait constituer l'offense dont il s'agit, mais bien l'intention qu'avait *Robert* en leur parlant ainsi.

Baron Martin said in the *Westminster* case :—

The question is not what is the motive that operated upon the mind of the voter. The mind of the voter has nothing to do with it; the question is, the intention of the person who furnished the board. Probably there is no man who ever was bribed but would swear that the bribe had not influenced his vote. (1)

Quoique dans cette citation il s'agisse d'aliments fournis aux voteurs, le principe est le même et cette autorité est applicable au cas actuel.

Que la connaissance des démarches faites par *Robert*,

(1) 1 O. & H.

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que celles faites directement par *Alphonse Paré*, lui-même, six mois avant l'élection, en écrivant à l'Intimé pour obtenir une place pour *Ouellette*, aient eu l'effet d'engager les *Paré* à s'abstenir, c'est à peu près certain ; mais ce que la preuve n'établit pas, sans quoi il ne saurait y avoir d'offense, c'est que cette abstention est due à des démarches faites par *Robert* dans le but d'obtenir ce résultat. L'allusion que *Robert* a faite à cette promesse ne paraît pas plus que la promesse elle-même entachée de corruption. Un fait bien remarquable et qui fait voir que les conversations de *Robert* avec les *Parés* n'étaient pas en vue de l'élection, c'est qu'il n'en a jamais fait mention à l'Intimé ni à aucun de ses agents. Je ne puis donc voir dans ce fait un motif suffisant pour annuler une élection qui, sous tous les autres rapports, me parait avoir été conduite avec un désir évident de se conformer à la loi.

HENRY, J.:

I agree with the conclusions arrived at by the learned Chief Justice in regard to all the objections urged against the return of the Respondent and argued before us, except as to that of *Placide Robert* in regard to the alleged bribery by him of the two *Parés*, by means of which they were induced to refrain from voting for the Appellant. Although I may not coincide with the learned Chief Justice as to all he has thought proper to give as his reasons for arriving at the results he has intimated, I have, after the most anxious and laborious consideration, and the most exhaustive researches, arrived at the same conclusions he has in regard to all the cases, except the one referred to; but, after the same consideration and researches, in respect to the excepted case, I feel myself obliged to differ from him; and I shall, as briefly as I can, explain why I cannot coincide in his views. There is no evidence to charge

the Respondent individually with the alleged bribery of the *Parés*, for none was given that he either directed or counselled *Robert* to communicate what passed between them to the *Parés*, or even knew at the time of the election that he did so, or intended doing so. We are, therefore, to see if *Robert* was guilty of bribery or undue influence by what he said to the *Parés* in respect to their votes, and if so, was he the agent of the Respondent at the election, so that the Respondent should be held answerable for his corrupt acts, if committed. I have no doubt but the two *Parés* were restrained from voting by what *Robert* said to them, but, looking at all the facts and circumstances, the conclusion that he was guilty of corrupt bribery or undue influence, is not so easily arrived at.

About a year before the election *Robert*, who was not only a political supporter, but a client and personal friend of the Respondent, made use of those relations with him to try to obtain an appointment of some kind for his brother-in-law (*Edouard Honoré Ouellette*). He (*Robert*) says: "I asked him if he could do something for my brother-in-law? He, in reply, simply told me that he would think of me, and that if a vacancy occurred he would do his best for me." The substance of this conversation, he says, was repeated once, or oftener; but not, as he says, within four or five weeks before the time, when the election was first spoken of. During the election and during the public discussions, he says he had no conversation with Respondent on the subject. He sayshe communicated the conversation with the Respondent about *Ouellette* to the *Paré* family; but he does not say when; and, as there is no proof that he did so during the election, the reasonable conclusion is, that he did so shortly after the first conversation, as one of the *Parés* wrote the Respondent on the subject about six months before the election. It will thus be seen

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that long before the election was thought of, *Robert*, by his repeated intercessions with the Respondent, exhibited a strong desire to benefit his brother-in-law; that this motive continued operative at the time of the election may be fairly assumed; but, it is alleged, he had also the corrupt one, to influence the votes of the *Parés*. Upon these propositions we have no direct evidence, but we may assume the correctness of both. What then is the law in regard to them?

In the *Windsor* case (1), cited by the learned Chief Justice approvingly in the *Kingston* case (2), and in his judgment to-day, it was proved that the Respondent, some long time before the election, had distributed among his tenants (voters and others) £100; and, on being questioned

Whether, when he made these gifts, he had in view the election for the borough, admitted that, to a certain extent, he had. It was argued that this was a corrupt act, on account of which the Respondent should be unseated.

Baron *Bramwell*, in his judgment, said as to this:

It is certain that the coming election must have been present to his mind when he gave away these things; but there is no harm in it. If a man has a legitimate motive for doing a thing, although in addition to that he has a motive which, if it stood alone, would be an illegitimate one, he is not to refrain from doing that which he might legitimately have done, on account of the existence of this motive, which, by itself, would have been an illegitimate motive. If the Respondent had not been an intending candidate for the borough, and yet had done as he has done in respect to these gifts, there would have been nothing illegal in what he did; and the fact that he did intend to represent *Windsor*, and thought good would be done to him, and that he would gain popularity by this, does not make that corrupt which otherwise would not be corrupt at all.

Apply, then, that doctrine, laid down as lately as 1874, to *Robert*, and he cannot be convicted of bribery or undue influence. In the case just cited, the Respondent admitted that he made the expenditure to a "certain

(1) 2 O. & H. 88. (2) 11 C. L. J. 19.

extent in view of the election." In the present, we only have that position by presumption, from the fact of his being an ardent supporter of the Respondent. Of the two, the former is the stronger case, because there can be no doubt of the feeling of the Respondent, who himself admits it. If, indeed, the Respondent in the case cited had but the one motive, and that the corrupt one mentioned, he would have been unseated ; and so, if *Robert* had but the motive of aiding the Respondent the latter should be unseated, if *Robert* were his agent. It is the *mind of the alleged briber* that is to control. See *Westminster* case (1), where Baron *Martin* says :

> The question is not what is the motive that operated upon the mind of the voter. The mind of the voter has nothing to do with it; the question is, the intention of the person who furnished the board.

And why, then, if *Robert* did what would be harmless, but for the assumption that he was also actuated by the motive to assist the Respondent in his election, should he not have the benefit of the same principle as the learned Baron, in the *Windsor* case (1), so unequivocally and unreservedly laid down. Every one must admit that if *Robert*, when suggesting the propriety of the *Parés* abstaining from voting, was actuated *solely* by the motive to benefit his brother-in-law, or, if he were wholly indifferent about the result of the election, there would be no harm in his making that suggestion. The case of *Robert* is, therefore, exactly that of the Respondent in the *Windsor* case. I have sought in vain for a dividing principle between them ; and I do not feel justified in setting up a decision of mine against that of the learned Baron which I have cited.

In the *Warrington* case (1), Baron *Martin* is reported as saying :

> I adhere to what Mr. Justice *Willes* said at *Lichfield*, that a Judge,

(1) 1 O. & H. 95.
(2) 1 O. & H. 44.
(3) 2 O. & H. 88.

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to upset the election, ought to be satisfied *beyond all doubt* that the election was void, and that the return of a member is a serious matter, and not lightly to be set aside.

Mr. Justice *O'Brien* in the *Londonderry* case (1), after quoting, approvingly, the above words of Baron *Martin*, says:

> Mere suspicion, therefore, will notbe sufficient to establisha charge of bribery; and a Judge, in discharging the duty imposed upon him by the Statute, acting in the double capacity of judge and juror, should not hold that charge established upon evidence, which, in his opinion, would not be sufficient to warrant a jury in finding the charge proved.

Adopting this decision, I think the evidence here would not warrant a jury in finding that *Robert* had not the motive of befriending his brother-in-law when telling the *Parés* "they might do as they liked, but he thought it better they should not vote." Independently of the principle mentioned, the case, to satisfy the requirements of law and evidence, is not by any means a strong one. It is not suggested that *Robert* made an attempt to exercise corrupt influence with any other party; and stronger evidence of a corrupt intention is therefore necessary.

I will now proceed to give briefly my views on the question of the agency of *Robert*.

Mr. Justice *Blackburn*, in the *Bridgewater* case (2), says:

> It has never yet been distinctly and precisely defined what degree of evidence is required to establish such a relation between the sitting member and the person guilty of corruption, as should constitute agency. I do not pretend to be able to define it certainly. No one has yet been able to go further than to say, as to some cases, enough has been established; as to others, enough has not been established to vacate the seat. This case i on the right side of the line, that is on the wrong, but the line itself has never been definitely drawn, and I profess myself unable accurately to draw it."

Grove, J., in the *Taunton* case (3), said:

(1) 1 O. & H. 279. (2) 1 O. & H. 115

(3) 2 O. & H. 74.

All agree, that the relation is not the common law one of principal and agent. * * * I am of opinion that to establish agency for which the candidate would be responsible he must be proved by himself or by his authorized agent to have employed the persons whose conduct is impugned, to act on his behalf; or to have, to some extent, put himself in their hands, or to have made common cause with them for the purpose of promoting his election. To what extent such relation may be sufficient to fix the candidate must, it seems to me, be a question of *degree* and of evidence to be adjudged of by the Election Petition tribunal. *Mere non-interference* with persons, who, feeling interested in the success of a candidate, may act in support of his canvass, is not sufficient, in my judgment, to saddle the candidate with any unlawful acts of theirs of which the tribunal is satisfied he or his authorized agent is ignorant.

In the *Windsor* case (1) it was proved that one *Pantling* wrote a letter to a voter named *Juniper*, who, at the time of the election, was away from the borough, offering to pay his travelling expenses, if he would come and vote; and it was admitted that this offer, if made by the Respondent, or an agent of his, would have unseated him. The only evidence of *Pantling* being an agent was that he was a member of a committee which had been formed for the purpose of promoting the Respondent's election. It was not proved *who put him on the committee, or how he got there; what his duties were, or what he did;* but his own statement as to this was that he "understood that his duties were *to do the best he could for the Respondent.*" Mr. Baron *Bramwell*, in his judgment, said as to this:

I am invited to believe that, in some way or other, a man *who has given no description of himself except that he was on a committee,* was an agent, so that his act, in writing this letter, should unseat the Respondent. It appears to me really impossible to hold that he was an agent. I think that according to the authorities (citing *Staleybridge*, vol. I, 67; *Westminster*, ib. 92; *Blackburn*, ib. 200; *Dublin*, ib. 272; *Taunton*, ib. 183; *Wigan*, ib. 189; *Galway*, vol. II. 53. See also *Newry*, P. &. K. 151; *Bristol*, P. & K. 574), and according to the good sense of the matter, he was not an agent. *He*

(1) 2 O. & H. 88.

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has given us no account of how he came to write this letter to *Juniper*, he having told him where he had gone to, and having told him to write upon the occasion of an election. I cannot help agreeing with Mr. *Giffard* that if we were to hold this man to be an agent it would make the law of agency, as applicable to candidates, positively hateful and ludicrous.

In the *Bolton* case (1), Mr. Justice *Mellor* said :

> Of course the production of the canvass-books proves nothing except that certain ticks appear on it. If you want to go further call the canvasser ; because the mere fact of a man having a canvass-book and canvassing, cannot affect the principal unless I know by whom the man was employed. There is nothing more difficult or more delicate than the question of agency ; but if there be evidence which might satisfy a Judge, and if he be conscientiously satisfied that the man *was employed* to canvass, then it must be held that his acts bind his principal. Again, I should not, as at present advised, hold that the acts of a man, who was known to be a volunteer canvasser without any authority from the candidate or any of his agents, bound the principal. You must show me various things. You must show me that he was in company with one of the principal agents, who saw him canvassing or was present when he was canvassing ; or that, in the committee room, he was in the presence of some body or other acting as a man would act who was authorized to act. If putting all these things together, you satisfied me that the man was a canvasser *with the authority of the candidate's agents*, then I do not look with nicety at the precise steps, but there must be something of that character.

Where a sitting member is not acquainted with the illegality of the act for which he subsequently repays the person who originally made the payment, that is not sufficient to make such a person an agent by adoption. *Bewdly* (2).

If therefore the Respondent subsequently was informed of *Robert* having canvassed a voter and thanked him for obtaining a voter, he would not in regard thereof be answerable for *Robert's* illegal act, unless made acquainted therewith ; but there is no evidence even of any such adoption. There is no evidence whatever that the Respondent *knew* he was canvassing or had canvassed. A

(1) 2 O. & H. 141. (2) 1 O. & H. 18.

member of a self constituted committee is not an agent (1).

Rogers on Elections (2) says:

The rules which apply to a committee being agents obviously apply with less force to clubs or associations which not unfrequently constitute themselves committees for the purpose of promoting an election, but the members of which are not thereby constituted agents, though the sitting member may contribute to their funds, *unless they are in fact his committee*, and have undertaken the practical conduct of the election. For similar reasons a mere volunteer is not an agent.

In the *Windsor* case (3), Mr. Justice *Willes* says:

I have stated that *authority* to canvass, and I purposely used the word *authority* and not *employment*, because I meant the observation to apply to persons authorized to canvass, whether paid or not for their services, would in my opinion constitute an agent.

After quoting this Mr. Justice *O'Brien* in the *Londonderry* case (4), adds:

I cannot concur in the opinion that any supporter of a candidate who chooses to ask others for their votes and to make speeches in his favor can force himself upon the candidate as an agent, or that a candidate should be held responsible for the acts of one from whom he actually endeavors to dissociate himself.

In the *Hastings* case (5) Mr. Justice *Blackburn* says:

But I cannot but feel where the case is a small isolated, solitary case it requires much more evidence to satisfy one of the agency than would otherwise be necessary. If a small thing is done by a person who is the head agent * * I think that would have upset the election. And if small things were done to a great extent by a subordinate person comparatively slight evidence of agency would probably have induced one to find that he was an agent. But when you come to a single case of one man telling another, whom he was inducing to go to the polls, that he would be paid afterwards for what he might spend in drink, to make that single case upset the election would require considerable evidence of agency.

I take, then, this single case of *Robert's*, and applying

(1) *Drogheda*, W. & D. 209; *Staleybridge*, 1 O. & H. 67; *Wareham*, W. & D. 95.
(2) 12th Ed. 1876, 437.
(3) 1 O. & H. 3.
(4) 1 O. & H. 278.
(5) 1 O. & H. 219.

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the principles of evidence just quoted, let us see what there is to make the Respondent answerable for *his* acts.

The Respondent says in his sworn declaration, received in evidence (and in regard to the reception of which I agree with the learned Chief Justice), that he only appointed one agent, Mr. *Adam*; that the committee in *Montreal* was formed without his knowledge, and therefore, necessarily, without his concurrence. That during the election he never was present at any committee meeting or entered the committee room, and that whoever was employed besides Mr. *Adam* and Mr. *Lemay* was employed without his knowledge. It may, however, be alleged, that although the Respondent did not attend a meeting of the committee or visit the committee room, he was aware nevertheless of all they did, and may have accepted their services. Such, indeed, may have been the case, but the Petitioners cannot ask us so to conclude without any proof whatever. The onus was on them. They might, if such were the case, have proved it by the Respondent himself, or by some of the committee. Mere non-interference is not sufficient, and so held. I am not aware of any law requiring a candidate to have a committee or committees; and a party, if he so please, can be quite clear of the assistance of and responsibilities for such; and no number of friends, forming themselves into a committee without his knowledge, can bind him in any way. If, however, a candidate is *shown* to be aware that any member of a committee so formed is, *as such*, performing acts of canvassing or otherwise, in such a way as an agent duly authorized would be alone supposed to do, and he, with full knowledge, ratifies such acts, it might possibly be sufficient to bind him, not only as to that one member, but as to the rest of the committee, so far as he was aware that such persons composed it. There is some

evidence that the *Respondent* received funds through the treasurer of the committee for the election expenses, but I can find no evidence that he was aware for what particular purpose, if any, the committee was formed, or the extent of aid they intended giving. There is no satisfactory evidence of any authority from the Respondent to any committee to canvass for him, or act for him in the election. He certainly may have known that gentlemen were acting in concert in his favor, but in what way is not stated; but I have already shown that mere negative authority is not binding. There is no evidence to contradict the Respondent's statements on that point, and I don't feel at liberty to question them. Were there good reason for the conclusion that any organized system existed to commit corrupt acts, successful or otherwise, through the means of partizans of the Respondent, banded together as a committee, and that it was understood the Respondent was to be kept in ignorance, so that he would be safe from the consequences of illegal acts; or there appeared to have existed a general intention to secure the return of the Respondent by illegal means, and it was satisfactorily shown that he knew of the existence of the committee, and had good reasons to believe in the existence of the combination for illegal purposes, it might, in such a case, require grave consideration before concluding that the ignorance in which the Respondent was ostensibly kept was not solely to avoid the consequences of the illegal acts of his friends. There is, however, nothing to shew anything of the kind on the part of any committee referred to in the evidence, and I cannot, therefore, draw any such conclusion. It is not improbable that the candidate was pleased to have the benefit arising from a combination of his friends, but unless there be *proof of authority* beforehand to act for him, or ratification, with full knowledge afterwards, I can

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discover no law to bind the candidate. There is no clear evidence as to how, or by whose means, the committee spoken of were appointed or formed. So far as the evidence goes, they were volunteers, and I can find no trace of any legal connexion between them and the Respondent. We are not told what their functions were, or to what extent, or in what particular way they were to aid the Respondent; and we cannot, therefore, ascertain how any apparent ratification of the acts of one or more of those composing a committee would be sufficient. The functions of the committee might have been limited, so as not to include or justify something done by one of its members. There is no allegation or suggestion of illegal conduct on the part of the *Montreal* committee themselves, and I can find no evidence to make them the agents of the Respondent; and none to connect them or any of them, directly or indirectly, with the acts of *Robert*. It is true we might *imagine* or *surmise* a great many things; we might draw conclusions, but we might be far from the facts if we did so. I submit, we are not called upon to do so, unless the result of evidence; we are to look for reasonable proof of all facts necessary to the chain of evidence to establish the necessary allegations and connections. In the late *Charlevoix* case I had little, if any, doubt of the complication of the Respondent in the illegal acts upon proof of which he was deprived of his seat; but, in the absence of *proof of the fact*, I could not certify that they were known to or sanctioned by him. I feel bound to apply the same rule in this case.

I have summarized the evidence bearing, as I think, upon the question of the agency of *Robert*, and I start with the assertion that in the whole of it there is not a scintilla to establish the position that the Respondent, at the time of the election, knew that *Robert* had canvassed or was about to canvass or do any other particu-

lar service towards his election. If he (the Respondent) did not ask him to act, and knew not of his acting, in any particular way, the mere general impression that he would aid him in some undefined way is surely not sufficient. If a candidate is to be held answerable, and not only him but the majority who returned him, because he simply knew, in a general and undefined way, that hundreds were active partizans of his and who without his authority or knowledge committed illegal acts, merely because he did not, as soon as he knew they were such active partizans, forbid their interference in any way, I cannot see how an election could be safely run. To decide so would be unprecedented so far as I have been able to discover.

Leopold Laflamme says, in substance: "I am a brother of the Respondent in this case. Mr. *Placide Robert* comes often to our office. He took part in the last contest in the interest of my brother. My brother could not help knowing it. I am certain he was a devoted partizan of my brother." I would ask, what is meant by "he took part in the contest." It would be straining evidence to say that it was *such a part* as must necessarily make him an agent; and it would be still more absurd to call *Robert* an agent, merely because, in the opinion of Respondent's brother, he was not an *active* but a *devoted* partizan of the Respondent. I may be a most *devoted* partizan, but it does not necessarily follow that I am an *active* one or did anything. This evidence, I take it, by itself, proves nothing; and it will be seen that if considered, even with all the other evidence, it is unassisting.

Placide Robert says, substantially:

I was one of Mr. *Laflamme's* supporters. I took pretty much interest in the last election. *I spoke in many instances to voters about their votes.* I did not go to the voters' houses to know their opinion. I saw Mr. *Laflamme* during the election and I spoke and shook hands

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with him. There might have been a few words said about the election at *Chvrlebois'* tavern when Mr. *Laflamme* was there, but I don't recollect what was said. I never reported to Mr. *Laflamme* during the election as to his chances at *Lachine*. I made a report to Mr. *Gariepy*, to Mr. *Cardinal*, and I believe, to Mr. *Prevost*. I attended three or four meetings of the election committee. My name was put on the committee as one of the members and I attended now and then. It was a private committee but it was attended by conservatives as well as liberals, the door was open to all. At this committee we used to check the lists of voters; I helped to do so. I was at the organization of it and was a member from that time. There was, I think, no President or Secretary. I cannot say the lists we prepared were intended for canvassers, but they were for men who called on the electors and solicited their votes. The committee met at the house of Mr. *Jean Baptiste Poirier*, and I can't say whether or not anything was paid for the room. I had at my service a printed list of the electors, and I checked the same at the committee room. The list was for the town and parish of *Lachine*.

On his cross-examination he says: (in answer to the question "were you requested to act as you did or did you act from your own accord?")

I have acted from my own free will. I think I was not considered as an election agent. I was never asked by any election agent to use any influence. I saw no political opponent at the committee room. Those I saw there were persons who could be trusted. I drove a vehicle on the polling day and brought in some voters for the party.

There may be some other portions of the evidence that have some reference to this question of agency; but it is too remote to have the slightest legal affect in regard to it.

The meeting of a number of respondent's friends to *check the lists* (and that is all it is shown was done), at what the witness (*Robert*) calls the committee meetings, and the having in his possession one of those lists, surely would not make him an agent. The authorities I have quoted show this. There is no evidence how this committee was appointed, who were present, or what its functions were. The Respondent was not shown to have authorized or ratified its appointment,

and even had such proof been given, it is not shown how far they were authorized to go, and no evidence was given to show a connection in action with the committee in *Montreal*. He (*Robert*) says he spoke in many instances to voters *about their votes*. Asking voters *about their votes* is not evidence of canvassing for either party; and if he really did canvass, in the legal sense of the term, he should not have been allowed to escape saying so. I certainly cannot say that "speaking to voters ABOUT THEIR VOTES" necessarily means canvassing. It is not shown that the Respondent knew he (*Robert*) was even speaking to voters *about their* votes, and I have yet to learn that the knowledge, by the Respondent, that he was merely speaking to voters ABOUT THEIR VOTES, would in the slightest degree have affected the question. *Robert* says he made reports to *Gariepy* and to *Cardinal*, and he believed to *Prevost*. I see no proof to establish the agency of any of the three, and I have yet to learn that a person, who is not shown to have been appointed by anyone, can make himself an agent of the candidate by merely reporting the prospects at a particular locality. *Robert* says substantially that he acted without authority from any one; for, when the question is put to him in the alternative, he replies: "I have acted from my own free will. I think I was not considered as an election agent"—(and if he had no more authority than we have seen, he had good reason to think so),—"and I was never asked by any agent to use my influence."

The presumptions of law are always in favor of innocence; and he who asserts the contrary necessarily assumes the onus of proving his allegations. It may be done by direct or circumstantial evidence; but, if by the latter, it should be so full and complete as to exclude any reasonable theory of innocence. Such evidence should leave no gaps to be filled either by doubtful de-

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ductions from other portions of the evidence or the still more dangerous expedient of drawing wholly upon imagination or speculation, which would require a judge or jury to violate the invariable rule of evidence I have mentioned. I can find no precedent for declining to apply this principle of evidence to election cases; and if the petitioner fail to give sufficient evidence, I am not justified in saying he has done so. We might, possibly, be correct in *assuming* the circumstances to be as the petitioner alleges, but I can find no justification for doing so. If his evidence is insufficient, our obvious duty is simply to say so. He has given us no evidence of facts incompatible with the absence of the slightest legal connection of the Respondent with *Robert.*

With, therefore, as I think, such insufficient evidence to raise necessarily even a presumption of the agency of *Robert*, and in the face of the positive statements last quoted from his evidence, coupled with the uncontradicted statement of the Respondent, that all who acted in his behalf in the election, with the exceptions named by him, had no authority from him, I feel bound, after the best application of my mind to the subject, and to the prevailing rules of law, to say that the allegation of the agency of *Robert* has not been established, and that upon the whole case the appeal should be dismissed, and the Respondent declared duly elected.

Appeal dismissed with costs.

Attorney for Appellants :—*D. Girouard.*

Attorney for Respondent:—*E. C. Monk.*

CONTROVERTED ELECTION OF THE COUNTY OF CHARLEVOIX

1878
*Jan'y 25.
*April 15.

OSÉE BRASSARD AND OTHERS.....APPELLANTS;

AND

HONORABLE L. H. LANGEVIN.....RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT OF LOWER CANADA, FOR THE DISTRICT OF SAGUENAY.

Appeal,—Election petition—Jurisdiction—Preliminary objections, judgment on, not appealable—sec. 48, chap. 11, 38 *Vic.*

On the 21st April, 1877, an election petition was fyled in the Prothonotary's office at *Murray Bay*, District of *Saguenay*, against the Respondent. The latter pleaded by preliminary objections that this election petition, notice of its presentation and copy of the receipt of the deposit had never been served upon him. Judgment was given maintaining the preliminary objections and dismissing the petition with costs. The petitioners, thereupon, appealed to the Supreme Court under 38 *Vic.*, cap. 11, sec. 48.

Held,—That the said judgment was not appealable and that under that section an appeal will lie only from the decision of a Judge who has tried the merits of an election petition. [*Taschereau* and *Fournier*, J. J. dissenting.]

Per *Strong*, J., (*Richards, C. J.*, concurring,) That the hearing of the preliminary objections and the trial of the merits of the election petition are distinct acts of procedure (1).

(1) By *The Supreme Court Amendment Act of* 1879, sec. 10, it is provided that "An appeal "shall lie to the Supreme Court "from the judgment, rule, order "or decision of any Court or "Judge on any preliminary objection to an Election Petition, the "allowance of which shall have "been final and conclusive, and "which shall have put an end to "the petition, or which would, if "allowed, have been final and "conclusive, and have put an end

*PRESENT:—Sir William Buell Richards, C. J., and Strong, Taschereau, Fournier and Henry, J.J.

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THE question to be decided in this appeal, was whether a judgment maintaining preliminary objections and dismissing an election petition was appealable under the 48th section of the Supreme and Exchequer Court Act.

The facts appear sufficiently in the head note and the judgments.

Mr. *A. F. McIntyre*, for Appellant :—

The petition has been virtually tried, for the judgment of the Court amounts to a final judgment against the petitioners. We must read section 25 of the Supreme and Exchequer Court Act in connection with section 48. If this Court has not jurisdiction in such a case as this, then it is in the power of any Judge to oust the appellate jurisdiction of this Court in every controverted election case. The policy of the law has not been to diminish the right of appeal but to extend it. The judgment in this case is final and therefore appealable. *See Freeman* on judgments (1); *Powell* on the law of appellate proceedings (2).

Mr. *H. C. Pelletier* for Respondent :—

The judgment is final and without appeal.

The 8th section of the Statute 38 *Vic.*, chap. 11, (the Supreme and Exchequer Court Act) says positively: "Any party to an election petition under the said Act, who may be dissatisfied with the decision of the Judge *who has tried such* petition, &c.," may appeal from said judgment. In the present case, we have not to consider

"to the petition: Provided al- "ways, that an appeal in the last- "mentioned case shall not operate "as a stay of proceedings or to "delay the trial of the petition, "unless the Court, or a Judge of "the Court appealed from, shall "so order: and provided also, "that no appeals shall be allowed "under this section in cases in "litigation and now pending, ex- "cept cases when the appeal has "been allowed and duly filed."

(1) Secs. 29, 30, 33.

(2) Pp. 364, 368.

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a decision given at the time of the *trial* of an election petition, but a judgment given on *preliminary objections*.

If an appeal is allowed from every decision of a judge, it would be impossible to proceed with a petition. "Trial" means the examination of witnesses, &c. See *Hardcastle*, Laws and Practice of Election Petitions (1); and *Wolferstan*, Law of Election Petitions (2).

STRONG, J.:—

This was an appeal from a judgment rendered by His Honor Mr. Justice *Routhier*, of the Superior Court of the Province of *Quebec* for the District of *Saguenay*, in the matter of a petition filed by the Appellants, under the Controverted Elections Act 1874, against the return of the Respondent as member of the House of Commons for the Electoral District of *Charlevoix*. The return of the writ of election to the Clerk of the Crown in Chancery in which the Respondent was declared to be duly elected a member of the House of Commons, was published in the *Canada Gazette* on the 7th April, 1877. The Appellants filed their petition against the return on the 21st April, 1877. A copy of the petition is alleged to have been served on the Respondent on the 27th April. On the 28th April, 1877, an application was made on behalf of the Respondent to Mr. Justice *Routhier* to extend the time for filing preliminary objections to the petition until the 22nd May following, which application was allowed. On the 22nd May, the Respondent filed his preliminary objections against the further maintenance of the Appellant's petition. The objections material to be noticed here (being those which the learned judge sustained) are the first and fourth.

The first objection is, "That no certified copy of the

(1) pp. 14 & 18. (2) p. 44.

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"said petition has been served on the Respondent;" and the fourth, "That no notice of the presentation of the "petition and of the security was served on the Re- "spondent."

The Appellants inscribed these objections for proof and hearing for the 12th July last, when counsel for both parties appeared before Mr. Justice *Routhier*, and, no evidence being entered into by either side, the objections were argued and taken *en delibéré*.

On the 24th of July the learned Judge gave judgment, holding the first and fourth objections to be well founded, and dismissing the Appellant's petition with costs. The appeal to this Court is from that judgment. The grounds of the appeal are, that the judgment is wrong and cannot be maintained. *First*, Because there was no proof of any kind establishing the objections. *Secondly*, Because the burthen of proving the objections was upon the Respondent.

The first objection in answer to this appeal, set up by the Respondent in his factum and in argument at the Bar, was, that the decision of the Court below was final, as having been pronounced by a Court of last resort, and that this Court has no jurisdiction.

The procedure for the trial of Controverted Elections under the Act of 1874 (37 *Vic.*, Cap. 16) may, so far as it is material here, be succintly stated as follows :—

The petition must, subject to some exceptions not applicable here, be presented not later than thirty days after the day of publication in the Gazette of the receipt of the return to the Writ of Election by the Clerk of the Crown in Chancery.

The presentation is to be made by delivery to the Clerk of the Court. At the time of the presentation a deposit of $1,000 is to be made, for which the Clerk is to give a receipt, which shall be evidence of the deposit. Within five days after presenting the petition and

making the deposit, or within such other time as the Court or a Judge may allow, a notice of the presentation of the petition and of the security, together with a copy of the petition, is to be served on the Respondent. Within a like delay, after service of the petition, the Respondent is to present any preliminary objections which he may have against the petition, or the petitioner, or against any further proceedings. The Court or any Judge thereof is to hear these objections, and is to decide them in a summary manner. After the expiration of five days from the decision of the preliminary objections, or from the expiration of the time for presenting them, if none be presented, the petition is to be deemed to be at issue, and the Court is to fix a time and place of trial. So far, all the proceedings are to take place in or before the Court in which the petition has been presented, or before one of the Judges of that Court. By section 13 the petition is to be tried by one of the Judges of the Court without a jury. The trial is to take place, unless otherwise ordered by the Court, in the electoral district the election or return for which is in question. At the conclusion of the trial the Judge must determine whether the member whose election or return is complained of, or any and what other person, was duly returned or elected, or whether the election was void, and other matters arising out of the petition, and requiring his determination ; and shall, except only in the case of an appeal, immediately after the expiration of eight days from the day on which he shall have given his decision, certify in writing such determination to the Speaker, appending thereto a copy of the notes of the evidence ; and the determination so certified is to be final to all intents and purposes. If any charge is made in the petition of any corrupt practice having been committed at the election, the Judge is, in addition to such certificate, and at the same time, to report

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in writing to the Speaker: (*a*) Whether any corrupt practice has or has not been found to have been committed by or with the knowledge and consent of any candidate at the election, stating the name of the candidate and the nature of the corrupt practice. (*b*) The names of any persons who have been proved at the trial to have been guilty of any corrupt practice. (*c*) Whether corrupt practices have, or whether there is reason to believe they have, extensively prevailed at the election. The Judge may, at the same time, make a special report to the Speaker as to any matters arising in the course of the trial, an account of which, in his judgment, ought to be submitted to the House of Commons.

Section 54 of the Act contains a provision recognizing a distinction very pertinent to the question raised here; it relates to the withdrawal of a petition and enacts, "That a petition shall not be withdrawn without the leave of the Court or Judge according as *the petition is then before the Court or before the Judge for trial*, upon special application," to be made as prescribed by general rules.

This clause recognizes and carries out very clearly a distinction which runs through the whole Act, as to the separation of the powers and jurisdiction of the Court and those of the Judge at the trial.

After the petition is set down for trial the functions of the Court are at an end, for no provision similar to that embodied in section 23 of the Controverted Elections Act of 1873, authorizing the Judge who tries a petition to reserve a case for the opinion of the Court, is contained in the Act of 1874. There is, therefore, a well defined line of demarcation between the two jurisdictions, that of the Court and that of the Judge who tries the petition. It appears, then, that a Judge who is called upon to decide a "preliminary objection" pre-

sented under section 10, exercises the jurisdiction of the Court in which the petition is filed.

This jurisdiction is not restricted as to locality, but the objections may be heard and determined at any place within the jurisdiction of the Court, whilst the trial of the petition in the absence of an order of the Court, founded on some special circumstances, must be had within the Electoral District. Again, whatever may be the proper construction of the words "preliminary objections," whether they are to be taken as applying to every irregularity or failure to comply with the procedure laid down by the Act of Parliament and the rules of Court, as well as to objections which might be taken to the qualification of the petitioner, or to the latter class of objections only, it is plain, that their determination does not comprise any such decision as the Judge at the trial is bound to come to. In deciding preliminary objections, the Judge cannot determine whether the member whose election or return is complained of, or any other person, was duly returned or elected, or whether the election was void. He can have no evidence before him to enable him to enter into the merits of the petition, and, consequently, he cannot make the report to the Speaker required by the 30th section of the Act of 1874.

In determining preliminary objections, although the Judge may have to hear evidence he is in no sense "trying the petition." The 10th section, and the whole context of the Act, indicates that the two proceedings of hearing preliminary objections and the trial of the petition are separate and distinct, to be taken before different tribunals, at different times, and possibly at different places. The determination of the preliminary objections has for its object an adjudication upon such exceptions as the Respondent to a petition may take to the status of the Petitioner and to his compliance

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with the statutory pre-requisites to being permitted to proceed to trial.

If the decision of the Judge on the objections is against the Respondent, his functions are terminated; he cannot proceed to enquire into or try the merits of the petition. On the other hand, the decision which section 29 of the Act of 1874, makes it incumbent on the Judge at the trial to pronounce is one, on the grounds of law and fact, upon which the validity of the election is impugned, and upon those grounds also on which by way of recrimination the Respondent may seek to in validate any claim to the seat made by the Petitioner on his own behalf, or on that of some other person. Manifestly, this is a very different process from that to be gone through with by the Court or a Judge dealing with preliminary objections only. In short, the word "preliminary" imports that these objections are to be precedent to some proceeding in which the merits of the election and of the petition are to be enquired into, and the Statute authorizes no other proceeding for that purpose than the trial of the petition. The words "preliminary objections" are, therefore, to be construed as an elliptical expression for objections preliminary to the trial.

The convenience of such a division of the enquiry under the petition is very obvious. It is calculated to save large expenditure in summoning and paying witnesses, generally very numerous, to testify for and against the merits of the petition which would be useless and wasteful, if the preliminary objections were reserved until the trial and should then appear to be well founded. It relieves the Judge from the inconvenience and loss of time which might be occasioned in going to the Electoral District to hear mere technical points of law argued, and it tends to disembarrass the trial on the merits, when it comes on, from collateral

issues, and to save time which might otherwise be consumed in long arguments as to the qualification of the Petitioner or the regularity of his proceedings, whilst the witnesses on the merits were uselessly kept in attendance.

This practice of disjoining the hearing of preliminary objections from the trial, which does not correspond with any similar proceeding provided for by the English Act, was probably suggested by the course of proceeding formerly adopted by the Election Committees, who, though bound by no prescribed rules, but being free to regulate their procedure in each case according to convenience, were accustomed to hear and determine *in limine*, objections taken to the qualification of the Petitioner, and others of the same class, before proceeding to investigate the merits of the petition. These considerations appear sufficient to demonstrate that the Controverted Elections Act of 1874 deals with the hearing on preliminary objections and the trial of the petition as two distinct acts of procedure, having for their objects different results, and which it was the policy of the Act to keep separate. Parliament has, indeed, in so many words recognized the separation between the jurisdiction of the Court before trial and that of the Judge after the petition is set down for trial, when, in the 54th section it requires the withdrawal of the petition to be with the leave of the Court or Judge,

According as the petition is then before the Court or before the Judge for trial

Then, the Respondent's proposition is, that the appeal to this Court is limited to one from the decision of the Judge who tries the petition, and does not include an appeal from the determination of the Court or Judge on the hearing of preliminary objections.

Section 48 of the Supreme and Exchequer Court Act is the enactment which confers the jurisdiction on this

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Court, and it repeals sections 33, 34 and 35 of the Act of 1874, which had provided for appeals in the Province of *Quebec* to the Superior Court sitting in Review, and in the other Provinces to the Court in which the petition was presented sitting in banc. These repealed clauses in themselves shew that they were meant to confer the right of appeal from the Judge at the trial only. Section 33, which has reference to appeals in *Quebec* cases, requires the Court of Review to determine and certify its determination and decision to the Speaker upon the several points and matters, as well of fact as of law, upon which the Judge might otherwise have determined or certified his decision, in the same manner as the Judge would otherwise have done at the trial, and declares that the determination of the Court thus certified shall be final to all intent and purposes

Section 35, which relates to appeals from the Provinces other than *Quebec*, is to the same effect, and contains even stronger indications that the appeal was intended to apply only to the substance and merits of the petition.

These sections, however, are repealed by section 48 of the Supreme Court Act, which contains express words not found in the repealed clauses of 37 *Victoria, Cap.* 10, limiting the appeal to one from the Judge at the trial. After enacting a repeal of the sections just mentioned, to take effect so soon as the Supreme Court should be organized, and in the exercise of its appellate jurisdiction, it proceeds as follows:—

> And thereafter any party to an election petition under the said Act, who may be dissatisfied with the decision of the Judge who has tried such petition on any question of law or fact, and desires to appeal against the same,

may do so by adopting the mode of procedure which had been provided for by the repealed section 35 of the

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Act of 1874, and it requires the Registrar to certify the decision of this Court to the Speaker in the same manner as the Judge at the trial is required to do by the provisions of the former Act already referred to, and it lastly declares that the judgment and decision of the Supreme Court shall be final to all intents and purposes.

Applying this section to the case in hand, it cannot possibly be said, having regard to what appears to be the proper construction of the Act of 1874, as already stated, that Mr. Justice *Routhier*, when he heard these preliminary objections, "tried the petition," nor would it be possible for the Court, if it came to the conclusion that the preliminary objections ought to have been overruled instead of allowed, to pronounce a decision which would have been final on the merits of the petition, nor could this Court in any aspect pronounce a judgment upon this appeal which would warrant such a certificate as in every case of appeal this Court is imperatively bound to send to the Speaker of the House of Commons. Therefore the inevitable result of the construction I have placed upon the Controverted Elections Act of 1874, in treating the hearing of the preliminary objections and the trial as distinct acts of procedure, requires me to hold that the decision complained of is not a proper subject of appeal.

The language of the 48th section of the Supreme Court Act, already quoted, seems so explicit that it scarcely requires the aid of any extrinsic argument to support the construction I uphold, but it may well be thought that an enactment which would have made every decision upon preliminary objections or upon interlocutory or incidental motions or applications in litigated election proceedings appealable, would have been most undesirable, since it might have been used vexatiously and oppressively, both as regards delay

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and expense. If from every incidental decision in the proceedings in a controverted election, the parties were to be at liberty to resort to this Court by way of appeal to be remitted back upon the determination of the appeal against the objection to the primary Court, there to resume the contestation of the merits, the litigation would be prolonged to the prejudice not merely of the parties to the petition but to the detriment also of the constituency whose representation was in dispute. It cannot be presumed, that the Legislature intended to authorize such appeals, for it may be truly said that there is no class of litigation in which judicial despatch is more desirable than that arising out of controverted elections. The interests of all concerned, those of the parties, the Courts and the public alike, require reasonable promptitude of decision in such cases. There may, no doubt, be exceptional cases in which the rights of parties to petitions may be seriously affected by erroneous decisions on preliminary points and motions, but the balance of convenience greatly preponderates in favor of confining appeals to the merits. Were this Court to concede the right to take an appeal in the present case, an equal process of reasoning in construing the Act would require it to admit an appeal from the most insignificant motion which could be made. There is, therefore, every argument to be drawn from convenience in favor of restricting the appeal, as the Legislature has done to one upon the merits of the petition, the decision of which must be conclusive.

But supposing I am wrong in this opinion as to the policy of the law, and even though in particular instances the interpretation of the Statute restricting appeals to the merits of the petition might seem to leave parties without relief against erroneous decisions, such consequences would afford no ground for wresting the plain words of the 48th section of the Supreme Court

Act from their obvions primary meaning and extending them so as to include such cases as the present. Where the language of a Statute is doubtful, arguments drawn from unjust and inconvenient results may be of force, but where there is no ambiguity of language they cannot affect judicial construction, whatever weight they may have as reasons for Legislative amendment.

A majority of the Court agreeing on the question of jurisdiction, there is no necessity for discussing the second point argued on this appeal; that involving the correctness of the judgment which is called in question.

In my opinion, this Court has no jurisdiction to entertain the appeal, which should, therefore, pursuant to section 37 of the Supreme and Exchequer Court Act, be quashed, with costs to be paid to the Respondent.

THE CHIEF JUSTICE concurred with *Strong*, *J.*

TASCHEREAU, J :—

Je dois donner un court aperçu des faits de la cause en ce qui concerne le présent appel.

1o. Le 21 avril 1877. Les appelants, contestant l'élection de l'Intimé, produisent leur pétition et en déposent une copie au bureau du protonotaire de la Cour Supérieure du district de *Saguenay*, qui sous sa signature en date du même jour reconnaît en avoir reçu copie, et de plus les appelants déposent la somme de mille piastres en un billet de la Puissance du *Canada*. Cette pétition ne porte aucun certificat de sa signification ni d'avis du jour de sa présentation à l'Intimé, et on ne trouve pas au dossier un certificat d'avis du dépôt des mille piastres et de leur destination, ou d'aucun cautionnement quelconque.

2o. Le 9 mai 1877. Les pétitionnaires, présents appelants, produisent au greffe du bureau du protonotaire du district de *Saguenay* un avis informant l'Intimé que le

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douze de ce même mois de mai 1877 ils demanderont au Juge du district de fixer un jour pour l'instruction de la pétition.

3o. Le 12 mai 1877. L'Intimé présente une requête pour extension de délai pour produire ses objections préliminaires, et ce délai lui est accordé jusqu'au 22 mai, et le 21 mai l'Intimé produit ses objections préliminaires, et le 12 juillet la cause est inscrite au rôle pour preuve et audition sur les objections préliminaires. La cause est mise en délibéré devant M. le juge *Routhier* qui, le 21 juillet, renvoie la pétition sur le principe qu'aucune copie certifiée de la pétition, non plus qu'aucun avis de la présentation de cette pétition et du cautionnement n'ont été signifiés au défendeur.

Maintenant la première question qui est soulevée en cette cause par l'Intimé, l'honorable M. *Langevin*, est celle de savoir si la décision du Juge, sous les circonstances que je viens d'exposer, est ou n'est pas susceptible d'appel, en un mot, si une décision sur les objections préliminaires est susceptible d'appel. L'Intimé le prétend, et il a en sa faveur l'opinion de mes deux honorables confrères qui viennent d'exposer leur vues à ce sujet. L'Intimé se fonde sur la section 48 de la 38e *Vic.*, ch. 11, (Acte constitutif de la Cour Suprême) pour y trouver une distinction entre le droit d'appel d'une décision sur les objections préliminaires et le droit d'appel de la décision du mérite de la pétition même. Je ne trouve rien dans cette section pour justifier cette distinction. La section est en ces termes :

Sec. 48. When the Supreme Court is organized, and in the exercise of its appellate jurisdiction, the thirty-third, thirty-fourth and thirty-fifth sections of the Act passed in the thirty-seventh year of Her Majesty's reign, and intituled " An Act to make better provision for the trial of controverted elections of members of the House of Commons, and respecting matters connected therewith," shall be repealed, except as hereinafter provided with respect to proceedings then pending, and thereafter any party to an election petition under

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the said Act, who may be dissatisfied with the decision of the Judge who has tried such petition, on any question of law or fact, and desires to appeal against the same, may within eight days from the day on which the Judge has given his decision, deposit with the clerk, or other proper officer of the Court (of which the Judge is a member) for receiving moneys paid into such Court at the place where the petition was tried, if in the Province of Quebec, and at the chief office of the Court in any other Province, the sum of one hundred dollars as security for costs, and a further sum of ten dollars as a fee for making up and transmitting the record; and thereupon the clerk or other proper officer of the Court shall make up and transmit the record in the case to the Registrar of the Supreme Court, who shall set down the matter of the said petition for hearing by the said Court, &c., &c., &c.

Je ne trouve rien en cette section pour justifier la prétention de l'Intimé. Au contraire j'y vois qu'il y a appel de toute question de droit ou de fait. Or, en la présente cause le Juge qui en a été chargé, a adjugé sur les questions de droit et de fait, 1o. de droit, en décidant que les appelants devaient commencer l'enquête et faire la preuve, 2o. de fait, en décidant qu'ils avaient failli de prouver leurs objections préliminaires.

Une contestation d'élection est soumise au même Juge qui peut *ab initio* la conduire jusqu'à jugement final; il est obligé de décider également les objections préliminaires aussi bien que le mérite même, et il y a dans l'un et l'autre de ces cas une importance et une responsabilité égales, et de la décision de ces objections préliminaires, comme de celle du mérite de la pétition, dépend le sort de cette pétition; les intérêts d'une division électorale peuvent en être également et fatalement affectés.

Je ne vois aucun motif légal ni rationel pour justifier une telle distinction du droit d'appel sur des questions également importantes quant au résultat. Au contraire, je trouve un argument sérieux dans le danger de laisser à un seul homme le pouvoir d'adjuger en dernier ressort sur des objections préliminaires.

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Je ne puis me reconcilier à l'idée que la législature au moyen de cette section 48, et de l'emploi des mots: "*Judge who tried the petition*," ait voulu dire que le Juge chargé d'adjuger sur une contestation d'élection et qui la renvoie *in toto* sur des objections préliminaires n'y a pas complètement mis fin et n'a pas jugé la pétition d'une manière substantielle, "*did not try the election.*" Il l'a tellement jugée cette contestation d'élection qu'il l'a renvoyée à toutes fins que de droit, et sans laisser aux pétitionnaires l'espoir de renouveler cette contestation.

Sous un autre aspect, on peut dire que la prise en considération d'une contestation d'élection par un juge commence avec la lecture et l'étude de la pétition, des moyens de défense, et se termine avec la preuve, si on n'y met fin auparavant par le renvoi sur objections préliminaires. Tout cela forme le *trial*, savoir: la preuve et l'adjudication sur tous les points en litige, et c'est là la seule interprétation plausible à donner à cette section 48.

Quant à cette première question relative au droit d'appel, je considère que les prétentions de l'Intimé sont non fondées.

Mais il y a dans les autres objections que l'Intimé énonce en son factum, quelque chose que je considère comme très sérieux.

Les appelants prétendent que l'Intimé comme excipant, devait commencer sa preuve sur les objections préliminaires, et l'Intimé soutient le contraire, et je considère que l'Intimé a raison sur ce point. Il est le défendeur, il se tient donc sur la défensive; il dit à ses adversaires, vous m'accusez, montrez à la Cour que vous m'avez assigné conformément aux réquisitions du statut, et que vous m'avez signifié un certificat légal du cautionnement et un avis du jour de la présentation de la pétition. Les appelants ou n'ont pu, ou n'ont pas voulu

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faire cette preuve et Son Honneur le juge *Routhier*, devant qui elle devait se faire, a renvoyé la pétition, faute par les Appelants d'avoir établi ce qui était la bâse, la fondation de la pétition, savoir, que les pétitionnaires avaient signifié à l'Intimé une copie certifiée de la pétition, un avis de sa présentation, et du cautionnement fourni tel que la loi l'exige.

Mais comme je l'ai dit, les Appelants prétendent que c'était à l'Intimé à prouver ces négatives, vû qu'il était l'excipant. Je conçois qu'il peut y avoir des cas où l'excipant puisse être tenu de prouver un plaidoyer affirmatif qui attaquerait une présomption légale. Dans le cas présent la loi ne présume pas que les Appelants se soient conformés aux requisitions du statut en ce qui concerne la signification des documents exigés comme assignation de l'Intimé. C'était donc aux Appelants à commencer cette preuve et non à l'Intimé qui n'avait qu'à attendre les bras croisés la preuve de ces significations. Il lui faudrait prouver une négative, ce qui dans la plupart des cas est impossible, cette preuve incombait aux Appelants comme ayant ou devant avoir en mains les documents nécessaires pour l'établir, d'après la section 40 du statut des élections de l'année 1874 qui énonce que le service de la pétition et des avis de sa présentation, et d'une copie du reçu du dépôt ou du cautionnement doivent être effectués autant que possible en la même manière qu'un bref de sommation en matière civile, ou en toute autre manière qu'il pourrait être prescrit. Or, à défaut de toute autre injonction à cet égard, le Code de Procédure Civile de la province de *Québec* doit régler, et de fait règle, ce mode de signification par les articles 56, 57, 77, 78, 80. Ces articles exigent que les significations de sommations soient effectuées par un huissier ou par une personne quelconque qui en donnera un certificat sous forme d'affidavit.

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Les Appelants prétendent que l'Intimé a admis avoir reçu une copie de la pétition, mais il n'admet pas qu'il ait reçu avis de sa présentation, ni d'une copie du cautionnement, ou du reçu du dépôt pour en tenir lieu. Si cet aveu de l'Intimé quant à la réception d'une copie de la pétition peut être interprété contre lui (ce que je ne crois pas), toujours est-il vrai que son objection quant à l'absence d'un certificat de signification de l'avis de sa présentation et de la copie du cautionnement subsiste en son entier et doit être fatale aux Appelants. Le dossier en cette cause ne démontre nullement l'accomplissement d'aucune de ces formalités essentielles exigées par le statut et sans lesquelles la pétition ne peut exister. Je le demande, comment était-il possible au Juge qui a prononcé le jugement de passer pardessus de telles irrégularités. Je crois de plus que M. le Juge *Routhier* ne pouvait exercer aucune discrétion à cet égard, et de son propre mouvement, sans y être requis par les Appelants, accorder un délai ultérieur aux Appelants pour rectifier leurs erreurs ou omissions. Les Appelants ne paraissent pas avoir aucunement essayé ce moyen d'y remédier, et s'en sont tenus à leurs prétentions que j'ai signalées. Ils ont eu grand tort ; pour ces raisons, je suis d'opinion,

1o. Qu'il y avait en faveur des Appelants un droit d'appel du jugement renvoyant les objections préliminaires.

2o. Qu'au mérite de l'appel, le jugement doit être confirmé avec dépens contre les Appelants.

FOURNIER, J. :—

Le présent appel est de la décision rendue en cette cause, le 24 juillet dernier, maintenant des objections préliminaires produites par l'Intimé, et renvoyant la pétition produite par l'Appelant contre son élection.

L'Intimé a soulevé devant cette cour une question au

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sujet de la compétence de celle-ci à entendre le présent appel. C'est de cette question qu'il faut d'abord s'occuper, car de sa décision dans la négative dépend le sort de la cause.

L'Acte des Elections Contestées de 1873, sec. 14, admettait, dans les mêmes termes que celui de 1874, sec. 10, les objections préliminaires à la pétition. Ces objections sont définies d'une manière générale dans l'un et l'autre acte, comme étant toutes les objections ou raisons d'insuffisance que le défendeur pourra faire valoir contre le *pétitionnaire*, ou la *pétition*, ou contre toute *procédure ultérieure* sur la pétition, et la Cour ou le Juge doit en décider sommairement. Mais la constitution de la Cour n'est pas la même dans les deux actes.

Le statut de 1873 établissait une Cour d'élection composée de trois juges, dont chacun, individuellement, ainsi que tous les autres juges qui pouvaient y siéger, exerçaient au sujet des pétitions d'élections des pouvoirs différents de ceux de la Cour.

Ainsi, un seul juge pouvait décider de la validité des objections faites au cautionnement et de tout ce qui s'y rapportait, et exercer les pouvoirs de la Cour d'élection, excepté lorsqu'il était déclaré que la Cour seule pouvait décider, ou quant aux points de droit soulevés par la pétition, ou dans un cas spécial (*spécial case*), ou dans les questions réservées par le Juge pour la décision de la Cour. Le Juge avait le pouvoir de réserver sans distinction tous les points de droit soulevés dans les procédures faites en vertu de l'acte.

Quant aux objections préliminaires qui devaient être décidées sommairement, il y avait juridiction concurrente entre le Juge et la Cour.

L'Acte de 1874 a fait disparaître ces différences de pouvoir entre un seul Juge et la Cour telle que composée auparavant. Aujourd'hui, la Cour ne consiste plus que d'un seul juge qui décide sur toutes les procédures

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qui peuvent avoir lieu au sujet d'une pétition d'élection, ainsi que sur toutes les questions de faits et de droit qui peuvent y être soulevées. Il doit décider finalement, sans pouvoir les référer à la Cour; car la Cour c'est lui-seul, la distinction entre les pouvoirs de la Cour et du juge n'existant plus.

Au lieu du pouvoir qu'avait le Juge en vertu de l'acte de 1873, simplement de réserver la décision des questions de droit pour la Cour, composée de trois juges, la loi de 1874 avait substitué l'appel, pour la province de *Québec*, à la Cour de Révision. Toute partie à la pétition pouvait, dans les huit jours de la décision, faire transmettre le dossier à cette Cour. Les procédures devaient y être conduites comme dans une cause en révision, et la Cour devait prononcer sa décision sur les matières de fait et de droit sur lesquelles le juge aurait pu lui-même prononcer, et de la même manière qu'il aurait pu le faire.

Les pouvoirs exercés à cette époque par la Cour de Révision ont été, en vertu de la 38me *Vict.*, ch. 11, sec. 48, transférés à cette Cour qui doit prononcer, tant sur les questions *de droit* que sur les questions *de faits*, le jugement qui aurait dû être rendu par le juge de la décision duquel appel est interjeté.

La principale objection que l'on fait au droit d'appel en cette cause provient de ce que dans cette sec. 48 l'on emploie, pour désigner le jugement dont il y aura appel, les expressions suivantes : " the decision of the Judge who has *tried* such petition ; " et aussi de ce que plus bas dans la même section, le régistraire est requis " to set down the *matter of the said petition* for hearing." On prétend que ces expressions ne peuvent s'entendre que du mérite de la pétition, et non pas d'une décision sur des objections préliminaires; que partant cette Cour n'a pas droit de prendre connaissance du présent appel, bien que le jugement dont on se plaint mette fin à la pétition.

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C'est en donnant au mot *trial* une signification restreinte qu'il ne me semble pas avoir dans cet acte, qu'on arrive à cette conséquence. Ce terme (*trial*) ne doit pas s'appliquer seulement à l'examen des faits concernant le mérite de la pétition, puisque d'après la loi il peut y avoir plusieurs *trials* dans la même contestation, savoir: *trial* sur les objections préliminaires, et *trial* sur le mérite de la pétition. L'examen de la matière de fait en issue étant un *trial* d'après la définition technique, ce terme devait donc s'appliquer à l'instruction de la contestation soulevée par les objections préliminaires aussi bien qu'à l'examen du mérite de la pétition; la loi en se servant de cette expression indique l'un aussi bien que l'autre, puisque, dans les deux cas, il y a lieu à l'examen (*trial*) des questions de faits.

Mais on dira, peut-être, que dans le cas actuel les objections préliminaires, n'étant fondées que sur des moyens de forme attaquant la régularité de la signification de la pétition et des avis requis par la loi, elles ne font pas régulièrement la matière d'une telle procédure. Cependant d'après la section 10, *toute raison* suffisante pour empêcher *toute procédure ultérieure* sur la pétition est indiquée comme pouvant faire le sujet d'objections préliminaires sur lesquelles il peut être prononcé un jugement qui met fin à la contestation. Or, il n'existe pas, je crois, d'autre manière de prendre avantage de ces irrégularités que par objections préliminaires.

De tout temps cette manière de procéder a été admise, et de tout temps aussi, on a considéré que les expressions *try the merits of the petition*, *try the matter of the petition* s'appliquaient au jugement rendu sur ces objections comme au jugement décidant le mérite de la pétition.

C'est par des objections préliminaires que dans la cause de *Honiton*, (1) le membre siégeant prenait avantage, 1o.: du fait que la pétition produite n'était pas de

(1) 3 Luders "On Elections."

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bonne foi une pétition *renouvelée*, ainsi que la loi l'exigeait à cette époque, lorsque la procédure n'avait pas été terminée dans la session, mais un *duplicata* de celle qui avait été présentée dans une session précédente; 2o : que les pétitionnaires s'étaient rendus coupables de corruption.

Le Conseil du membre siégeant argumentait ainsi : Both these points are preliminary conclusive objections to the trial of the cause; contending, that if established by evidence, the Court ought not in justice to proceed upon it. That though the duty of the members, *enjoined by oath*, required *a trial of the matter of the petition* referred to them, yet this rule was necessarily subject to the fundamental rules of practice, by which the Court proceeded: because all trials were necessarily guided by such rules. For, if it could be supposed that the names to a petition were forged, or that the parties had no interest or right to petition, it would be proper to receive the evidence of the facts, and if found true, to reject such petition. For in such cases there are no merits to try; and the ends of justice would be obtained in this manner, although the terms of the oath would not be literally obeyed.

Le comité adopta cette manière de voir et déclara que le membre siégeant pouvait faire la preuve de la nullité de la pétition, et prouver aussi l'irrégularité dans la signature et la présentation de la seconde pétition. Le résultat final fut le renvoi de la pétition pour les motifs invoqués dans les objections préliminaires. La cause de *Bedford* en 1728 était du même genre.

Ces décisions ont été rendues en vertu de l'acte 10 *Geo.* 3, ch. 16, communément appelé le *Grenville act* lequel contient au sujet de la référence d'une pétition d'élection à un comité, les mêmes expressions que celles employées dans la 38 *Vict.* ch. 11., sec. 48. La section 72 de cet acte décrétait que le comité général auquel était référée la formation des comités spéciaux pour la décision des pétitions d'élection ferait rapport à la Chambre des noms des membres "of such select committee appointed *to try the merits.*"

Par la section 73 il était exigé des membres ainsi nommés qu'ils prêtassent le serment de

well and truly *to try the matter of the petitions* referred to them, *and* a true judgment to give according to the evidence, and shall be taken to be as a select committee legally appointed to *try* and *determine* the *merits* of this return of election so referred to them by the House.

Section 78. Such select committee shall meet at the time and place appointed for that purpose, and shall proceed to *try the merits* of the election petition so referred to them.

Cependant, en dépit des expressions si souvent répétées "*to try the merits, to try the matter of the petition*, to determine the *merits of the return* of election," on a de tout temps divisé la contestation d'une élection et admis des moyens de forme plaidés par objections préliminaires, dont la décision avait l'effet de terminer la contestation. J'oserais dire sans craindre de commettre une grave erreur, qu'il a été jugé autant de pétitions d'élections sur des objections préliminaires, que sur le mérite même de ces pétitions. Cependant les réferences, faites aux comités chargés de les décider, étaient "*to try the merits*," malgré cela on n'a jamais eu l'idée que c'était forfaire au serment "*to try the merits*" que de décider finalement du sort d'une pétition sur des moyens de forme. Telle a toujours été la jurisprudence tant en *Angleterre* qu'ici, depuis que la décision des élections contestées a été transférée de la Chambre des Communes à des comités spéciaux assermentés pour cet objet, c'est à dire pendant un siècle.

On ne doit donc pas hésiter à conclure que ces expressions "*try the merits*" signifiaient dans l'acte impérial des élections contestées de 1770, et dans notre statut provincial de 1851, le procès (*trial*) sur les objections préliminaires aussi bien que le procès (*trial*) sur le mérite de la pétition.

En répétant les mêmes expressions dans l'acte des élections contestées de 1873 et 1874 ainsi que dans la

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38e *Vic.*, ch. 11, sect. 48, la législature est censée d'après les règles ordinaires d'interprétation des statuts, avoir adopté et conservé l'interprétation donnée antérieurement à ces expressions. Dans la section 48, conformément à la jurisprudence établie, les expressions " try the petition " ou " try the matter of the petition " doivent avoir la même signification qu'auparavant.

Conséquemment l'appel donné dans ces termes doit aussi comprendre l'appel d'un jugement qui, quoique rendu sur des objections préliminaires décide en même temps le mérite de la pétition et anéantit la contestation.

D'ailleurs les termes de la section 48 donnant le droit d'appel me semble ne laisser aucun doute sur ce sujet ; " any party to an election petition under the said Act, who may be dissatisfied with the *decision* of the judge who has *tried* such petition, *on any question of law* or *of fact*, and desires to appeal against the same etc." C'est de la décision que l'appel a lieu, non pas du procès (*trial*) et cette décision peut être rendue " on the *trial* of a question of *law* or of *fact*." Dans le cas actuel il y avait l'un et l'autre ; et c'est de la décision sur les questions de fait et de droit que l'appel est donné, sans distinction d'appel sur le mérite ou sur les objections préliminaires. La loi ne fait à cet égard ni restriction ni distinctions, et là, où elle n'en fait pas, il n'est pas permis au juge d'en faire.

Pour ces raisons, je suis d'avis que l'appel devrait être reçu.

Quant aux questions soulevées sur le mérite, il serait inutile d'entrer dans leur considération, puisque la majorité de la Cour est d'opinion qu'il n'y a pas d'appel du jugement dont on se plaint en cette cause.

HENRY, J. :—

The points in this case I have found not to be so easily resolved as, at the hearing, I was inclined to think

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They were raised by two issues, numbers one and four, in the shape of preliminary objections, by the Respondent as follows:—

The Respondent asked to have the petition dismissed because, as he alleges,

1st. No certified copy of the petition was served upon him, and

2nd. No notice of the presentation of the petition and of the bail (cautionement) was served upon him.

The learned Judge before whom the matter came decided in favor of the Respondent on both points; and dismissed the petition with costs. From that judgment the Petitioners appealed to this Court; and, in addition to the claim of the correctness of that decision, the Respondent takes the ground that, inasmuch as the merits of the petition were not heard and adjudicated upon by the learned Judge, no appeal will lie.

I will deal with the latter objection first, as it touches the jurisdiction of this Court to try the merits of the judgment given on the other points at issue.

The appeal directly to this Court in controverted election cases is given by section 48 of the Dominion Act of 1875, entitled: "An Act to establish a Supreme Court and a Court of Exchequer for the Dominion of *Canada*."

It provides for the repeal of sections 33, 34 and 35 of the Controverted Elections Act of 1874, and enacts that:

> Any party to an election petition under the said Act, who may be dissatisfied with the decision of *the Judge who has tried such petition on any question of law or of fact*, and desires to appeal against the same, may appeal to this Court. And the appeal shall thereupon be heard and determined by the Supreme Court, which shall pronounce such judgment upon questions of law or of fact, or both, as in the opinion of the said Court ought to have been given by the Judge whose decision is appealed from.

It also empowers this Court to make orders as to the money deposited; as to the costs of the appeal; and also

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for the taking of further evidence when improperly rejected, and it further provides :

That the Registrar shall certify to the Speaker of the House of Commons the judgment and decision of the Court upon the several questions, as well of fact as of law, upon which the Judge appealed from might otherwise have determined and certified his decision in pursuance of the said Act, in the same manner as the said Judge should otherwise have done, and with the same effect, &c.

The thirty-third section of the Act of 1874, so repealed, provided for appeal from the Judge to the Court of Review in *Quebec* or *Montreal*, as the case might be, as follows :

Provided also that in the Province of *Quebec*, any party to the petition may, after depositing the neccessary sum of money as security, &c., file in the same office an inscription for review, notice of which must be given to each of the opposite parties, &c., * * * and all other proceedings shall be had *as in a case of review*. And the Court shall determine and certify its determination and decision to the Speaker upon the several points and matters, as well of fact as of law, &c.

as in section 48 of the other Act hereinbefore first quoted.

Section 34 provides for the appeals to be made to the Court of Review at *Quebec* or *Montreal*, as the case might be.

Section 35—

Provided, also, that in any other of the Provinces any party to the petition who may be dissatisfied with the decision of *the Judge on any question of law or of fact*, and desiresto appeal against the same, may, within eight days from the day on which the Judge has given his decision, deposit in the Court of which the said Judge is a member, with the proper officer of the Court, &c., the sum of one hundred dollars, &c., by way of security for costs, &c.

The *matter of the petition* is then to be set down "for hearing before the full Court." And the said appeal shall thereupon be heard and determined by the said full Court, and the judgment shall be pronounced both upon questions of law and of fact, as should, in the

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opinion of the said Court, have been delivered by the said Judge, with the same conclusion as to the power to dispose of the deposit and the costs of the appeal, the certificate to the Speaker, and the finality of the judgment in substance as in the section which gives the appeal to this Court.

Under the circumstances in this case, then, could a party, dissatisfied with the decision of a Judge of the Superior Court of *Quebec* as to the preliminary objections, appeal to the whole Court? By the Act the preliminary questions may be tried by the Court or a Judge, and sections 3 and 7 declare what "the Court" and "the Judge," when used in the Act, shall mean. Section 3 provides:—

In this Act and for the purposes thereof, the expression, "the Court," as respects elections in the several Provinces hereinafter mentioned respectively, shall mean the Courts hereinafter mentioned, *or any Judges thereof*, &c.

And section 7 provides:—

The expression, "the Judge," shall mean the Judge trying the election petition, *or performing any duty to which the enactment in which the expression occurs has reference*, &c.

Section 10 provides for the filing of preliminary

Objections or grounds of insufficiency which he may have to urge against the petition or the Petitioner, or *against any further proceedings thereon*; and the Court, or any Judge thereof, shall hear the parties upon such objections or grounds, and shall decide the same in a summary manner.

I have no doubt that the objections taken were legitimate ones in this case, which, if proved, would be sufficient to cause the dismissal of the petition, but the consideration of which I consider unnecessary.

By the Act of 1874 no part of the proceedings in regard to preliminary objections need necessarily come before "the Court"; for section 3 makes a Judge "the Court," with plenary powers. The Judge who tries the preliminary objections is, for the time being, "the

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Court," and, if so, no appeal to the whole Court would lie, unless expressly provided by the Statute. I think, therefore, no appeal would lie to the whole Court. Section 7 says that "the Judge" shall mean not only the Judge trying the petition, but a Judge performing *any duty to which the enactment in which the expression occurs has reference.*

Section 33 provides for an appeal to the whole Court within "eight days from the day on which *the Judge* has given his decision," and for the hearing of the appeal, and enacts, that all other proceedings shall be had as in a case of Review.

It has been contended that an appeal will only lie from the decision of the Judge who tried the merits of the petition, and not from the Judge who tried the preliminary objections. Section 33, however, gives an appeal from the decision of "the Judge," without any distinction, as between the Judge trying the preliminary objections and the Judge trying the merits of the petition. The words "performing any duty," would, no doubt, in some respects, and for some purposes, apply to and include the Judge trying the preliminary objections. The section in question says, in substance, that "the Judge" shall mean and include a Judge other than the Judge trying the petition, but it may not still be applicable to "the Judge" trying the preliminary objections and still have abundant application otherwise.

If it be considered wise or necessary that the party against whom a decision is given on a trial of the merits should be entitled to an appeal, why should there not be an appeal when an erroneous judgment on the preliminary objections deprives the petitioner of a trial on the merits, and leaves the Respondent illegally in his seat. I cannot conclude the Legislature intended to leave parties interested and the status of the Legislature itself dependent to such an extent on the decision

of any one Judge with out appeal. The question here is however not so much, what the *intention* was, but whether an appeal in such a case is, by legislation, provided. That it is not by express provision is clear, and I must confess I find no little difficulty in arriving at the conclusion that it is necessarily to be implied. The words of the clause giving the appeal to this Court provide for such appeal only from "the decision of the Judge who has tried such petition;" and the five latter words, being clearly words of limitation, we cannot extend the provision beyond them, unless by other parts of the Act it is patent they were not intended to be so construed. I have sought in vain for anything in any of the enactments to justify the conclusion that the restrictive words in question were not intended to have their full effect. If the Legislature intended an appeal should be had from the judgment on the preliminary objections, the restrictive words were unfortunately used; but I feel myself bound to interpret the several Statutes as I find the wording of them requires irrespective of results.

What is meant by the words "tried the petition"? They are, to my mind, intended to distinguish between the Judge who has tried *the merits of the petition* from a Judge who may have tried *the preliminary objections*.

Section 13 of the Act of 1874, provides that every election petition shall be tried by one of the Judges, &c., without a jury; and settles where the trial shall take place.

"The Judge who has tried the petition," is here pretty plainly indicated, and certainly does not, in my opinion, include the Judge who tries the preliminary objections. It is not necessarily the same Judge who tries both; and although it may be asserted that the Judge who tries the preliminary objections does indirectly, as in this case, determine the election, and in

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that way *try the petition*, is such a trial what the Statute refers to? I have had no small difficulty on that point; but I cannot see my way clear, after a studious consideration of all the legislation upon the subject, to the conclusion that such should be the proper legal interpretation of the words by which an appeal is provided. The clause giving the appeal to this Court, as also those giving the appeal to the other Courts under the Act of 1874, clearly point to *a final judgment and report to the Speaker*; and if it was intended that the judgment on preliminary objections should be the subject of an appeal, no final judgment could in many cases be given, and the matter would, in case of reversal, have to go back to a Judge to try the merits of the petition. For such there is no statutory provision; and when considering the words of limitation I have mentioned in connection with that fact, and the provision for the peculiar and final judgment to be given on appeal, and report of the same to the Speaker, I feel myself bound to conclude, either that no appeal in such cases was intended, or, that if it was, the legislation for it is defective. Section 29 of the Act of 1874 provides that the Judge shall, after eight days from the time of his decision, unless in case of an appeal, certify his determination to the Speaker, and it shall be final; and the same provision for eight days' time for an appeal is given in section 32, where provision is made for a decision upon a "special case" agreed upon. Section 10, which provides for the trial of preliminary objections, has no such time given, but says that

> The parties shall be heard upon the objections and grounds, and that the Court or a Judge shall decide the same in a summary manner.

The distinction that thus appears as to the judgment in the latter case from those under sections 29 and 32, would lead to the conclusion that on the trial under section 10, no appeal was contemplated. There are,

however, several reasons in opposition to those I have mentioned, but I cannot help feeling that they are not sufficient to control those I have given for the conclusions I have arrived at. Taking this view, it is unnecessary for me to refer to the remaining points.

Appeal quashed with costs.

Solicitors for Appellants: *Langelier & Langelier.*

Solicitor for Respondent: *H. Cyrias Pelletier.*

JAMES SCOTT.....APPELLANT;

AND

THE QUEEN.....RESPONDENT.

1878
Jan. 26.
April 25.

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

Larceny—Unstamped Promissory Note—Valuable Security—32 & 33 *Vic.*, ch. 21 D.

S. was indicted, tried and convicted for stealing a note for the payment and value of $258.33, the property of A. McC. and another. The evidence showed that the promissory note in question was drawn by A. McC. and C. R., and made payable to *S's* order. The said note was given by mistake to *S.*, it being supposed that the sum of $258.33 was due him by the drawers, instead of a less sum of $175.00. The mistake being immediately discovered, *S.* gave back the note to the drawers, *unstamped* and *unindorsed*, in exchange for another note of $175.00. An opportunity occurring, *S.* afterwards, on the same day, stole the note; he caused it to be stamped, indorsed it, and tried to collect it.

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*PRESENT.—Sir William Buell Richards, C.J., and Ritchie, Strong, Taschereau, Fournier and Henry, J.J.

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Held,—On appeal reversing the judgment of the Court of Queen's Bench for *Lower Canada* (Appeal side), that *S.* was not guilty of larceny of "a note" or of "a valuable security" within the meaning of the Statute, and that the offence of which he was guilty was not correctly described in the indictment.

The prisoner, *James Scott*, was tried and convicted on a charge of stealing "a note for the payment of and of the value of $258.33, the property of *Archibald McCallum* and *Charles Read*," at the March Term, 1877, of the Court of Queen's Bench (Crown Side) sitting at *Montreal*.

Mr. Justice *Ramsay*, holding that Court, reserved the following case for the Court of Queen's Bench sitting in Appeal and Error.

"PROVINCE OF QUEBEC, "District of Montreal. } IN THE COURT OF QUEEN'S BENCH.

(*Crown Side*).

March Term, 1877.

"No. 90.
"THE QUEEN
"*vs.*
"JAMES SCOTT. } On Conviction of Stealing a Valuable Security.

"Case reserved for the Court of Queen's Bench sitting "in Appeal and Error.

"Prisoner was indicted for stealing a note for the "payment and value of ($258.33) two hundred and "fifty-eight dollars and thirty-three cents, the property "of *Archibald McCallum* and another. The evidence "showed that the promissory note in question was "drawn by *Archibald McCallum* and *Charles Read*, and "made payable to the prisoner's order. The said note "was given by mistake to prisoner, it being supposed "that the sum of ($258.33) two hundred and fifty-eight "dollars and thirty-three cents was due him by the "drawers, instead of a less sum of ($175.00) one hundred "and seventy-five dollars. The mistake being immedi- "tely discovered, prisoner gave back the note to the

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"drawers, unstamped and unindorsed, in exchange for "another note of ($175.00) one hundred and seventy-"five dollars. An opportunity occurring, prisoner after-"wards, on the same day, stole the note; he caused "it to be stamped, indorsed it, and tried to collect it. He "was convicted, and I reserved the following questions "for the consideration of the Court:—

"First: Whether an unstamped promise to pay is a "promissory note or a valuable security?

"Second: Whether in the hands of the drawers it was "such property as to be the subject of larceny?

"And I postponed the judgment until such questions "are decided, and recommitted the prisoner to prison.

"(Signed) T. K. RAMSAY, J.

"*Montreal*, 11th June, 1877."

The reserved case was heard in the full Court and the conviction sustained, Chief Justice *Dorion* and the late Mr. Justice *Sanborn* dissenting.

Due notice to appeal to the Supreme Court of *Canada* was given to the Attorney-General of the Province of *Quebec*, within fifteen days from the rendering of the above judgment, as required by sec. 49 of the Act.

The prisoner, being poor, was unable to make any deposit to appeal, but fyled in the office of the Clerk of the Court of Appeals a petition *in forma pauperis* to be allowed to obtain the papers from that office.

Mr. *Frank Keller*, for Appellant:—

The indictment contains but one count: that of "feloniously stealing one note for the payment of and of the value of $258.33, the property of *A. McC.* and another." This note, payable to appellant's order, was unstamped and unindorsed when stolen. In order to obtain a conviction under 32 and 33 *Vic.*, c. 21, it was the duty of the Crown prosecutor to have evidence that the Appellant had stolen "money or a valuable secur-

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ity." Now, all the English authorities go to prove that an ordinary unstamped note cannot be "a valuable security in the hands of the owner." The Canadian Statute which allows a *bonâ fide* holder of a promissory note to cure the defect by affixing double stamps, does not alter the case. A note, considered as a valuable security, is only deemed equal in value to the unsatisfied amount of money, for the securing or for the payment of which it is applicable. There was no amount due upon this note and it cannot have been of any value to the owner, as it was stolen before it was negotiated. See *Rex* v. *Phipoe* (1); *R.* v. *Mead* (2); *R.* v. *Bingley* (3); *R.* v. *Perry* (4); *Russell* on Crimes (5); *Caverly* v. *Caverly* (6); *Rex* v. *Walsh* (7); *Reg.* v. *Yates* (8); The case of *R.* v. *West* (9); was relied upon by the Court below, but it does not apply.

The case of *West* was an indictment against *Frederick West* for stealing £95 in money, and against *Elizabeth West*, his wife, for receiving £5 in money, part of said £95, knowing them to have been stolen. The money stolen consisted in bank notes, and the only question raised, was whether bank notes not in actual circulation could be the subject of larceny as money, under section 18 of 14 and 15 *Vict.*, ch. 100, similar to section 25 of 32 and 33, ch. 29, of the Dominion Acts, which declare it sufficient to describe bank notes in an indictment as money.

It cannot be seriously argued that there is any similarity between taking a bank note and a promissory note made by the drawer, especially when the Statute declares that stealing bank notes is equivalent to stealing money.

(1) 2 Leach 673.
(2) 4 C. & P. 535.
(3) 5 C. & P. 602.
(4) 1 Denn, 69.
(5) Greaves' Ed., vol. 2, p. 344.
(6) 3 U. C. Q. B. (O.S.) 338.
(7) R. & R. 215.
(8) 1 Mood. C. C. 170.
(9) 7 Cox C. C. 185.

The honorable Judges who delivered the judgment of the full Court acknowledged the decision was contrary to English precedents. This judgment, if sustained by the Supreme Court of the Dominion of *Canada*, would over-rule the former decisions existing on this point.

Our criminal law being based on the English criminal law should follow the English precedents. The reasoning of the honorable the Chief Justice, and the grounds urged by the different authorities cited, prisoner's counsel respectfully submits are clear and ought to be sustained.

Mr. *C. P. Davidson*, Q. C., for the Crown:

The prisoner was convicted for stealing a *note*. In Art. 2344 C. C. L. C., we have the definition of a promissory note. Under this section the moment the note got into the possession of the Appellant it was a legal instrument. The English cases cited by Appellant's Counsel do not apply, for the law was not the same when these decisions were rendered as ours is now. In the Canadian Statute the following words have been added "evidencing title to any chattel or money." The importance of these words has not been taken into consideration by the learned Judges who differed in the Court below. It is argued that the note was unstamped and unindorsed, but the endorsation by *Scott* is not of the essence of the note, neither is the stamp, for the note can be legalized here by affixing double stamps.

The case of *R.* v. *Walsh* (1), relied on by the Appellant, has been twice overruled: 1st. by *R.* v. *Metcalfe* (2); and 2nd. By *R.* v. *Heath* (3). The case of *Reg.* v. *West* (4), where it was held that bank notes in the hands of a bank, and not in circulation, could be the subject of larceny, is a case in point.

(1) R. & R. 215.
(2) 1 Mood, C. C. 433.
(3) 2 Mood, 57.
(4) 7 Cox, C. C. 185.

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Mr. *F. Keller*, in reply :—

There is no difference between a promissory note here and a promissory note in *England*. In the case of *R.* v. *Heath* (1) there, the cheque was taken, not from the hands of the drawer, but from the servant. It became a valuable security because it was taken from a third party. In no case whatever is the case of *R.* v. *Heath* referred to as overruling *R.* v. *Walsh* (2).

RITCHIE, J. :—

A note was made payable by the prosecutors to the prisoner's order and given to him. It having been discovered that a mistake had been made in the amount for which the note was drawn, the prisoner returned it to the drawers, unstamped and unindorsed. On the same day prisoner stole the note, caused it to be stamped, indorsed, and tried to collect it. He was indicted "for stealing a note for the payment and value of $258.33, the property of *Archibald McCallum* and another, the drawers." He was convicted, and the learned Judge reserved for the consideration of the Court the following questions:—

First. Whether an unstamped promise to pay is a promissory note or a valuable security ?

Second. Whether, in the hands of the drawers, it was such property as to be the subject of larceny ?

The conviction was sustained by a majority of the full Court, the Chief Justice and Mr. Justice *Sanborn* dissenting.

The Statute under which the prisoner was indicted and convicted is the 32 and 33 *Vic.*, ch. 21, and the sections bearing on this case are sections 1 and 15. Section 1 provides :—

(1) 2 Mood, 57. (2) R. & R. 215.

That in the interpretation of this Act the term "valuable security" shall include, *inter alia*, any debenture, deed, bond, bill, *note*, warrant, order, *or other security* whatsoever, for money or for payment of money, whether of *Canada* or of any Province therein, or of the United Kingdom, or of any British Colony, or possession, or of any foreign State, or any document of title to lands or goods as hereinbefore defined, and any stamp or writing which secures or evidences title to, or interest in, any chattel, personal, or any release, receipt, discharged or other instrument evidencing payment of money or the delivery of any chattel personal; *and every such valuable security shall, where value is material be deemed to be of value equal to that of such unsatisfied money*, chattel personal, share, interest or deposit for the securing or payment of which, or delivery, or transfer, or sale of which, or for the entitling or evidencing title to which such valuable security is applicable or *to that of such money* or chattel personal, *the payment* or delivery of which is evidenced by such valuable security.

And section 15 declares that:—

Whosoever steals or for any fraudulent purpose destroys, cancels, obliterates or conceals the whole or any part of *any valuable* security other than a document of title to lands is guilty of felony of the same nature and in the same degree; and punishable in the same manner as if he had stolen any chattel of like value with the share, interest or deposit, to which the security so stolen relates, *or with the money due on the security so stolen or secured thereby and remaining unsatisfied*, or with the value of the goods or other valuable thing represented, mentioned or referred to in or by the security.

I think it capable of easy demonstration that at the time this document was stolen it was neither a "note," nor a valuable security within the meaning of the Statute. If it was of any appreciable value to the owner as a mere piece of paper, the prisoner was not indicted for stealing it as such, and therefore on this indictment for stealing a note could not be convicted.

The document was not at the time it was stolen, as against the makers, valid and obligatory, so that in whosesoever hands it might come for valuable consideration it would be productive and available against the makers.

The note was not stamped when stolen. The 11th

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section of the Stamp Act then in force declared that if any person in *Canada* makes, &c., "any promissory note" chargeable with duty under 31 *Vic.*, ch. 9, before the duty or double duty has been paid, such person shall thereby incur a penalty of $100, and save only in case of payment of double duty as in 12th section provided, such instrument shall be invalid and of no effect in law or equity. The 12th section provides:—

> No party to or holder of any promissory note, draft or bill of exchange, shall incur any penalty by reason of the duty thereon not having been paid at the proper time and by the other party or parties, provided that at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it, that he had no knowledge that they were not affixed at the proper time and by the proper party or parties, and that he pays the double duty or additional duty as soon as he acquires such knowledge,—and any holder of such instrument may pay the duty thereon and give it validity, under section eleven of this Act, without becoming a party thereto. In this section the word "duty" includes any double or additional duty payable under the said section eleven.

It is therefore clear, that the alleged note, not having been stamped by the makers, and, indeed, never properly stamped, was, under the Stamp Acts, of no effect in law or equity.

At the time this paper was taken it was not then a valid or binding undertaking to pay or secure any sum of money, nor yet intended so to be, and if the maker did not stamp it, and never intended it should be stamped, surely the law never contemplated that in the event of such a paper being stolen, it could be legally stamped by the thief, and so, by the act of the thief, vitality and effect should be given to that which otherwise would be wholly void and of no effect, either at law or in equity. I can find no provision in the law for making the stamping by such a party effective.

But, independent of this, the Statute only declares that the party stealing a valuable security shall be

guilty of felony of the same nature and in the same degree, and punishable in the same manner, as if he had stolen any chattel of the like value with the same, &c., "*or with the money due on the security so stolen or secured thereby and remaining unsatisfied*"; so if there is no money due on the security so stolen nor secured thereby and remaining unsatisfied, what is the nature of the felony and degree and punishment to which he is liable? And thus we find in *Archibold* (1) the form of the indictment for stealing a bill or note contains the averment, that the sum "payable and secured by and upon the said Bill, being then due and unsatisfied," and in the text it is stated; "so that to show that the stealing of a bill, or note, or cheque is punishable within the 7 & 8 *Geo.* 4 C. 29, s. 5 (which is couched in the same language as section 15 of the Dominion Act), it is necessary to show that some amount of money is due upon it or secured by it and remaining unsatisfied, and that is not done by merely stating it to be a bond, bill of exchange, promissory note or order for money or payment of money, for it may have been paid;" and in the case of the *Queen* v. *Lowrie* (2), in which the indictment was in a similar form, and where it was determined, that an indictment, under the 24 and 25 *Vic.*, cap. 96 Sec. 27, (which uses similar language to our own Statute,) for stealing a valuable security must particularize the kind of valuable security stolen. *Bovill*, C.J., delivering the judgment of the Court, speaking of the document proved, says: "It was not by itself a document entitling *Cairns* (the Prosecutor) to receive the money from *Stafford*. *Moreover, the money was not due and unsatisfied at the time the prisoner took the agreement.*"

How can it be said there was any money due on this paper or secured thereby? It could not have been used by the drawer, the owner, for any available purpose

(1) 1 Pr. & P. 464. (2) (3) L. R. 1 C. C. 61.

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whatever, either as a promissory note or a valuable security; nor, as regards others, could what prisoner stole, have been sued on, or made available by any one at the time he took it, in the unindorsed and unstamped state in which it then was, and certainly not by the prisoner himself, because, if he sued on it, it would be quite open to the maker to show that nothing was due or owing on it, and that the claimant had stolen the paper, which it is obvious would be a clear answer to his action, and so conclusively establish that the instrument, in lieu of being a valuable security, was simply a piece of paper, on, or by which, there was no money due or secured, and no unsatisfied money for securing or payment of which the paper was applicable. If then it was valueless as a security to the maker and payee, and, at the time it was taken, to all others, it not being then indorsed or stamped, had the prisoner been apprehended and indicted and tried while the paper continued in that condition, is it not self-evident that he could not have been convicted of stealing a promissory note or a valuable security, the paper then being in fact and in law neither the one nor the other. If this be so, on what principle can it be successfully contended, that the act of the prisoner in either stamping or indorsing, or both, subsequent to the taking, and wholly unconnected with the act of taking, and while still retaining the paper in his own possession, or under his own control, could make that taking larceny, which was not larceny when the act of taking was committed; for when he took the note from the prosecutor, he certainly neither stole a stamped nor an indorsed note. If such was the effect of his dealing with the paper, it would necessarily follow, that it was not the taking which constituted the larceny, but the subsequent stamping and indorsing, and we were not to look at the condition of the paper when the larceny was actually

committed. But it is clear that neither the stamping nor the indorsing would give the paper any value in the possession of the prisoner; because the mere fact of his stamping and indorsing the paper and retaining it in his own hands could in no way make the paper a good note, or a valuable security, nor in my opinion in any way change the relative position of the parties in respect to the paper, or their relative rights or obligations.

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It is not necessary to discuss or express any opinion as to what might have been the possible effect of prisoner's acts had he stamped and indorsed the paper and transferred it to a *bonâ-fide* innocent indorsee for value, whereby it might, or might not, have become available as against the drawer as a promissory note, the payment of which he could or in view of the stamp Acts or otherwise he could not resist.

It is sufficient for us to say that on the present indictment, we think the prisoner should not have been convicted of stealing a note for the payment and value of $258.33; but there need have been no failure of justice in this case, for had the Prisoner been indicted for the common law offence of simply stealing a piece of paper, and had there been a second count in the indictment of that character, he might have been tried for that crime and convicted as in *Reg.* v. *Perry* (1); *Reg.* v. *Walls* (2); *Reg.* v. *Yates* (3); *Reg.* v. *Clark* (4); *Reg.* v. *Frampton* (5); *Reg.* v. *Rodway* (6); *Reg.* v. *Vyse* (7); and other cases.

Strong, J., I am of the same opinion.

HENRY, J.:—

The prisoner was indicted for stealing "a valuable

(1) 1 C. & K. 725.
(2) 1 Eng. L. & Eq. 558.
(3) 1 Mood. C. C. 170.
(4) R. & R. C. C. 181.
(5) 2 C. & K. 47.
(6) 9 C. & P. 784.
(7) 1 Mood. C. C. 218.

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security," in the shape of a promissory note, for the payment and of the value of $258.33, the property of *Archibald McCallum* and another. The note was made by *Archibald McCallum* and *Charles Read*, payable to prisoner's order. The note was delivered unstamped to the prisoner, but it was immediately given back by him in the same state and unindorsed, as it was discovered that the amount was too large, and he received a note in lieu thereof for the correct amount ($175). The prisoner afterwards, on the same day, stole the note first mentioned. He was convicted, and the learned Judge on the trial reserved two points:

"First. Whether an unstamped promise to pay is a promissory note or a valuable security?

"Second. Whether, in the hands of the drawers, it was such property as to be the subject of larceny?"

The reserved case was heard in the full Court, and the conviction sustained by three out of the five Judges who heard it, and it has come to this Court by appeal from that decision.

I am of opinion the conviction was wrong on many grounds.

In the first place the indictment charges the larceny of "a note," being the note in question. I am of opinion it was not a note at all. It was drawn by mistake, and, although delivered, it was unstamped, and, therefore, then imperfect *as a note;* and the re-delivery when the mistake was discovered made it precisely as if never made or delivered. It is then an incomplete instrument in the hands of the drawers, with no intention or idea of ever completing the execution or delivery of it, or of making any use whatever of it *as a note.* It has been argued that the payee, after a larceny of it, might *double stamp it*, and indorse it for a valuable consideration to a third party without notice of the larceny, and that the indorsee would thereby acquire a right of action to re-

cover the amount from the parties whose names appeared as the makers. I can find no law to sustain this proposition. If, indeed, a note be fully executed, and passes by delivery out of the hands of the drawer, is endorsed and subsequently stolen, and gets into the hands of an innocent holder for a valuable consideration, he can recover it from the drawer, but it must first have the character of a note. If I draw a note to the order of a party, and lock it up in my desk to be stamped and delivered when I receive a consideration for it, and my desk is opened and the note stolen, I know of no law to oblige me to pay it. When I execute and deliver a note, I am presumed to have received a consideration for it, and am therefore bound to pay the legal holder or indorsee, but it would be contrary to every equitable, and I may say legal, principle to make me pay in the other case, where I received no value or did no act from which such might be presumed. There is no doubt of the law in the first case, but I can find none to sustain the other proposition. Many decisions, however, run in the opposite direction.

The authorities as to the necessity of a *delivery* before liability attaches are abundant.

It must be by the drawer or by some one authorized by him. An executor cannot complete his testator's indorsement by delivering the instrument which has been already signed by the testator. *Bromage* v. *Lloyd* (1). Neither indorsement nor acceptance are complete before delivery of the bill. *Cox* v. *Tray* (2); *Chapman* v. *Cottrell* (3). Where *A.* specially indorsed certain bills to *B.*, sealed them in a parcel and left it with his servant to be given to the postman, it was held that the special indorsement did not transfer the property in the bill still delivery, and that delivery to the servant was not suf-

(1) I Exch. 32. (2) 5 B. & Ad. 474.
(3) 34 L. J. Exch. 186.

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ficient, although it would have been otherwise if delivery had been made to the postman. *Reg.* v. *Lampton* (1); see also *Adams* v. *Jones* (2); *Brind* v. *Hampshire* (3); *Côté* v. *Deveze* (4).

The liability of the acceptor, though irrevocable when complete, *Thornton* v. *Dick* (5); *Trimmer* v. *Oddie* (6), does not attach by merely writing his name, but upon the subsequent delivery of the bill—or upon communication to some person in the bill, that it has been so accepted. Hence it follows that if the drawee has written his name on the bill, with the intention to accept, he is at liberty to cancel his acceptance at any time before the bill is delivered, or, at least, before the fact of the acceptance is communicated to the holder, *Cox* v. *Tray* (7); and the other cases cited in *Byles* on bills (8);

A distinction, and a wide one, exists on this point between a note or bill payable *to order* and those payable to *bearer*. In the case of the latter an unauthorized delivery may, and often does, give to a *bonâ fide* holder a claim on the other parties, but the rule is not so in respect to those payable to *order*.

There is no doubt that, in general, the circumstance of a bill or note having been obtained without adequate consideration, or by duress or fraud, or feloniously, or having been put into circulation contrary to agreement, affords no defence when the instrument has come into the possession of a *bonâ fide* holder for value (9); but that doctrine does not apply to what was never a bill or note. If a note be fully executed, as I have before said, the maker is answerable if the instrument be stolen from a holder and gets afterwards into the hands of another *bonâ-fide* holder for value.

(1) 5 *Price* 428.
(2) 4 P. & D. 174; 12 A. & E. 455.
(3) 1. M. & W. 369.
(4) L. R. 9 Chan. App. 27.
(5) 4 Esp. 270.
(6) 5 B. & Ald. 474.
(7) Bayley 6th Ed. 204.
(8) Note G. page 196.
(9) Chitty on Bills, 10th Ed. 50.

The cases cited by *Chitty* in support of the doctrine quoted as to stolen notes refer to bank notes or cheques, or crossed cheques, all of which pass by delivery after issue, but do not, in the slightest degree, refer to promissory notes never delivered.

Having shewn that on principle it would be inequitable to enforce payment of an inchoate instrument stolen from the party to it, and for which he never received any value, and in the absence of any legal authority, I feel bound to declare that no action on the note in question would lie, even at the instance of a *bonâ fide* holder for value, and must conclude that it was not a note at all and therefore *as such* not the subject of larceny.

The provision for double stamping, if carried out in regard to this note, does not, I take it, help the case, for if it wanted other essentials the mere stamping could not change the character of the instrument.

I am also of opinion, from a careful study of all the authorities, that in no case could a mere promissory note, payable by a party to some other, and not fully executed and delivered, be in any circumstances "a valuable security." It could not be one to the intended payee for he had never acquired any right to it, and a man's own note could not be a security to *him*. It is laid down in *Archibold's* Criminal pleading (1), that it must be of value to the *prosecutor*, and be proved that something remains due and unsatisfied *to him*. How could it be said that a man's own note was due and unsatisfied to himself? Common sense forbids it.

I also am of opinion, that it must be a valuable security *to some one at the time of the larceny*, and that no subsequent act of double stamping which might make the note otherwise a good one would be sufficient to sustain a charge of larceny. On the points stated by my learn-

(1) P. 392.

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ed brother *Ritchie*, I fully agree and am therefore of opinion that the indictment has not been sustained by proof.

THE CHIEF JUSTICE, TASCHEREAU AND FOURNIER, J. J., concurred.

Appeal allowed.

Solicitor for the Prisoner: *Frank Keller.*

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Jan. 26 & 29.

*June 3rd.

JOHN J. MACDONALD.....APPELLANT;

AND

THE GEORGIAN BAY LUMBER COMPANY, ..RESPONDENTS.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Foreign Bankruptcy—Assignment thereunder—Lands in Canada.

D., a naturalized British subject, who owned lands in *Canada*, resided and carried on business in partnership with *H. & S.*, in the State of *New York*. In November, 1873, the firm of *D., H. & S.* became insolvent. On the 14th February, 1874, the said firm, under the Bankruptcy Act of the *United States* (s. 5,103, Rev. Stat. *U. S.*,) executed a deed purporting to "convey, transfer and deliver all their and each of their *estate* and effects" to one *C.*, as trustee for the creditors. On the 26th Sept., 1874, a writ of execution against *D's* lands in *Canada* was placed in the hands of the proper Sheriff by the Respondents, who had in the mean time recovered judgment against him. Subsequently *D.*, by way of

*PRESENT:—Sir William Buell Richards, C.J., and Ritchie, Strong, Taschereau, Fournier and Henry, J.J.

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further assurance, and in pursuance of the deed of the 14th Feb'y, 1874, granted to *C.*, the trustee, his lands in *Canada*, specifying the different parcels.

M., the Appellant, was afterwards substituted to *C.* as trustee, and, as such, filed a Bill in the Court of Chancery to obtain a declaration that the lands specified in the bill were not liable to the operation of the writ of execution of the Respondents.

Held,—That a bankrupt assignment, made under the provisions of an Act of the Congress of the *United States of America*, will not transfer immoveable property in *Canada*.

Also,—That the deed of the 14th February, 1874, was not effectual, either as a deed of bargain and sale, or a deed of grant to pass any legal title or interest in the lands of *D.* in *Canada*.

APPEAL from a judgment of the Court of Appeal for *Ontario* by the Plaintiff in a cause in the Court of Chancery, in which the present Appellant was Plaintiff and the *Georgian Bay Lumber Company* were Defendants.

The Plaintiff's bill was filed in the Court of Chancery on the 18th day of May, 1876, in order to obtain a declaration that the Writ of Execution against the lands of *Anson G. P. Dodge*, placed by the Defendants in the hands of the Sheriff of the County of *York*, did not operate to bind certain lands in that County described in the bill. The answer of the Defendants was filed on the 23rd day of September, 1876.

Issue having been joined, the case came on to be heard at the sittings of the Court of Chancery at *Toronto*, on the 8th day of November, 1876, before The Honorable Vice-Chancellor *Proudfoot*.

Judgment was delivered by the Vice-Chancellor on the 10th of January, 1877, in favor of the Plaintiff, and a decree was thereupon drawn up and entered in accordance with the prayer of the bill.

The Defendants subsequently appealed from this decree to the Court of Appeal for *Ontario* and that Court, on the 18th day of June, 1877, gave judgment in favor of the Defendants, reversing the decree of the Court of

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Chancery with costs and ordering that the bill be dismissed with costs.

The present appeal to this Court was brought in order to reverse the order of the Court of Appeal and restore the decree of the Court of Chancery. The facts material to a decision may be stated as follows :—

On the 1st of November, 1873, a petition was filed in the District Court of the *United States* for the Southern District of *New York*, under the provisions of an Act of the Congress of the *United States of America*, entitled : "An Act to establish a uniform system of bankruptcy throughout the *United States*," approved March 2nd, 1867, against *Anson G. P. Dodge*, *W. J. Hunt* and *Samuel Scholefield*, praying that they might be adjudicated bankrupt ; and on the 15th November, 1873, they were duly adjudicated bankrupt.

On the 14th February, 1874, an order of the same Court was made in the matter of the Bankruptcy whereby it was ordered that the said *A. G. P. Dodge*, *W. J. Hunt* and *S. Scholefield* should forthwith convey, transfer and deliver all their and each of their property or estate to *John L. Cadwalader*, as trustee, by deed in a form which was set out *in extenso* in the body of the order, and which was afterwards followed in the deed of the same day, the purport and terms of which are next stated.

On the same day *John L. Cadwalader* was duly appointed trustee of the estates of the bankrupts, and on that day the bankrupts executed and delivered to the trustee a deed purporting to "convey, transfer and deliver all their and each of their estate and effects to" the trustee, "to have and to hold the same in the same manner, and with the same rights in all respects as" the bankrupts, "or either of them would have had or held the same if no proceedings in bankruptcy had been taken against them or either of them, the same to be ap-

plied for the benefit of the creditors of the " bankrupts in like manner as if they had been at that date duly adjudged bankrupts, and the said trustee had been appointed assignee under the Act of Congress.

On the 24th September, 1874, the bankrupt *Dodge*, being seized in fee of a large quantity of lands in *Canada*, granted and conveyed by way of further assurance, and in pursuance of the said Act and of the said deed of the 14th February, 1874, to the said *Cadwalader*, in trust for the said creditors, the said lands, specifying the different parcels.

Cadwalader resigned his office of trustee, with the sanction of the Court, and on the 7th December, 1874, the Plaintiff was duly appointed by the Court trustee of the said estates in the stead of the said *Cadwalader*, and by indenture, dated the 25th January, 1875, *Cadwalader* conveyed the lands in *Canada* to the Plaintiff, as such trustee for the said creditors, and the Plaintiff immediately went into possession of them.

The Defendants, on the 26th September, 1873, sued out a writ of summons in the Court of Queen's Bench for *Ontario* against *Dodge*, who was a naturalized British subject, then residing out of the jurisdiction; and such proceedings were thereon had that judgment was signed on the 30th June, 1874, for $13,254.18 debt and costs; and on the 26th August, 1874, a writ of execution against the lands of *Dodge* was placed in the hands of the proper Sheriff, which was renewed on 23rd August, 1875.

The Plaintiff, in his bill, charged that this writ is void and of no effect against the lands, but is retained by the Defendants in the Sheriff's hands, and forms a cloud upon the title of the Plaintiff, who had applied to the Defendants to have the same removed, but which they had refused to do

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Mr. *Cattanach* for Appellant:—

The conveyance of the 14th of February, 1874, was prior to the writ of execution; and the law here as well as in England is that the execution only affects such an interest as the debtor has at the time the writ is placed in the Sheriff's hands. *Parke* v. *Rielly* (1); *Wickham* v. *The New Brunswick and Canada Railway* (2); *Beaven* v. *Lord Oxford* (3). The registry laws do not effect the question. *McMaster* v. *Phipps* (4). The real question, then, involved in this appeal is, whether after the conveyance referred to, there was any estate or interest left in the debtor which could be affected by a writ of execution.

The Appellant admits that the bankruptcy proceedings in *New York*, could not affect lands in this country without a conveyance sufficient to pass real estate according to our laws—the *lex loci rei sitæ* applying (5); but he contends that the deed of 14th February is sufficient to pass the bankrupt's estate, or at any rate amounts to an equitable contract or assignment which would be equally efficacious having been followed by the deed of September which conforms to our laws, and by possession.

Foreign bankruptcy proceedings are recognized in *England* by comity; and the Courts will aid in giving effect to them. *In re General Company for Promotion of Credit* (6); affirmed on Appeal under the title of *Princess of Reuss* v. *Bos* (7). Our Courts have adopted the same rule, *Howell* v. *Dominion Oils Company* (8); *Barned's Banking Company* v. *Reynolds* (9). English

(1) 3 Grant's E. & A. 215.
(2) L. R. 1 P. C. 64.
(3) 6 DeG. M. & G. 492.
(4) 5 Grant 253.
(5) Robson on Bankruptcy, 393.
(6) L. R. 5 Chy. 380.
(7) L. R. 5 H. L. 176.
(8) 37 U. C. Q. B. 487
(9) 36 U. C. Q B. 256.

Courts have even gone to the length of appointing Receivers, who have no estate at all in lands, for real property in foreign countries, *Hinton* v. *Galli* (1); and the Court of Chancery of *Ontario* has recognized and given effect to such appointments, *Louth* v. *Western of Canada Oil Company* (not reported.) If, therefore, the deed of 14th February, did not effectually accomplish the intention of the parties, our Courts would, if necessary, give effect to the intent in the same way as if the transaction were entirely within the jurisdiction.

In the absence of any thing else to shew what was intended a certain form of words is necessary in a deed, I admit. But when it appears on the face of the deed and from the surrounding circumstances that the grantor is parting with his entire interest, I submit that by estoppel, if not otherwise, the deed would operate. Now here, the deed shews on its face that the grantors were conveying all their estate for sale and distribution among their creditors. It would be a fraud on their part to attempt to limit the effect of the deed to a life estate, and much more so to say they had not conveyed anything. And then the deed says that the grantees are to have and hold " in the same manner and with the same rights in all respects " as the grantors would have done if they had not become bankrupts. What does this mean, unless it means an estate in fee or as large an estate as the grantors had to give?

Justice *Patterson* in the Court below held the deed to be sufficient in form, and the only difficult there was as to whether it could be intended that these lands were to pass.

It is altogether a question of intention to be gathered from the deed and the surrounding circumstances. It is not necessary to describe lands specifically in a deed,

(1) 24 L. J. Chy. (N. S.) 121.

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and parol evidence is often admissible; and the surrounding circumstances always explain what is meant if there is any ambiguity. Here the circumstances necessarily shew that the bankrupts were giving up all they had. *Dodge* had been, up to this time, a resident of *Canada*. His head office was there; he did a large business there; and it was notorious that he owned and lived on the very property in question; and, in fact, for aught that appears in the record, he owned no property in the *U. S.* Is it possible then that the parties could have had in contemplation only property in *N. Y.*, when they knew, as we must assume them to have known, that we would recognize and aid their bankruptcy proceedings.

And in *Wheaton*, on International Law (1), it is stated that by comity real estate in a foreign country can be reached. The Court, it is true, cannot directly enforce its decrees, but it may do so *in personam* and by the aid of foreign Courts. *Bump*, p. 297, and cases before cited.

The true interpretation to be given to the Judge's order is, that the bankrupts must, so far as they are concerned, divest themselves of everything they possess in the world, and that the Court will, so far as it can, administer the estate, wherever it is. Suppose the Canadian lands had been specifically mentioned in the deed, and that the deed was unquestionably in proper form could it be contended that the lands did not pass because the Judge who made the order had no power to deal with these lands? So the case comes down to the deed itself and the surrounding circumstances, irrespective altogether of the order, which is a mere matter of procedure.

Mr. *Dalton McCarthy*, Q. C., for Respondent:—

(1) Edition of 1864, pp. 283-4.

The deed of the 24th February, 1874, is a statutory deed, deriving its force and validity from s. 5,103 of the Revised Statutes of the *United States of America*, and cannot have effect as a deed passing by its own force the real estate in *Ontario* now in dispute in this suit. The proceedings in this case clearly shew that it was not the intention of the petitioners or of the debtors, when possession of the joint and separate estates of the estates was given to the trustee, that they contemplated a conveyance of any property that was not subject to the restraining order of the *United States* Court, there being no power in the Courts of a foreign State to enforce their decree or order in bankruptcy here; and no legislative body will be presumed to exceed its legitimate jurisdiction. Moreover, the operative words used, "convey, transfer and deliver," have no operation in passing real estate here, either at common law or by statute.

With this view of the case all the decided American cases agree, shewing that this is a deed, not a contract, and one which passes to the trustee just so much as, and no more than, would have passed to the assignee in insolvency by order of the Court, and without any deed under the hand and seal of the bankrupt. *Re Williams* (1); *Bump's* Law of Bankruptcy (2); *Osborn* v. *Adams* (3); *Holmes* v. *Remsen* (4); *Lee* on Bankruptcy (5); *Ford* v. *Beech* (6).

The assignee derives his title from a conveyance executed by the Judge or Registrar, which takes effect by operation of law, sec. 14; and if the assignment had been made by him, it is conceded it would not affect the property, but, because it was made by the insolvent, it is contended that if the words are wide

(1) 2 Bank. Reg. 79.
(2) P. 682, and notes to sec. 5,103.
(3) 18 Pick. 245.
(4) 4 Johnson, 460.
(5) Pp. 110-111.
(6) 11 Q. B. 866.

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enough, the Courts in *Canada* will give effect to the deed. But the deed cannot be said to be a deed poll or an indenture. A clear statement of what is intended to pass is as necessary in an agreement as in conveyance. Here there is no word shewing that an inch of land in *Ontario* was ever intended to be conveyed. The language of the instrument itself, and the proceedings in bankruptcy, shew that the intention of the parties was most certainly confined to the dealing with such property as would have passed to the assignee had not the creditors superseded the bankruptcy by appointing a trustee.

Mr. *Cattanach* replied :—

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*June 3.

RITCHIE, J. :—

Defendants issued an execution against the lands of one *Anson G. P. Dodge*, and placed the same in the hands of the Sheriff of *York*. Plaintiffs by their bill seek to obtain a declaration that such execution did not operate to bind certain lands in that county, but that a certain deed, dated 14th February, 1874, executed by said *Dodge*, passed the title to *Dodge's* said lands, so as to prevent the Defendants execution, subsequently issued, from being levied thereupon.

The Vice-Chancellor decided in favor of Plaintiff, which decree on appeal was reversed and judgment was given by the Appellate Court in favor of Defendants.

The present appeal is taken with a view to reverse the latter decision.

The Plaintiff is trustee of the bankrupt estate of said *Dodge*, *Hunt* and *Scholefield*, all of and in the *United States of America*.

On the 1st November, 1873, a petition was filed in the District Court of the State of *New York*, *U. S.*, in accordance with the Act of Congress, entitled: "An

* The Chief Justice was absent when judgment was delivered.

Act to establish a uniform system of bankruptcy throughout the *United States*, against *Dodge*, *Hunt* and *Scholefield*, praying they might be adjudicated bankrupts, and on the 15th November, 1873, they were duly adjudicated bankrupts.

On the 14th February, 1874, *Cadwalader* was duly appointed trustee of the estates of the bankrupts and they made and delivered to *Cadwalader*, as such trustee, the deed of the 14th February, 1874, entitled: "In the District Court of the *United States* for the Southern District of *New York*—in Bankruptcy. In the matter of *Anson G. P. Dodge*, *William Jay Hunt* and *Samuel Scholefield*, bankrupts, Southern District of *New York*, [S.S.]," and whereby they did convey, transfer and deliver all their and each of their estate and effects to *John L. Cadwalader*, as trustee absolutely, to have and to hold the same in the same manner and with the same rights in all respects as the said bankrupts, or either of them, would have had or held the same, if no proceedings in Bankruptcy had been taken against them or either of them; the same to be applied and administered for the benefit of the creditors of said bankrupts in like manner as if said *Dodge*, *Hunt* and *Scholefield*, had been at the date thereof duly adjudged bankrupts, and *Cadwalader*, trustee, had been appointed Assignee in Bankruptcy, under the Act of Congress; which deed was in the exact form prescribed in an order of Court, on proof that three-fourths in value of the creditors of the bankrupts had resolved to supersede Bankruptcy proceedings by arrangement under section 43; which order, after stating that the certificate of the Registrar in Bankruptcy had been read and filed, and resolutions therein referred confirmed, ordered that the said bankrupts should forthwith convey, transfer and deliver all their and each of their property or estate to *Cadwalader*, as trustee, by

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deed on the following form, to wit, &c.: (the form which was adopted.)

Cadwalader subsequently on the 20th June, 1874, with the sanction of the District Court of the *U. S.*, for the Southern District of *New York*, resigned his office of trustee, and on the 7th December, 1874, Plaintiff was duly appointed by said Court trustee instead of said *Cadwalader*. On the 24th September, 1874, *A. G. P. Dodge* and wife executed a deed, reciting the petition in bankruptcy under the Act, entitled: "An Act to establish, &c.," the adjudication thereon, the appointment of *Cadwalader* as trustee, the execution of the deed of the 14th February, 1874, setting it out verbatim, and that the estate and effects comprised lands in the Province of *Ontario*, Dominion of *Canada*, being individual property of *Dodge*, and thereafter particularly described, and that said lands are vested in said trustee by force of said Act and deed of 14th February, 1874, and that it had become necessary that the then present deed should be executed by way of further assurance, in order that, under the Registry Laws of *Ontario*, the title of said trustee in said lands might be registered. The deed witnessed that, in consideration of the premises, and by way of further assurance, and in consideration of $5, *Dodge* granted, &c., to *Cadwalader*, as such trustee, his heirs, &c., the lands, &c., set out in the plaintiff's bill, in trust for the creditors of the said bankrupts.

Cadwalader, by deed, dated 7th December, 1874, after reciting his appointment as trustee, and the deed of the 14th February, 1874, and his resignation as trustee, and its acceptance, and the order directing the execution and delivery of the deed, conveyed, &c., to *John Macdonald*, the Plaintiff, "all and each of the estates, real and personal, and all the property and effects, both joint and separate, of said *Dodge*, *Hunt & Scholefield*, wheresoever situate, both in the *United States* and in *Canada*," which

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were conveyed by said recited deed to hold the same, as trustee, in the same manner, and with the same powers and duties relative thereto, as he, *Cadwalader*, now has, or held the same and as bankrupts, or either of them, would have held them, if no proceedings in bankruptcy had been taken against them, and to be applied for the benefit of their creditors in like manner as if they, at the date thereof, had been duly adjudged bankrupts, and said trustee had been appointed assignee, &c.

And on 25th January, 1875, *Cadwalader*, by deed of that date, between himself, as trustee of said bankrupts, and Plaintiff, as trustee, after reciting, as the first two recitals of the deed of 24th September, 1874, and that the estate and effects included certain lands in *Ontario*, being the individual property of *Dodge*, which were vested in *Cadwalader*, as trustee, by force of the said Act of Congress and deed of 14th February, 1874, which deed was registered in the registry office N. R. County of *York*, at 10.50 a.m., 13th October, 1874; and that *Cadwalader* had resigned his office of trustee, and his resignation had been accepted, and that by order of the District Court of *New York*, on 7th December, 1874, Plaintiff had been appointed trustee in place of *Cadwalader*, with same rights, &c., and that said lands were then vested in Plaintiff, as trustee, by force of said Act of Congress and orders and decrees of said District Court, and that it had been deemed necessary that the then presents should be executed by way of further assurance, and in order that under the Registry Laws of *Ontario* the title of Plaintiff, trustee to said lands, might be registered, conveyed as *Dodge* had conveyed to *Cadwalader*.

On 25th August, 1874, Defendants caused a writ of execution to be issued against the lands and tenements of *Dodge*, and on the 26th of the same month, it was placed in the hands of the Sheriff of *York*, for $13,201.61

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debt and $52.57 costs, which writ was renewed on 25th August, 1875, and which, at the time of filing of Plaintiff's bill, remained in the Sheriff's hands unsatisfied, and in full force and effect.

This writ Plaintiff claims is void, and of no effect against said lands, but operates as a cloud on his title; that he has had an opportunity of selling the lands, but is prevented by reason of the retention by Defendants of said writ in Sheriff's hands.

The deed under which it is claimed the property passed, or by which it is alleged an equitable interest in the real estate of *Anson G. P. Dodge* in the Dominion of *Canada* was created, was not a voluntary conveyance, but a statutable assignment, the grantor having been adjudicated a bankrupt. He was adjudged by a Court of competent jurisdiction in the *United States* to make a statutable conveyance of his property in a certain prescribed form. This was, in my opinion, an involuntary legal conveyance, intended to convey only the property over which the Legislature had assumed the disposition, *in invitum*, and consequently with which alone the Court had power to deal, and was intended to have, and had, no other or greater effect than if the Legislature had declared that the property of the bankrupt should pass to the assignee or trustee without conveyance by operation of law. In either of which cases the only property that would be affected by the deed or declaration would be the property, or the subject matters of the bankrupt, within the control of the Legislature, or upon, or over which, it could operate, and which clearly would not include lands in a foreign country; for the principle is too well established to be now questioned, that real estate is exclusively subject to the laws of the government within whose territory it is situate. Mr. *Story* says, so firmly is this principle established, that in cases of bankruptcy, the real estate

of a bankrupt, situate in a foreign country, is universally admitted not to pass under the assignment.

That real estate is exclusively subject to the law of the Government within whose territory it is situate, see *Sills* v. *Worswick* (1); *Phillipps* v. *Hunter* (2); *Hunter* v. *Potts* (3); *Selkrig* v. *Davies* (4); *Brodie* v. *Barry* (5); *Birthwhistle* v. *Vardill* (6); and American cases cited in *Story's* Conflict of Laws, sec. 428.

In sec. 425, after stating the principle as laid down by foreign Jurists, *Story* says :—

> The universal consent of the tribunals, acting under the common law, both in *England* and in *America*, is, in a practical sense, absolutely uniform on the same subject. All the authorities in both countries, so far as they go, recognize the principle in its fullest import, that real estate or immoveable property is exclusively subject to the laws of the Government within whose territory it is situate.

I think, therefore, the Court of the State of *New York* must be presumed to have intended to do only what it had the right to do, and intended the deed it directed the bankrupt to execute to pass only the property with which the Court had a right to deal, and there is nothing whatever on the face of the deed to indicate a contrary intention, and we have no right to assume the Court of *New York* did or attempted to do any more than it had the legal power to accomplish.

In *Elliot* v. *North Eastern Railway Company* (7) it was held, that a deed of conveyance made under the authority of an Act of Parliament must be read as if the sections of the Act were incorporated in it. At p. 335 Lord *Chelmsford* says :—

> The conveyance to the Company was made in the form prescribed

(1) 1 H. Bl. 665.
(2) 2 H. Bl. 402.
(3) 4 T. R. 182.
(4) 2 Dow. 230.
(5) 2 Ves. & Beames 130.
(6) 5 B. & C. 438; Bell's Comt. 690, 4th Edition.
(7). 10 H. L. C. 333.

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by the Act and must be read as if the sections applicable to the subject matter of the grants and its incidents were inserted in it.

So in this case must the deed be read by the light of the Bankrupt Act of the *United States* and the proceedings had thereunder.

Had the Court in the State of *New York* ordered the bankrupt to convey the lands in *Canada*, I do not think it would have been of any avail, for I think it is well established that foreign lands cannot be affected by the administrative Act of any Court, nor can the person be obliged to supply the defects of such administrative Act. See *Selkrig* v. *Davies* (1). The House of Lords held that only a moral obligation to convey to assignees was imposed, which might be justly enforced by withholding the bankrupt certificate till he complied. But in a later case, *Cockerell* v. *Dickens* (2), Lord *Wensleydale* denied that even the certificate can be properly withheld on this ground. I am therefore of opinion that the deed of the 14th February, 1874, was not effectual to pass any title or interest in the lands of *A. G. P. Dodge* in *Canada*, and therefore, I think the judgment of the Court of Appeal should be confirmed.

STRONG, J. :—

The first point argued before this Court was one which seems to have been held to be untenable by all the learned Judges of the Court of Appeal, as well as by the Vice-Chancellor. This was the contention, that the jurisdiction of the foreign Bankruptcy Court extended to lands in this country, or that it, at least, imposed upon the bankrupts a personal obligation so to deal with lands here as to bring them under the control of the foreign bankruptcy, an obligation which, upon princi-

(1) 2 Dow. 230. (2) 3 Moo. P. C. C. 134.

ples of international comity, it was said, our domestic tribunals would enforce.

An almost universal consent of authorities, that of Courts and Judges, as well as of text writers, is against both these propositions. For the proposition that bankruptcy proceedings have any extra-territorial operation as regards immoveables, there is no English or American authority, judicial or otherwise, which can be quoted, though some of the continental jurists—*Savigny*, in particular, as appears from passages in the 8th volume of his work on Roman Law, translated by Mr. *Guthrie*—appear to favor such a doctrine, not so much, however, as a principle of international law actually recognized, but rather as one, the adoption of which is commended by a liberal spirit of comity, or which ought to be made the subject of treaty stipulations. The Courts and jurists of no nation appear to have gone so far in excluding the extra-territorial operation of bankruptcy proceedings as those of the *United States*. They have applied the rule, not merely to immoveables, but also to moveable property having its *situs* in their territory (1). In *England* (2), on the other hand, the more liberal rule has been adopted, of treating moveables as subject to a bankruptcy in the foreign domicile of the owner. The latest American writer on Private International Law (3) states both the rule and the reason for it, thus, distinctly:

> In the *United States* the law is, that a foreign bankrupt assignment will not be permitted to transfer property, whether moveable or immoveable, as against domestic attaching creditors. This result is sometimes based on the position that compulsory conveyances in bankruptcy are the creatures of local law, and should not be extra-territorially extended, and sometimes on the priority which every State, in case of collision, should give to its own subjects. But the true ground is, that property, personal as well as real, is subject to

(1) Story's Conflict of Laws, sec. 420.

(2) *Sills* v. *Worswick*; 1 Hy. Bl. 665, Wharton Conflict of Laws, sec. 389.

(3) Wharton Conflict of Laws, secs. 391-392.

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the local laws of its site; and if the owner locally incurs obligations on the faith of such property, it is but fair that it should primarily bear the burden of such debt. The forced application of the law of the *lex domicilii* to such case would operate to extend oppression and fraud.

This rule is recognized in the English cases of *Selkrig* v. *Davies* (1), and *Cockerell* v. *Dickens* (2), cited in the judgment of the learned Vice-Chancellor, and is beyond dispute (3).

The other ground adverted to is equally without foundation, for the House of Lords determined in *Selkrig* v. *Davies*, already quoted, that English Courts will not interpose to compel a bankrupt to convey his foreign lands to the assignees, although there might be a moral obligation requiring him to do so (4); and in *Cockerell* v. *Dickens* (5) it was held to be improper to compel such a conveyance even by the indirect pressure of withholding the certificate. Mr. *Westlake* (6) points out that the true ground for non-interference in such cases is, that if the Courts were, by acting on the bankrupt *in personam*, to compel a conveyance of the foreign immoveables, they would be indirectly doing that which they had no jurisdiction to do directly; and he shews the distinction between interference in such cases and the jurisdiction exercised by Courts of Equity to compel specific performance of contracts relating to foreign lands. I have stated the law on these points more fully than I should otherwise have done, from consideration for the earnest and able arguments of Mr. *Cattanach* on this part of the case, on which, however, I have to express my entire concurrence with the

(1) 2 Dow. 230.

(2) 3 Moo. P. C. C. 98.

(3) See also Wharton's Conflict of Laws, secs. 845 to 850; Kent's Comment. Vol. 2, p. 406; Westlake's Private International Law, secs. 67-283; Story's Conflict of Laws, sec. 428; Phillimore's International Law, Vol. 4, p. 593.

(4) Archbold's Law of Bankruptcy, Vol. 1, p. 393.

(5) Ubi Sup.

(6) Private International Law, sec. 67.

opinions of all the learned Judges in the Courts below.

The learned Vice-Chancellor based his decree upon the effect of the deed of the 14th February, 1874, regarded as a conveyance sufficient to pass these lands, independently of the bankruptcy proceedings. I cannot gather very satisfactorily from the language of the judgment whether the learned Judge considered the deed a good conveyance at law, sufficient to pass the legal estate, or whether he relied on it as operating only in equity, or as a defective conveyance, which a Court of Equity would aid. The only forms of original conveyance appropriate for transferring a legal estate in possession in freehold lands between strangers are, of course, those of feoffment, lease and release, bargain and sale, and a statutory deed of grant.

The deed of the 14th February, 1874, cannot operate as a deed of bargain and sale, as no consideration is mentioned in the deed sufficient to raise a use. It cannot take effect as a deed of grant, for the use of the word "grant" is indispensable to the operation of such a deed; and feoffment and lease and release are both out of the question. It is plain, therefore, that no legal estate passed by the instrument under consideration.

The remaining question relates to the Appellant's rights to invoke the aid of a Court of Equity to perfect the deed, or to have it carried into execution by a legal conveyance. Without stopping to enquire whether the words of description contained in this deed, "all their estate and effects," would, if used in an ordinary purchase deed, be sufficient to pass all the grantor's lands —a point on which I express no opinion—it appears to me that there are decisive objections to supporting this deed as an efficient instrument in equity. The execution of this indenture was compelled by the order of the District Court, which I have before stated, made

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on the same day, and which ordered the bankrupts to execute the deed, being the ordinary statutory form of assignment prescribed by the Act of Congress. It is therefore a part of the proceedings in the bankruptcy. Now, in view of the prevalent doctrine of American Courts and jurists already alluded to, that it is a rule of private international jurisprudence, founded on reasonable and sound principles, not to give extra-territorial effect to bankruptcy jurisdiction, it must be assumed that Congress, in passing the Act, did not intend to attach any wider meaning to the general words used, "estate and effects," than, according to the recognized doctrine of the *United States* Courts, it had power effectually to do; and that, therefore, immoveables in foreign countries were not intended to be comprised. The order of the Bankrupt Court could only directly affect lands in the *United States*, and it is not to be presumed that either the legislation of Congress, or the act of the Court, was intended to bring that indirectly within the jurisdiction of the Court which could not be reached by its direct process. There can be no objection here to our putting a construction on this deed by means of which it is sought to affect lands within our jurisdiction. It is no infringment of the rule which requires foreign law to be established as matter of fact by skilled witnesses; for instruments affecting lands must be construed and governed by the law of the situation of such property, and moreover questions of construction, dependent on presumption, are questions of fact rather than questions of law.

But granting that it was intended to compel the bankrupts to execute an assignment including lands in *Canada*, and assuming that the deed of the 14th February, 1874, comprises these lands as effectually as if they had been specifically mentioned in it, I am still of opinion that the assistance of a Court of Equity could

not be claimed by the assignee. When the jurisdiction of equity is exercised to enforce specific performance, or to aid or perfect a defective assurance between parties who are strangers in blood, a valuable consideration is an indispensable element in the transaction which is sought to be executed or aided. In the present case there is not only a total absence of valuable consideration, but the deed does not even possess the character of a free disposition, having been executed, as it was, under the compulsion of the process or order of the District Court. Further, if the deed is to be construed, on the hypothesis last assumed, as comprising these lands, a Court of Equity, in giving effect to it, would be doing nothing short of enforcing a foreign bankruptcy; it would be recognizing extra-territorial legislation, and aiding the jurisdiction of a foreign Court against lands in this Province; for, in signing and sealing the indenture, the bankrupts did but submit themselves to the power of the law, and were mere instruments of the Court. To deny to foreign Courts of Bankruptcy direct jurisdiction over property situated here, and at the same time to assist them when they attempt to evade this same rule of law (which they apply to the protection of their own citizens) by compelling the execution of an assignment, is too great an inconsistency to be legally possible. The objection to the direct exercise of such a jurisdiction is equally applicable to its indirect exercise. Mr. *Westlake* recognizes this position, for he says :—

> But that a Sovereign should claim to affect foreign land generally through the compulsory intervention of the owner, merely on the ground of such owner's status, as fixed by his ordinary authority over him, does not differ perceptibly from a claim to affect it directly (1).

The refusal to give equitable relief cannot be condemned as harsh or wanting in comity, since reciprocity is the foundation of all comity, and the American Courts

(1) Westlake, Private International Law, sec. 67.

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themselves would, in a like case, act upon a similar rule. The justice of the rule itself which withholds lands from the operation of foreign bankruptcy in favor of the local creditors, is well stated and defended in the passage already quoted from Dr. *Wharton's* work on the conflict of laws.

The result is that the appeal fails and must be dismissed with costs.

TASCHEREAU, J., concurred.

FOURNIER, J. :—

Dodge et *Cie.* furent déclarés en faillite, le 15 novembre 1873, par la cour de district du "Southern District of New-York," en vertu de la loi de banqueroute des *Etats-Unis*, qui autorise un tel procédé. Le 10 novembre suivant, les créanciers décidèrent d'opérer par arrangement la liquidation des affaires des faillis, au lieu de la continuer par le mode compulsoire qu'ils avaient d'abord adopté. Ce procédé (1) consiste à substituer au syndic un fidéicommissaire choisi par les créanciers, et à remplacer le contrôle de la Cour sur les actions du syndic par la surveillance d'un comité de créanciers aussi nommé par eux pour surveiller et diriger les affaires en liquidation. Le fidéicommissaire et le syndic ont à peu près les mêmes attributions.

C'est en vertu de cette sec. (5103) que les créanciers firent choix de *John L. Cadwalader*, comme fidéicommissaire, et de cinq autres personnes pour composer le comité de surveillance. Un ordre du juge en date du 14 février 1874, confirmant leur résolution à cet effet, enjoignit en même temps aux faillis de céder et transporter au dit fidéicommissaire tous leurs biens par un acte dont la formule insérée dans le jugement est la même que celle donnée par le Statut. Cette

(1) Sec. 5103, Stat. Revisés des Etats-Unis.

cession fut exécutée par l'ordre du juge et dans les termes voulus par la loi, par *indenture* en date du même jour, 14 février 1874, entre *Dodge* et ses associés, d'une part,—et le fidéicommissaire *Cadwalader*, de l'autre. Cette cession est ainsi conçue : "Witnesseth, that the "said *Anson G.P. Dodge*, *W.F. Hunt* and *Samuel Scholefield* aforesaid, hereby convey, transfer and deliver all "their and each their estate and effects to *John L. Cadwalader*, as trustee absolutely, to have and to hold the "same in the same manner and with the same rights in "all respects as the said *Anson G. P. Dodge*, *William Foy Hunt* and *Samuel Scholefield*, or either of them, "would have had or held the same if no proceedings "in bankruptcy had been taken against them or "either of them, &c., &c."

Plus tard, le 30 juin 1874, *Cadwalader* demanda à être relevé de sa charge de fidéicommissaire et obtint, le 7 décembre 1874, après avoir accepté la cession ci-après mentionnée, en date du 24 septembre 1874, un ordre à cet effet, nommant en même temps *John J. Macdonald*, l'appelant, comme son successeur, lequel reçut, le même jour de *Cadwalader* une cession et transport des biens des faillis, au même effet que celle faite à *Cadwalader*.

Le 13 juin 1874, les Intimés avaient obtenu jugement dans la Cour du Banc de la Reine, province d'*Ontario* contre *A. P. G. Dodge*, l'un des faillis, pour $13,201.61 et $52.57 pour frais ; en vertu de ce jugement ils firent émaner un bref d'exécution qui fut remis au shérif de *York*, le 25 août de la même année. Ce n'est qu'après que le shérif fût devenu porteur de ce bref d'exécution que *Dodge* et sa femme firent, le 24 septembre 1874, une autre cession à *Cadwalader* des immeubles situés dans la province d'*Ontario*, appartenant personnellement au dit *Dodge*, en les désignant d'une manière spéciale et en déclarant que bien que le

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dit fidéicommissaire en fût déjà saisi en vertu de la cession du 14 novembre 1874, il était cependant devenu nécessaire, pour plus grande sûreté (*by way of further assurance*) et pour se conformer aux lois d'enregistrement de la province d'*Ontario*, d'en faire cession de nouveau. Cette fois la cession en est faite dans les termes qui, d'après les lois d'*Ontario*, sont nécessaires pour transporter la propriété absolue des immeubles, savoir: " hath granted, bargained, sold, aliened, demised, releas- " ed conveyed, assured and confirmed."

L'Appelant, comme fidéicommissaire remplaçant *Cadwalader*, se prétend en cette qualité propriétaire des biens des faillis en vertu des actes ci-dessus cités, et les réclame à l'encontre de l'Intimé dont il veut faire annuler l'exécution contre les propriétés des faillis situés dans *Ontario*.

Ces faits soulèvent la question de savoir si une cession compulsoire en vertu de la loi de faillite des *Etats-Unis* peut affecter les biens d'un failli situés dans la la province d'*Ontario*.

D'après le principe que la propriété immobilière est réglée par la loi du lieu où elle est située, la cession faite en vertu des procédés en faillite ne peut avoir d'effet au-delà du territoire dans lequel elle est faite. "Real estate is governed by the *lex loci rei sitæ*, and if a bankrupt is entitled to real estate situate abroad, it will not pass to the trustee unless he acquires a title to it by the law of the country where it is situate."

Sur ce point, il ne peut y avoir de difficulté ; les deux parties sont d'accord sur ce principe. Mais l'Appelant prétend que les termes de l'acte du 14 février 1874 sont suffisants pour transférer le titre de propriété des immeubles de *Dodge*, sans distinction, et que par conséquent ceux situés dans *Ontario* sont compris dans la cession faite à *Cadwalader*. Comme il est dit plus haut, cet acte du 14 novembre a été fait par ordre du juge, en

vertu de la loi de faillite et ne peut par conséquent comprendre que les biens qui peuvent être affectés par la loi de faillite des *Etats-Unis*. Les propriétés situées dans *Ontario* ne pouvant pas l'être n'ont donc pu être ainsi transportées; elles ne peuvent être censées avoir été transportées au moyen d'un acte qui avait pour but restraint et limité de saisir le fidéicommissaire des biens du failli soumis à l'effet de la loi de banqueroute des *Etats-Unis*. Rien ne fait voir dans cet acte qu'il y eût de la part du failli une intention de faire un transport plus ample que celui que le juge pouvait, d'après la loi, lui ordonner de faire.

Les propriétés de *Dodge*, situées dans *Ontario*, formant une partie importante de ses biens, si c'eût été son intention d'en faire cession, il les aurait sans doute spécialement mentionnées. Loin de là, quoiqu'il dût faire le transport sous serment de n'en rien omettre, on voit qu'il s'est soustrait à cette formalité voulue par la loi et ordonnée par le juge. Si son but en agissant ainsi n'était pas légitime, il montre du moins qu'il n'avait pas l'intention de faire plus que la loi ne pouvait lui ordonner, et repousse nécessairement l'idée d'une intention de comprendre dans sa cession les biens situés en *Canada*.

D'ailleurs, cette cession est insuffisante d'après les lois du *Canada* pour opérer le transport du tître de la propriété réelle, parce qu'elle n'est pas faite dans les termes particuliers dont l'usage est nécessaire pour transférer la propriété immobilière d'après les lois de la province d'*Ontario* "grant, bargain, sell, &c." Il est de principe que le transport de la propriété immobilière située en pays étranger doit, pour y avoir effet, être fait dans la forme voulue par les lois de ce pays (1).

No. 555.—The grounds upon which the exclusive jurisdiction is maintained over immoveable property are the same, upon which

(1) Story, p. 745, Conflict of laws.

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the sole right to establish, regulate and control, the transfer, descent and testamentary disposition of it has been admitted by all nations. The inconveniences of an opposite course would be innumerable, and would subject immoveable property to the most destressing conflicts arising from opposite titles, and compel every nation to administer almost all other laws except their own, in the ordinary administration of justice.

No. 556.—It is universally admitted and established that the forms of remedies, and the modes of proceeding and the execution of judgments, are to be regulated solely and exclusively by the laws of the place when the action is instituted or as the civilians uniformly express it, according to the *lex loci.*

Si l'acte du 14 février est valable d'après la loi des *Etats-Unis*, il ne l'est pas d'après celle de la Province d'*Ontario*, comme il doit être exécuté ici, on ne peut invoquer l'autorité de nos tribunaux pour faire mettre à effet un transport de propriétés, nul d'après la loi d'*Ontario.*

Cette difficulté a été bien sentie par les parties intéressées qui ont essayé d'y remédier par l'acte du 24 septembre 1874, cité plus haut, dans lequel ils ont fait usage des termes sacramentels qui doivent être employés d'après la loi d'*Ontario* pour transférer la propriété foncière. Mais cet acte ne peut leur servir pour deux raisons: 1o. Parce qu'étant fait pour parvenir à l'exécution de celui du 14 février 1874, il n'est aussi qu'un transport de propriété immobilière fait en vertu de la loi de faillite, comme le premier auquel il a pour but de remédier; 2o. Parce qu'ayant été fait après la remise entre les mains du shérif de *York* d'un bref d'exécution dirigé contre ces même propriétés, l'Intimé avait acquis un privilége qu'un acte postérieur de son débiteur ne pouvait lui faire perdre.

Pour ces raisons, je suis d'opinion que le jugement de la Cour d'Appel d'*Ontario* renvoyant le bill en chancellerie doit être confirmé avec dépens.

HENRY, J.:—

This action was commenced by a bill of complaint in

the Equity Court in *Ontario*, filed on the 18th of May, 1876, in order to obtain a declaration that a writ of execution against the lands of *Anson G. P. Dodge*, at the suit of the present Respondents, and placed by them in the hands of the Sheriff of the County of *York*, did not operate to bind lands in that county of the execution debtor. After hearing, a decree was made by Vice-Chancellor *Proudfoot*, in favor of the Appellant, but that decree was reversed by the Court of Appeal, and from the latter judgment it comes by a second appeal to this Court.

Dodge was a member of the firm of *Dodge*, *Hunt* and *Scholefield*, residents respectively of *New York*, *Jersey City* and *Philadelphia*, in the *United States* of *America*, and which firm, as shewn by the evidence in this suit, carried on business in several places in that country. The firm became insolvent in 1873, and in the Southern district of *New York* made an assignment, under "An Act to establish a uniform system of Bankruptcy throughout the *United States*," to one *John L. Cadwalader* as a trustee for their creditors under that Act. That assignment is dated the 24th February, 1874, and forms part of the evidence herein. Subsequent thereto, on the 26th of August, 1874, the Respondents placed the execution for $13,201.60 debt and $52.57 costs, in the Sheriff's hands, and the same was renewed on the 23rd of August, 1875, and remained in full force in the Sheriff's hands unsatisfied up to the bringing of this suit.

Dodge, being the owner in fee simple of lands in *Ontario* bound by the execution and liable to be seized and sold to satisfy it, after the delivery of it to the Sheriff, that is to say, on the 24th September, 1874, made a conveyance by deed to the said *John L. Cadwalader*, in confirmation, as is alleged, of the previous assignment to him.

Cadwalader resigned his trusteeship on the 30th of

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June, 1874, and by course of law, which we may assume to be valid under the evidence, the Appellant was, on the 7th December, 1874, appointed trustee in place of *Cadwalader*—and the latter, by indenture bearing date the 25th of January, 1875, conveyed the said lands to the Appellant, as such trustee, in trust for the creditors of the said bankrupt firm. This deed was registered on the 27th April, 1875. On the part of the Appellant it is contended that the general assignment to *Cadwalader* covered and conveyed the lands of *Dodge* in question, but if not, that the subsequent deed to him from *Dodge* will operate as a confirmation of the assignment and relate back to the date of the latter, so as to have precedence of the execution at the suit of the Respondent company.

I have considered all the binding authorities as to both propositions, and can find none to sustain them. A general assignment, under the bankruptcy laws of the *United States*, cannot affect or cover lands in this country, although, as to moveable property, the law may be different. An assignment in bankruptcy in another country will not affect lands in the *United States*—neither will it in *England*. No reason has been given why we should hold differently here. The rule seems firmly established that in a contract concerning real or immovable property the law *rei sitæ*, and not that of the place of contract, should prevail. By the law here the assignment can have no operation merely as one made in bankruptcy in the *United States*. A general assignment under our own bankrupt laws would be good, but it is so only by Statute which does not apply to the former. Independently therefore of that question, is the first assignment valid between the parties to it so as to cover the lands? or, if it should be so declared, how, under the registry law, could it affect the execution in the Sheriff's hands. By the law of *Ontario* the

placing of the execution in the Sheriff's hands with directions to levy bound the lands of *Dodge* in the County of *York*. At that time there was no registry of any incumbrance thereon, the first conveyance to *Cadwalader* not having been registered, but that unrecorded assignment might, if a good conveyance, affect the rights of the Respondents under the execution. Suppose *Dodge* had given a deed *bonâ fide*, with every requisite necessary to a perfect conveyance, but it was never registered, as at present advised, I should say the execution claim would be affected by that deed, under the provision of sec. 7 of the Statutes of *Canada* of 1861, chap. 41, which provides that when no memorial of a deed is registered it should be deemed effectual according to the priority of time of execution. The execution only authorizes the sale of the interest of *Dodge* at the time it was placed in the Sheriff's hands. The previous assignment therefore, if valid, would leave no interest in *Dodge* to be sold under the execution. In this way, then, I think that, under the law of *Ontario* and the registry Acts, the assignment, if a valid one, would intervene to render the levy under the execution void. The decision of the case depends, in my judgment, altogether on the validity of the assignment.

Registry is not necessary to the validity of a conveyance of land in *Ontario*. Neither can a judgment creditor since 1861, secure a lien upon lands by registry; he can only make his judgment available by a levy upon, and sale of, the debtors lands. By the late registry Act of 1868, I think a judgment might be registered, but that Act (sec. 64) makes a previous unregistered instrument void only as against *a subsequent purchaser or mortgagee* for valuable consideration and therefore it would be of little benefit to register a judgment. As respects the first conveyance to *Cadwalader*, the registry Acts were not utilized; and the execution in the Sheriff's

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hands bound the property as against the debtor, but the previous unregistered conveyance, if valid in other respects, would prevail against it by the terms of section seven, before mentioned. Be that, however, as it may, the main question is, as I before stated, as to the validity of the conveyance of the lands, by the assignment as between the parties irrespective of the question of bankruptcy although unregistered. I am inclined to agree with the learned Vice-Chancellor that the trust expressed in the assignment was a sufficient consideration; and the question as to the *extent* of the trust beyond the right of the trustee *to hold* the lands to be subsequently "applied and administered for the benefit of the creditors," does not here arise.

The assignment does not mention lands—the words are "hereby convey, transfer and deliver all and each of their estate and effects." "Estate" in law, in regard to its use in conveyances, is properly defined to mean a property which one possesses, especially property in land. It is also understood as defining the *nature* and *quantity* of interests in lands, &c. In the conveyance under consideration, I think it may be fairly construed to mean and include, not only personal property, but lands; if, in other respects, the instrument is valid. "Effects" could not properly include lands; it means "results," "consequences"; but is often applied to "goods," "movables," "personal estate." There is no *localization*, however, in reference to the lands; no description, in a word, of the "estate" in the document in question. There is no pointing to anything by which the lands could in any way be ascertained—nothing to shew the intention of the grantor as to the lands to be conveyed—nothing to which the maxim quoted by the learned Vice-Chancellor, *id certum est quod certum reddi potest*, can be applied. In all his citations from 4 *Cruise's Dig.* 269, *pl.* 55, there are reference to localities and

other means of ascertaining the lands intended to be conveyed as to "all that the estate in the tenure of *J.S.*," or "all that estate which descended to the grantor from *J. S.*," or "all the grantors lands in the *Co. of B.*" In each of the three cases, there is given a reference limiting the inquiry and pointing to the mode of making it. In the present case there is no reference (and the deed itself must contain it) to anything to which the maxim could be applied. A deed may refer to other documents, or to matters in pais, to define the land intended to be conveyed, but it must either describe the lands so as by itself to indicate them, or contain references to something else by which the description, not being sufficient in itself, may be made so. I consider, therefore, the absence of any reference of the kind mentioned is fatal to the validity of the assignment as a conveyance of *Dodge's* interest in the lands in question. The title to the lands being in *Dodge* when the execution was delivered to the Sheriff, I consider they became thereby bound, and the subsequent deed to *Cadwalader* conveyed only subject to the lien of the execution. It is argued that, as the latter is but such a confirmation as a Court of Equity would enjoin *Dodge* to give of his previous assignment, the lien by the execution was subject to the equitable right of the Appellant. I know of no legal or equitable doctrine to sustain that proposition. Independently of the doubt that I entertain that the equity courts of this Dominion would necessarily be required to enjoin *Dodge* to make such a confirmation under the circumstances and nature of the assignment in bankruptcy in a foreign country, no Court of Equity could, or would, enjoin him to make such a confirmation when the lien under the execution intervened. Each of the two conveyances must in this suit stand upon its own legal merits. The first, I consider defective for the reasons given, and the

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second is, I think, inoperative against the previous lien by the execution.

I think, therefore, the appeal should be dismissed with costs and judgment entered in favor of the Respondents.

Appeal dismissed with costs.

Solicitors for Appellant: *Crooks, Kingsmill & Cattanach.*

Sollicitors for Respondents: *McCarthy, Boys & Pepler.*

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*Jan'y 31.

June 3.

THE HASTINGS MUTUAL FIRE INSURANCE COMPANY..... } APPELLANTS;

AND

THOMAS SHANNON .....RESPONDENT.

ON APPEAL FROM THE COURT OF ERROR AND APPEAL FOR ONTARIO.

Insurance—Misrepresentation as to Situation of Risk—Survey made by Agent.

C. M. Appellants' Agent solicited and prevailed on *T. S.* to insure his premises with the Appellants. Previously he had examined the premises to be insured, and on the 22nd of April, 1874, *T.S.* signed the application which *C. M.* had caused to be filled up, and upon the back of which was a diagram purporting to represent the exact situation of the building in relation to adjoining buildings. *T.S.* stated at the time of signing the application, that the distances put down in the diagram were not accurate. *C. M.* promised he would go to the property and make an accurate measurement

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*PRESENT:—Sir William Buell Richards, Knt., C. J., and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

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of the distances. By one of the conditions of the policy it was provided that if an agent should fill up the application, he should be deemed to be the agent for that purpose of the insured and not of the company, but the company will be responsible for all *surveys* made by their agents personally.

Held,—Affirming the judgment of the Court of Error and Appeal, that with respect to the survey, description and diagram the assured was dealing with *C. M.*, not as his agent, but as the agent of the company, and that therefore any inaccuracy, omissions or errors therein were those of the agent of the company, acting within the scope of his deputed authority, and not of the insured.

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

This was an action on a policy tried before *Patterson*, J., and a jury, at *Barrie*, at the Spring Assizes of 1876.

On the 22nd of April, 1874, the Respondent signed an application upon one of the Appellants' blanks for an insurance on fixed and moveable machinery contained in a grist mill, $2,000, annexed to which, or endorsed thereon, was a diagram purporting to represent the exact situation of the said mill in relation to adjoining buildings. The application and diagram represented that the saw mill was distant from the grist mill 140 feet, whereas it was only 110, and also other buildings as 100 feet, whereas they were not over 60 feet. The Respondent paid to *Charles Morris*, the company's agent, $45 for the premium of insurance of the property mentioned in the application and received an interim receipt.

By one of the conditions of the policy it was provided that if an agent should fill up the application he should be deemed to be the agent for that purpose of the insured, and not of the company; "but the company will be responsible for all *surveys* made by their agents personally." In this case *Morris*, who had, a few

(1) 2. App. R. Ont. 81. (2) 26 U. C. C. P. 380.

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days prior to the 22nd of April, 1874, examined the premises with a view of effecting an insurance, filled in the application. The Respondent, thinking that the distances stated in the said diagram were not, or might not be strictly accurate, and that the same might possibly in other respects be imperfect, drew the attention of the said *Morris* thereto, before and at the time of his (the Respondent's) signing the said application. *Morris* alleged that it was sufficiently accurate; that any inaccuracies, if there were any, were of no consequence, and that, at all events, he would go to the property and make an accurate admeasurement of the distances, and, if necessary, correct any errors in the said application or diagram before sending it forward to the Board of Directors of the Appellants.

The agent, in forwarding the application to the head office, wrote them in reference to the risk, but such letter was not produced at the trial. Upon the back of the application, underneath the diagram, is the following:—

The agent is particularly requested to answer the following questions (*inter alia*).

Q. Have you personally examined the premises? A. Yes.

Shortly thereafter the Respondent received a policy from the Appellants, but which was re-delivered to the agent, who got it as he said, for the purpose of making some change therein. The premises were subsequently destroyed by fire, on the evening of the twenty-first and the morning of the twenty-second day of July, 1874, of which the Respondent gave notice to the Appellants on the 26th of the said month of July, in the same manner that he had given notice of the insurance in the Citizens' Insurance Company, with whom he was also insured.

To the notification of the Respondent's loss, the Appellants replied, on the 29th of the same month, inform-

ing him that they had arranged with the Inspector of the Gore District Mutual Insurance Company, who had a concurrent risk on the grist mill, to adjust his loss.

Morris afterwards, and as promised by the said Inspector, handed to the Respondent's Solicitor the forms of application to be used by him in making the usual proof of claim, and the same were used accordingly, and, having been duly sworn and certified to, were, on the sixth day of August following, forwarded by post, in the same manner that all the notices and papers had been forwarded and given to the Appellants, and they were, in fact, duly received.

No objection was ever made to the form of the claim papers, nor was it contended that they did not contain all that the Respondent was bound to put therein, but on the 11th day of November, more than three months after the claim papers had been received, the Appellants, in answer to a demand for payment of the loss, answered, without objecting in any way to the form of the claim papers, that they had placed the matter in the hands of the Gore Mutual Insurance Company for adjustment, and they would, in all probability, concur in any settlement that company might make.

No further communication having been made, the Respondent commenced his action on the seventeenth day of February following the happening of his loss.

The declaration contained one count on the policy, to which the Defendants pleaded several grounds of objection.

The special replications and rejoinders raised the question on which this appeal was decided, viz.:—

Whether the company had not assumed a direct responsibility for the acts of their agent, *Morris*, in reference to surveys, and, if so, whether a notice to and knowledge by him as to the position of the adjoining buildings were binding on the company.

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Mr. *George D. Dickson*, for Appellants:—

The question is one of contract. The Appellants contend that they are free to make such contracts for insurance as may be agreed upon, subject to such conditions, restrictions and stipulations as their governing body may impose, and the insured agree to, and that when a contract has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, so as to add or subtract from, or in any manner vary or qualify, the written contract, *Goss* v. *Lord Nugent* (1); *Woolam* v. *Hearn* (2); *Forsyth* v. *Boyle* (3); *Mason* v. *Hartford Fire Ins. Co.* (4); *Mason* v. *Scott* (5); *Jones* v. *Victoria Graving Dock Company* (6); *Direct U. S. Cable Company* v. *Anglo American Telegraph Co.* (7); *Shannon* v *The Gore Ins. Co.* (8).

In the construction of a contract, the general intent to be gathered from the writing is to prevail, regard being had to the clear intent of the parties rather than to any particular words used. *Pollock* on Contracts (9); *Southwell* v *Bowditch* (10); *Smith* v. *Hughes* (11). In the application it is specially provided that "a special survey must be filled by the applicant on all mill and factory risks," and one of the conditions of the policy is:—

That if an agent of this company fill up an application for insurance therein, such agent shall be considered as acting for the Applicant, and not for this company, and no verbal or written statements of the said agent to the contrary shall be received in evidence, but the company will be responsible for all *surveys* made by their agents personally.

I take it, then, looking at the whole contract, that the intention of the parties was that the insured should be

(1) 5 B. & Ad. 60.
(2) 7 Ves. 211.
(3) 28 U. C. Q. B. 21.
(4) 28 U. C. Q. B. 31.
(5) 22 Grant 592.
(6) L. R. 2 Q. B. Div. 323.
(7) L. R. 2 App. C. 412.
(8) 27 U. C. Q. B. 405, 409.
(9) P. 407.
(10) L. R. 1 C. P. Div. 379.
(11) L. R. 6 Q. B. 607 and 610.

responsible for any errors in the description in the annexed diagrams, and that he is estopped from saying it is not his. *Pickard* v. *Sears* (1); *Cornish* v. *Abington* (2); *Hammersley* v. *DeBiel* (3); *Beattie* v. *Lord Ebury* (4); *Thomas* v. *Brown* (5).

Then, did the agent make the survey within the meaning of the words of the policy? It is evident, by the terms of the application, that the survey for which the company, by the policy, agrees to be responsible is not applicable to mill risks; and, moreover, what constitutes a survey, according to all authorities, is something more and quite different from looking all round the place, making no measurements, and this several days before the application was made, and before the applicant had made up his mind to insure with Appellants. See *Rowe* v. *The London and Lancashire Ins. Co.* (6); *Denny* v. *Conway* (7); *Bunyon* on Fire Insurance (8), and authorities cited in the judgment of *Harrison*, C.J., in court below.

In this case, the Respondent knew the application and diagram, misrepresented the facts and risk, and trusted to his friend to correct the same. This was not done, and the company cannot be held to have accepted the risk otherwise than as disclosed by the application.

The policy, also, was voided by reason of the further insurance, notice thereof not having been *received* by the company. *McCann* v. *The Waterloo County Fire Ins. Co.* (9).

Another point on which Appellants rely is, that the non-compliance with the requirements of the contract as to the certificate being given by the most contiguous Magistrate or Notary Public, accompanied by an affi-

(1) 6 Ad. & E. 469.
(2) 4 H. & N. 549.
(3) 12 Cl. & F. 45.
(4) L. R. 7 H. L. 102.
(5) L. R. 1 Q. B. Div. 714.
(6) 12 Grant 311.
(7) 14 Gray, Mas. 31.
(8) 2nd Edition, pp 67-68.
(9) 34 U. C. Q. B. 376.

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davit as required, voids the policy. *Lampkin* v. *The Western Assurance Co.* (1); *Davis* v. *The Canada Farmers' Mutual Fire. Ins. Co.* (2).

Under 36 *Vic.*, c. 44, sec. 36 *O.* the company had no power to contract except under seal, signed by the President and Vice-President, and countersigned by the Secretary. The written contract could only be altered in writing by the company, under seal, and no agent could vary a written contract by parol evidence.

Mr. *Dalton McCarthy*, Q. C., and Mr. *H. H. Strathy* for Respondent:—

As to the condition requiring the Respondent to furnish a certificate "under the hand of the Magistrate or Notary Public most contiguous to the place of fire," it is an unjust and unreasonable condition, and was properly so found by the Judge at *Nisi Prius*, and his ruling is right, and ought to be sustained. See 36 *Vic.*, c. 44, s. 33, *O.*; Imperial Act, 17 & 18 *Vic.*, c. 31, s. 7; *Rooth* v. *The North-Eastern Railway* (3).

The objections as to the form of the claim papers, and as to the preliminary proofs, were not taken at the trial, but, even if they were, the Appellants, having supplied the forms for the Respondent through their agent, cannot be heard to contend that they are not in the proper form; the Appellants are, in fact, estopped. These conditions are voidable, and the case of *Armstrong* v. *Turquand* (4) shews that they can waive their right by mere acquiescence, and we have more than that here. See also, *Webb* v. *The Commissioners of Herne Bay* (5); *Best's* Evidence (6).

The questions arising under the 7th and 8th pleas are, in effect, whether the finding of the jury upon the

(1) 13 U. C. Q. B. 237.
(2) 39 U. C. Q. B. 453, 465, 466.
(3) L. R. 2 Ex. 173.
(4) 9 Ir. C. L. 32.
(5) L. R. 5 Q. B. 642.
(6) 5th Ed., p. 684.

alleged misrepresentations in the application should be disturbed or not.

The alleged misrepresentations, as to the nature and situation of the risk, and as to the value of the insured premises, are said to have been contained in the written application for insurance. But the said application for insurance was not produced, but is alleged to have been lost, and the Appellants, being allowed to give secondary evidence thereof, endeavored to establish that a certain paper, which they put in, was a true copy thereof; the jury, however, in answer to the first, second, fifth and sixth questions put to them by the learned Judge before whom the case was tried, in effect, found that the said paper was not a true copy of the application. Such finding is supported by the evidence, and, if correct, disposes of all the grounds of alleged misrepresentation.

The alleged misrepresentations or errors are not in the application, but in the diagram thereon endorsed, and there is no clause in the policy avoiding it for errors or mistakes in the diagrams. It is for "erroneous representation," or for omitting "to make known any fact material to the risk" in the "application," that the policy is declared to be void.

As to the alleged misrepresentations of the nature and situation of the risk, the Appellants' agent, having himself made an examination and survey of the premises before the insurance was effected, knew, or must be taken to have known, whether the nature and position of the risk, proposed for insurance in the Appellants' Company, was correctly described, and the Appellants, possessing such knowledge, (for they must be taken to have known all their agent knew—all, at any rate, acquired in the discharge of his duty as their agent) cannot rely, as a ground of defence to the Respondent's claim, on any inaccuracies or misstatements in the application or diagram as misrepresentations.

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The agent of the Appellants, having made a survey and examination of the insured premises prior to the acceptance by him of the risk, and having caused the Respondent's application for insurance to be filled up in the form in which it was, and having promised to correct any errors that may have been therein, the Appellants cannot set up the mistakes (if any) therein as misrepresentations to avoid the contract of insurance.

But, even under the terms of the policy, it is declared that "the company (the Appellants) will be responsible for all surveys made by their agents personally." And the said *Morris* did personally make a survey of the insured premises and agreed to correct the diagram that was made, if it required correction, by making another and more accurate survey, all of which was within the scope of his authority.

Owing to the non-production of the letter that the said *Morris*, as agent of the Appellants, sent to his principals, and on which, as well as on the application, the insurance policy seems to have been made out, it cannot be safely assumed, much less established, that the said *Morris* did not do as he agreed.

The application, survey and diagram are not so described or made part of the policy as to constitute their contents warranties; a mere reference to them is not sufficient for the purpose. If there is a doubt about the words, the Court will interpret them not as a warranty but as a mere representation. All that is declared in the application is that "the descriptions in the annexed diagram are true and complete in all particulars," which certainly does not necessarily or reasonably imply or import that the diagram showed, accurately or particularly, more than a *description* of the proposed risk, possibly the dimensions, etc., of the building in which the property to be insured was situate. See *Lothian* v.

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Henderson (1); *Parsons* v. *Watson* (2); *Stokes* v. *Cox* (3); *Budd* v. *Fairmaner* (4); *Scanlon* v. *Scales* (5); *Turley* v. *North American Ins. Co.* (6); *Bunyon* on Fire Insurance (7); *Hide* v. *Bruce* (8); *Davis* v. *Scottish Provincial Ins. Co.* (9); *Hopkins* v. *Provincial Ins. Co.* (10); *In re. Universal Non-tariff Fire Ins. Co.* (11).

The proof of there being a double insurance was on the Appellants, and it was not established, nor was it admitted or conceded at the trial. The Secretary of the company was a witness in the case and was not questioned. On application for a new trial, there was no affidavit that the notice had not been received. The presumption of fact is in favor of the Respondent.

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

Charles Morris was Defendant's local agent, and, as such, solicited risks, received applications, transmitted them, received premiums, granted interim receipts, and appears to have been and acted as Defendant's agent in all particulars connected with insurance, save only in the matter of filling up applications, when, and when only, it would seem he was to be considered as acting for the assured.

Galt, J., in his judgment says :—

The seventh ground, on which, in fact, the defence really rested, remains to be considered. That objection is, *that the situation of the insured premises, as respects adjoining buildings, was not properly described in the application.* It is beyond question that the diagram on the back of the copy of the application produced at the trial does

(1) 3 Bos. and Pul. 499.
(2) Cowper, 790.
(3) 1 H. & N. 533.
(4) 8 Bing. 48.
(5) 5 Ir. L. R. 139, 154.
(6) 25 Wend. 374.
(7) Pp. 57 & 58.
(8) 3 Doug. 213.
(9) 16 U. C. C. P. 176.
(10) 18 U. C. C. P. 74.
(11) L. R. 19 Eq. 485.

* The Chief Justice was absent when judgment was delivered.

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not show correctly the position of the premises, but the Plaintiff, by his replication to the seventh and eighth pleas, says "that the insurance was effected by the Plaintiff with the local agent of the Defendants, having authority to solicit risks and to inspect premises offered or proposed or about to be insured by the Defendants, and to make out applications, receive premiums, and effect interim insurances;" and the Plaintiff says that the said agent personally inspected the property insured, and was fully aware of the position of the building containing the same, and its contiguity to other buildings; and the said agent afterwards made out the said application, or caused the same to be made out; and the Plaintiff says that the same was signed by him at the instance and procurement of the said agent, and upon the undertaking of the said agent that he would amend the same by inserting in the said application the distance of any building within one hundred feet from the building containing the property insured, before forwarding the said application to the head office of the Defendants, and the Plaintiff, relying on the said application, completed the effecting of the said insurance, by paying the premium to the said agent, and took from him an interim receipt effecting the said insurance of the said property against loss until the policy should be issued by the Defendants; but the said agent neglected to amend the said application by inserting therein the fact that there was a building within the distance of one hundred feet from the building containing the property insured, of which the Plaintiff had no notice or knowledge until after the happening of the loss in the declaration mentioned, and the Defendants did not make or raise any objection to the contiguity of any other building, or to the same not being mentioned or referred to in the said application; and the Plaintiff further says that there was no fraud or fraudulent misrepresentations on his part in reference to the matters herein pleaded to.

The clause in the policy is this:—

That if an agent of this company fill up an application for insurance therein, such agent shall be considered as acting for the applicant and not for the company, and no verbal or written statement of the said agent to the contrary shall be received in evidence, but the company will be responsible for all *surveys* made by their agents personally.

Upon the back of the application, underneath the diagram, is the following:—

The agent is particularly requested to answer the following questions (*inter alia*):—

Have you personally examined the premises?—Yes.

Are there any other circumstances connected with danger of fire to the property proposed for insurance ?—No.

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It is, therefore, true that, so far as the application is concerned, the Plaintiff was contracting, through *his* agent, with the Defendants, through their agent, though one and the same person. But, with respect to the survey, description and diagram, the assured was dealing with *Morris*, not as his agent, but as the agent of the company. The company are not, I think, to be released or excused from consequences resulting from the carelessness or want of skill of their agent in a matter within the scope of his deputed authority, because he is also employed by the assured in another portion of the same transaction. If the company had not assumed a direct responsibility for the acts of their agent in reference to surveys, the case might possibly be in a different position. It is clear that the error, if any, in the description or diagram did not occur by or through the default, negligence or mistake of the assured, who appears to have acted throughout with the most perfect good faith, and to have furnished to the agent of the company every opportunity of examining and surveying the premises, and of testing and correcting his description and diagram before transmitting it to the company. He never, in fact, assumed the false representation or the responsibility of it, he never put it forward, but, on the contrary, when put forward by the company's agent, he repudiated it, calling attention to the inaccuracies of the agent's description and diagram, and pointing out minutely the particulars in which they were incorrect. He never authorized the transmission of anything but a correct description and diagram; he was guilty of no concealment, and he in no way directly or indirectly, by himself or in collusion with the agent of the company, attempted to obtain from the Defendants an insurance upon false represen-

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tations. If the difficulty in this case has arisen by or through the default, negligence or mistake of the agent of the insurers, I think it cannot be disputed that the policy would be valid. The insurance was pressed on Plaintiff by the agent of the company authorized to obtain insurances for the company, and when so pressed to insure, *Morris*, the agent, was taken through the grist mill and all round the place, and after that undertook to make out, with the assistance of an amanuensis selected by himself, the application; this he did as Plaintiff's agent—if adopted by him. But as regards the diagram and description, he must, I think, be considered as the company's agent, that being within the scope of his deputed authority, and he having inspected and examined the premises, or, in other words, surveyed them—and for which the company must be responsible. The meaning of the word "survey," as applicable to this subject matter, as given in the imperial dictionary is "to examine with reference to condition, situation and value, as to *survey* a building, to determine its value and exposure to loss by fire." The agent appears to have adhered, notwithstanding the objections of the assured, to the description and diagram; the assured signed the application with the description the agent had put forward in the application and diagram which must be assumed to have been the result of his examination and enquiries, the agent, at the same time, stating that he would go again to the premises and measure and alter the paper to suit the measurements. This account of the transaction the jury have found to be correct. Now, the company having undertaken to be responsible for all surveys made by their agents personally, how then can they escape responsibility for an inaccurate examination or survey by their agent *Morris*, or an inaccurate description and diagram of that examination or survey prepared by him,

this being a matter unquestionably within the scope of his agency. Who but the company is to be responsible for his not making a more accurate examination and survey in the first instance, or for his not making the resurvey and measurements as he promised, or for not correcting the description and diagram before transmission to the company, as the assured desired and he agreed to do, and as it was his duty to the company to do, or for not furnishing the company with the information the assured gave him as to the inaccuracy of his description and diagram, and which, being connected with what was clearly within the scope of his agency, must have the same effect as if communicated directly to the company, the knowledge of the agent in such a case being the knowledge of the company, or, in other words, in such a case notice to the agent being notice to the principal; or for transmitting contrary to the evident wish of the assured an incorrect description and diagram, he being for the purpose of transmission the agent of the company, but who, on the contrary, transmitted the documents with his certificate or written assertion that he had personally examined, that is surveyed the premises, and that there were not any other circumstances connected with danger of fire. Surely under such circumstances the Plaintiff had a right to rely on Defendants' agent's assertion that he would transmit a correct description, and I think the survey and diagram must be considered the survey and diagram furnished by the agent of the company, and made part of the application by him, and for which the company, through him, are responsible; and so establishing their agent's description, diagram and assertion as the basis of the contract, which they cannot now dispute, it operating to estop the Defendants from disputing its correctness; for if the Defendants are responsible for the surveys of their agent, and for the information of the agent in

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respect thereof as being the information of the company, it would be a gross fraud in Defendants to receive through their agent a premium with the intention of avoiding the insurance in case of loss, and retaining the premiums in case no loss should occur.

So long ago as 1815 Lord *Eldon*, in the House of Lords, recognized that while it is a first principle of the law of insurance that, in the case of a warranty, the thing must be exactly as it is represented to be, it would be an effectual answer, even in the case of a warranty, that the insured were misled by the insurers or their agents; *Newcastle Fire Ins. Co.* v. *Macmoran* (1); and, in *Hartford Protection Ins. Co.* v. *Harmer* (2), *Ramsay*, J., referring to this case, says *Stephens*, in his *Nisi Prius*, (3) says:—

Upon the authority of *Newcastle Insurance Company* v. *Macmoran* (4), it seems that, even in case of warranty, it would be a good answer that the mistake or misrepresentation was to be attributed solely to the insurers themselves or their agent; and finally, the Supreme Court of *Pennsylvania*, in the case of *Bruner* v. *Howard Fire Insurance Company*—determined during the present year, and not yet reported—has decided that parol evidence is admissible to show that the description of property insured, annexed to a policy, though signed by the insured, was drawn up by the agents of the insurer; that they knew all about the property from verbal description by the insured and from actual survey, and that, therefore, omissions and errors therein were those of such agents, and not of the insured, notwithstanding a provision in the policy that the description should be taken as part thereof, and as a warranty on the part of the insured. 2 Am. Law Reg. 510.

In the case of *Peoria Marine and Fire Ins. Co.* v. *Hall* (5), it is stated:—

But the counsel for the Plaintiff in error insists that the printed conditions were notice to the assured of the agent's want of authority to assent to the keeping of gunpowder, &c., and that this assent could be given only by the company itself. This, at first view, would

(1) 3 Dow. 255.
(2) 3 Bennett Fire Ins. cases 656.
(3) Vol. 3, p. 2,081.
(4) 3 Dow. 255.
(5) 4 Bennett Fire Ins. cases 743.

seem plausible, and might be sound but for another principle which lies back of it and defeats its application. The principle to which we allude is, that notice to the agent is notice to his principal. The company must be regarded as knowing what he knew. If he knew that powder was kept at the time of the insurance, or to be kept during its continuance, the company must be regarded as having known it also. They had power to waive the condition; and by taking the premium and issuing the policy with such notice or knowledge, they must be regarded as having waived the condition which prohibited its keeping. It would be a gross fraud in the company to receive the premium for issuing a policy on which they did not intend to be liable, and which they intended to treat as void in case of loss.

And *In re Universal Non Tariff Fire Ins. Co.* (1) the same principle is put forward; the marginal note is:—

A fire insurance was effected in respect of certain property through an agent named *Donald*, who inspected the premises. One condition of the policy was, that any material mis-description of the property would render the policy void. The buildings were described as built of brick and slated, but it turned out that one of the buildings was not roofed with slate, but with tarred felt. The company alleged that *Donald* was not their agent, but the agent of the insured and that the mis-descripfion rendered the policy void.

Held,—That the mis-description was immaterial, and not sufficient to vitiate the policy; but that, if material, it was made by *Donald* as the agent of the insurance company, and the insured were not responsible for it.

As in *Wing* v. *Harvey*, (2), it was held that the company having held out *L. & S.* to the world as their agents for the purpose of receiving the premiums, it became the duty of *L. & S.*, and not that of the Plaintiff, to communicate to the head office at *Norwich* the circumstances under which those premiums had been paid to and received by them, and the representations which were made on the occasions of such payments and receipts. So here, the Plaintiff having held out to the world *Morris* as their agent to obtain insurances, trans-

(1) L. R. 19 Eq. 485. (2) 5 DeG. McN. & G. 271.

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mit applications, receive premiums, and make personal surveys, it became the duty of *Morris*, and not of Plaintiff, to communicate to the company all the circumstances connected with the description and diagram and the transmission of the application.

I by no means wish to be understood as intimating that if this application had been signed by Plaintiff, and placed in the agent's hands as containing a correct description, simply to be transmitted as Plaintiff's act, independent of any personal survey or examination made by the agent, or description thereof furnished by him, that, in such a case, knowledge by the agent that it was not correct would be evidence of a waiver by Defendants of the condition that a misrepresentation in the application should avoid the policy, because, in such a case, the agent would be acting simply as the transmitter of that for which the assured alone was responsible, though it is not necessary to discuss or determine this point.

There were two or three minor points suggested, but scarcely relied on, viz.: As to the notice of additional assurance; and as to the preliminary proof. We think there is nothing in either of these objections that was not disposed of by the finding of the Jury; and, as to the objection that the certificate of the magistrate most contiguous was not furnished, we agree with the Court below that this was an unreasonable condition.

STRONG, TASCHEREAU, FOURNIER and HENRY, J. J., concurred.

Appeal dismissed with costs.

Solicitor for Appellants: *George D. Dickson.*

Solicitors for Respondent: *Dalton McCarthy & H. H. Strathy.*

THE GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY..... } APPELLANTS;

AND

JAMES H. SAMO AND THOMAS JOHNSTON..... } RESPONDENTS.

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*Feb'y. 1.
June 3.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance—Misstatement as to incumbrances—Indivisibility of policy.—36 sec., c. 44, 36 *Vict., Ont.*

The Appellants issued to the Respondents, in consideration of $195, a policy of insurance to the amount of $3,000 as follows, viz.: $1,000 on their building, and $2,000 on the stock. In the Respondent's application, which had been signed in blank and delivered to the person through whose instrumentality the policy was effected, it was stated that there were no incumbrances on the property, although there were several mortgages. It was also proved that after the issuing of the policy the Respondents effected a further incumbrance on the land, but did not notify Defendants. The policy was made subject to 36 *Vic.*, c. 44, O., The proviso (since repealed by 39 *Vic.*, c. 7,) to sec. 36, declared, "That the concealment of any incumbrances on the insured property, or on the land on which it may be situate * * shall render the policy void, and no claim for loss shall be recoverable thereunder, unless the Board of Directors shall see fit in their discretion to waive the defect."

One of the conditions of the policy provided that the policy should be made void by the omission to make known any fact material to the risk.

On an action upon the policy, the Court of Common Pleas (1) refused to set aside the verdict in favor of the Appellants, but on appeal to the Court of Error and Appeal for *Ontario* (2), it was held that the policy was divisible and that Respondents were entitled to recover the insurance on the stock.

(1) 26 U. C. C. P. 465. (2) 1 Ont. App. Rep. 545.

*PRESENT—Sir William Buell Richards, Knt., C. J., and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

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Held,—On Appeal, that the contract of insurance on the building and on the stock was entire and indivisible, and that the misrepresentations as to incumbrances, by the conditions of the policy as well as by the 36 sec. of 36 *Vic.*, c. 44, O., rendered the policy wholly void.

THIS was an appeal from a judgment of the Court of Appeal for *Ontario*, making absolute a rule *nisi* to enter a verdict for the Respondents for two thousand dollars, being insurance on goods.

The action was commenced on the 3rd day of November, 1875, upon a policy of insurance issued by the Appellants to the Respondents, bearing date the 16th of December, 1874, on their property to the amount of three thousand dollars, as follows, viz.: $1,000 on the building only of their wooden furniture manufactory; $2,000 on their stock of lumber and materials, and furniture manufactured and in process of manufacture contained in said building.

The declaration contained four counts on the policy and the common counts. The pleas were:—

1st. One denying the making of the policy.

2nd. That the real estate was encumbered, and that in the application it was alleged to be unencumbered.

3rd. Concealment of the fact of encumbrances.

4th. As to so much of the counts as relate to the insurance on the building; that after the making of the policy, the Respondents transferred the said building, by mortgage, to *Robert Davies*, and gave no notice of such transfer to the Appellants.

5th. Sets up the same defence in a different way; and the

6th. Never indebted to the common counts.

The Respondents replied, taking issue on the first plea, and, to the second plea, 1st. That they did not, in their application, state there were no encumbrances on the property, as in that plea alleged.

2nd. That the policy was not issued on the application in that plea mentioned.

3rd. That the section of 36 *Vic.*, Chapter 44, of the Statutes of *Ontario*, referred to in the pleadings, does not affect the policy as to the goods insured and the risk thereon.

4th. That the application was made through an agent of the Appellants, and that before the application the Respondent informed him of the encumbrances, and that the misrepresentations were by him.

Issue was taken on the replication, and the Defendants rejoined that provision in the policy that if an agent of the company should fill up an application, he, in doing so, should be considered as acting for the applicant, and not for the Respondents. The cause was tried before Chief Justice *Hagarty*, in March, 1876, and a verdict given for the Appellants. Leave was, however, given to move for a rule to enter a judgment for the Respondents for $3,000 and interest, and shortly after a rule *nisi* was granted in pursuance of such leave, on the following grounds :—

1st. That there was no evidence that the Appellants had ever elected to avoid the policy for any cause.

2nd. That the evidence established that the only application made by the Respondents was in blank; that there was no concealment therein of encumbrances; that the policy was issued without the Respondents knowing that any one had represented the absence of encumbrances, and that the agency of *Rosenblatt* had terminated before he signed the application, and that he was then the agent of the Appellant and of *Griffith*, and not of the Plaintiff.

3rd. That no representations were made by the Respondents, but by *Griffith*—not their agent, but the agent of the Appellants.

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4th. That *Griffith* signed the application without any authority from *Samo*.

5th. That the replication proved there were no misrepresentations made by Respondents, and that they were not answerable for acts of *Griffith*.

6th. That the condition that the agent of the Appellants shall be deemed the agent of the Respondents is unreasonable and unjust.

7th. That the policy was divisible; and therefore only void as to the insurance on the factory, and not on the goods therein contained.

The Court of Common Pleas refused to set the verdict aside. The Plaintiffs then appealed from the decision of the Court of Common Pleas to the Court of Appeal of *Ontario*, which held that the policy was divisible, and that Plaintiffs were entitled to receive the amount of the risk, taken in and by the policy on the stock of lumber and furniture.

The material portions of the evidence are set forth in the judgments. The question to be determined on this appeal was, whether or not the policy in question is a divisible policy ; whether it is void in the whole, or only in part, viz. :—Void as to the insurance on the wooden manufactory, and good as to the stock of lumber and materials, and furniture manufactured and in process of manufacture ?

Mr. *Bethune*, Q. C., and Mr. *C. A. Durand*, for Appellants.

One of the covenants of the policy is that, " if the title of the property be transferred or changed without written permission, the policy shall thenceforth be void." Under Sec. 36 of the Statute, 36 *Vic.*, c. 44, O., it is the policy, that is, the whole policy, which is made void in the event of there being any false statement in the application respecting the title or ownership, or his

circumstances, or the concealment of any encumbrances on the insured property or the land on which it may be situate. It is admitted that there was a misrepresentation as to encumbrances on the land, the application stating that there were none, the land at the time being mortgaged to over $4,000. The insurance in this case was an entire insurance for $3,000, for which one rate was fixed and paid. The conditions of the policy apply equally to real and personal property: it cannot be argued that such a policy is divisible.

By the terms of the contract, "the policy," that is, the whole policy (not a part of it, as held by the majority of the Judges in the Court of Appeal) became void if the assured made any erroneous representations in the application, or if the assured was not the sole and unconditional owner of the property, unless the true title were therein expressed:—*Gottsman* v. *Pennsylvania Ins. Co.* (1); *Barnes* v. *The Union Mutual* (2); *Gould* v. *The York County Mutual Fire Ins. Co.* (3); *Lovejoy* v. *The Augusta Mutual Ins. Co.* (4); *Wilson* v. *The Herkimer County Ins. Co.* (5); *Bowman* v. *The Franklin Ass. Co.* (6); *Hinman* v. *The Hartford Fire Ins. Co.* (7); *Lee* v. *The Howard Ins. Co.* (8); *Friesmuth* v. *Agawam M. F. Ins. Co.* (9).

The only American case opposed to this view is that of *Phœnix Ins Co.* v. *Lawrence et al.* (10).

The case of *Date* v. *The Gore District Mutual Ins. Co.* (11) was under a different section of the Act. It is opposed to *Ramsay Cloth Co.* v. *Mutual Ins. Co. of Johnstown* (12); and to *Russ* v. *The Clinton Mutual Ins. Co.* (13); *Kerby*

(1) 56 Penn. 210.
(2) 51 Maine 110.
(3) 47 Maine 401.
(4) 45 Maine 472.
(5) 2 Selden N. Y. 53.
(6) 40 Maryland 620, 632.
(7) 36 Wisconsin 159, 169.
(8) 3 Gray 583, also, at page 594.
(9) 10 Cush. 587; 25 Barbour 503.
(10) 4 Metcalfe Ken. p. 9.
(11) 14 U. C. C. P. 549.
(12) 11 U. C. Q. B. 516.
(13) 29 U. C. Q. B. 73.

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v. *Niagara* (1); and to *Bleakely* v. *The Niagara District* (2). Moreover it is proved that subsequent to the policy being effected, the insured effected a further encumbrance on the property, and never notified the company. The learned counsel referred also to *Cashman* v. *London & Liverpool Ins. Co.* (3); *Flanders* on the law of fire insurance (4); *Bunyon*, law of life insurance (5); *Angell*, law of fire and life insurance (6); and *Phillipp's* law of insurance (7).

Mr. *Read*, Q. C., for Respondents.

The application was for two insurances in one policy: 1st, for the building for which a special rate of 5 p. cent. was fixed; and 2nd, for the stock for which a special rate of 5 p. cent. was also fixed. It makes no difference that the rate should be the same. This rate was subsequently changed to 6½ p. c., and it applies equally to the personal and real property.

The Appellants by their replications have made this case dependant upon the construction of 36 *Vic.*, c. 44, *O.*

The true construction of the 36. Sec. of 36 *Vic.*, Cap. 44, *O.*; which enacts that in case a fraudulent representation, or any false statement respecting the title or ownership of the applicant or his circumstances, or the concealment of any incumbrances on the insured property, or on the land on which it may be situate, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written assent of the company thereto, shall render the policy void, is that where a policy, as in this case, is for a cash premium, and in the application, a distinct premium is charged for the risk on the building and

(1) 16 U. C. C. P. 573.
(2) 16 Grant 198.
(3) Stevens' Digest N. B. Rep. 230.
(4) P. 302.
(5) P. 68.
(6) Pp. 184, 678.
(7) Pp. 470, 8, 9.

on the goods, that the policy is void as to the buildings only, where any of the defects referred to exist as to the buildings, and not as to the goods or personal property; and void only as to the goods and personal property insured where the defects exist only in reference thereto, and not to the buildings insured.

The 36th Sec. of 36 *Vic.*, Cap. 44, says that the policy shall be void, in case any of the defects therein referred to exist as to the "insured property," and not as to the "insured property or any part thereof," to make the policy void the defects, or some of them, must exist as to all the insured property mentioned in the policy, and not to a part thereof only.

The policy in question, however, was a divisible policy, and only void as to the factory, and not as to the furniture, goods, or other personal property: *Phœnix Insurance Co.* v. *Lawrence et al* (1); *Clark* v. *New England M. F. Insurance Co.* (2); *French* v. *Chemango Co. Mutual Insurance Co.* (3); *Barnes* v. *Union Mutual Fire Insurance Co.* (4); *Gould* v. *York County Mutual Fire Insurance Co.* (5); *Burrill* v. *Chemango Mutual Insurance Co.* (6); *Kuntz* v. *Niagara District Insurance Co.* (7); *Date* v. *Gore District M. F. Insurance Co.* (8).

Most of the American cases holding a policy is indivisible are cases in which there has been a premium note for which the company had a lien on the property, and do not apply.

The policy in this case, and the construction thereof, is not to be governed by the law as applied to whole or entire and divisible contracts without reference to legislative enactments, but must be governed by the legislative enactments referred to therein, and the ap-

(1) 4 Metcalfe K. R. 9.
(2) 6 Cushing 342.
(3) 7 Hill 122.
(4) 51 Maine 110.
(5) 47 Maine 403.
(6) 1, Edmunds' Select Cases N. Y. 233.
(7) 16 U. C. C. P. 573.
(8) 14 U. C. C. P. 548.

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plication therefor, and the construction to be placed thereon.

Even under the Law of Contracts, there is nothing to prevent this contract being a divisible contract, but on the contrary, the application for the contract and the contract itself show that it was intended to be divisible, and the words thereof do not necessarily make it indivisible. *Doran* v. *Reed* (1): Held, that notwithstanding the Consolidated Statutes of U. C. Cap. 85, Sec. 7, of which provides: —"If any such deed (one-third of married woman) be not executed, acknowledged, and certified as aforesaid, the same shall not be valid or have any effect," the deed is good as to husband's interest—in other words, partly good and partly bad. *Rose* v. *Scott* (2); chattel mortgage, held good in part and bad in part.

As to the defence set up by the Appellants in their second plea, viz.:—That the existence of the undisclosed mortgages was a circumstance material to the risk, and to be known to the Appellants, and setting up the failure to disclose them, as a breach of the agreement in the application for insurance, the Respondents submit, that the existence of an encumbrance on the building was not a material fact or circumstance, in regard to the condition, situation, value or risk of the property, nor was there any evidence at the trial that the failure to disclose such encumbrances was material to the risk, *Lindenan* v. *Desborough* (3); *Jones* v. *Provincial Ins. Co.* (4).

Mr. *Bethune*, Q. C., in reply:—

The Appellants did not only plead the Statute.

By the evidence it will be seen that the answers given by the applicant relate to *the risk*, and not to two risks,

(1) 13 U. C. C. P. 393.
(2) 17 U. C. Q. B. 386.
(3) 8 B. & C. 586.
(4) 3 C. B. N. S. 65.

and moreover, when the rate was increased, it was agreed to lump *the risk* at 6½ cent.

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RITCHIE, J.:—

Defendants insured Plaintiffs "in consideration of the receipt of $195, to the amount of $3,000 for the term of one year, ending at noon on 18th Nov., 1875, as follows, viz: $1,000 on the building only of their wooden furniture manufactory, situate on Yonge Street, in *Yorkville*, $2,000 on their stock of lumber and materials and furniture manufactured and in process of manufacture contained in said building." It is admitted there was a misrepresentation as to encumbrances which would invalidate the policy as to the building, but it is contended on Plaintiff's behalf that the contract of insurance is not entire, but divisible, the insurance on the building being, it is alleged, separate and distinct from that on the furniture contained in the building, and that consequently any encumbrance on the building could affect and render void only that portion of the contract applicable to the building, and had no reference to the insurance on the furniture, which, notwithstanding the encumbrance on the building, was valid. But, I am not able so to construe this instrument. The words of the Statute of 38 sec. 36 *Vic.*, Cap. 44, endorsed on the policy, enact that any false statement respecting the title or ownership of the applicant or his circumstances, or the concealment of any encumbrance on the insured property, or on the land on which it may be situate, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written consent of the company, shall render the policy void, and that the concealment of any circumstances on the insured property or the land on which it may be situate, renders the policy void.

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* The Chief Justice was absent when judgment was delivered.

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But entirely independent of the Statute, the application set forth :—

Application of *J. H. Samo & Co.*, of *Toronto*, County of *York*, for insurance against loss or damage by fire, by the *Gore District Mutual Fire Insurance Company*, in the sum of $3,000 for the term of one year, commencing the eighteenth day of November, 1874, at noon, on the property, as follows :—On a furniture manufactory two stories high, 50 x 25, built of wood, covered with shingles; present cash value, exclusive of land, amount to be insured ⅔ value, $1,000. Rate, 5 per cent.

On stock of lumber and materials, and furniture manufactured and in process of manufacture, contained in above building, covered with shingles, marked No. on diagram, said building owned by assured, present cash value, exclusive of land, $8,000; amount to be insured, $2,000. Rate, 5 per cent.

The said applicant makes the following statement and gives the following answers to interrogations here put, relating to the risk :—

1. Where is the property to be insured situate? On *Yonge* street, Village of *Yorkville*.

2. Name of owner of property to be insured? *J. H. Samo* and company.

3. By whom and for what purpose is the building occupied? By us as a furniture manufactory.

29. What other insurance is there at present on the property? $2,000.

30. In what companies? Guardian.

31. What is your interest in the property to be insured? Owners.

33. Is property encumbered, and, if so, to what amount? None.

* * * * * *

And the said applicant hereby covenants and agrees to and with the said company that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risks of the property to be insured, so far as the same are known to the applicant, and are material to the risk, and material to be known by the company, and agrees and consents that the same be held to form the basis of the liability of the said company, and shall form a part and be a condition of this insurance contract.

Signature of applicant,

J. H. SAMO & Co.,
per T. B. G.

Dated 18th November, 1874.

By the policy, it was covenanted :—

It is covenanted and agreed that the interest of the assured herein is not assignable without the consent of said company in writing; and if the title of the property be transferred or changed other than by succession, by reason of death, or the policy be assigned without written permission hereon, this policy shall thenceforth be void; and that the application of the assured upon which this insurance is granted, the survey and diagram of the premises and all things therein contained shall be taken and considered a part and portion of this policy; and that no insurance shall be binding until payment of the premium by cash or note. * * * * That if the assured in the application referred to herein make any erroneous representation or omit to make known any fact material to the risk, or if the assured shall have effected or shall hereafter effect any other insurance on the property hereby insured, or if the risk be increased by any means within the knowledge of the assured without the consent of this company endorsed thereon, or if the assured is not the sole and unconditional owner of the property insured unless the true title be expressed herein, * * * * then, and in every such case this policy shall be void. * * * * That if any agent of this company fill up an application for insurance therein, such agent shall be considered as acting for the applicant and not for this company, and no verbal or written statement of the said agent to the contrary shall be received in evidence, but this company will be responsible for all surveys made by their agents personally.

Having a due regard to the terms of this policy and the subject matter of the contract, I think it was an entire agreement to insure the house and its contents in consideration of the gross sum of $195, made up, no doubt, as proposed in the application for the insurance. The consideration is stated in the policy as entire on the one side for all Defendants undertook to do, on the other, the distribution of the risk being simply to limit the extent of the risk assumed by Defendants on each kind of property; in all other respects the contract was entire.

A remark of *Bramwell*, B., in *Harris* v. *Venables* (1); where one question was whether the consideration applied to both promises, and it was held it did, seems very apposite to this case. He says:—

(1) L. R. 7 Ex. 240.

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All that is to be done on one side is the consideration, for all that is to be done on the other; all the promises are referred to all the considerations.

So here, in consideration of an entire sum on one side, the Defendants assumed all the risks on the other.

The character and situation of the building is a prominent consideration in every contract of insurance, and is equally important, whether the policy covers personal property in the building or the building itself. No distinction is indicated in this policy in respect to the character and situation of the building between insurance on personal and on real property, or to indicate in any way that the condition relied on by Defendants refers exclusively to applications for insurance upon buildings. It is equally sensible and intelligible when applied to personal property as to real property, and when applied to personal property in the building as in reference to the building itself; for no one can doubt that if the building takes fire the property in the building is jeopardized. It has been argued that it would necessarily follow that the same rule would be applicable to two descriptions of insurance having no connection whatever with each other, as for instance, on personal property in one city and on a house in another, included in one policy; but this by no means follows. It cannot be doubted, there may be separate insurances in the same policy as there may be separate causes of action, totally distinct from each other, arising upon the same instrument for which an action might be brought on each of them. When questions, such as have been suggested arise, they will have to be decided on the language of the policy, having due regard to the subject matter. In *Hopkins* v. *Prescott* (1); at p. 591, *Wilde*, C. J., says:—

No doubt, you may put two distinct and independent contracts

(1) 4 C. B. 578.

upon one piece of paper, but here the consideration alleged is an entire one.

And in delivering judgment, he says:—

The declaration sets out an agreement; and one question is, whether it sets out an agreement, which is single and entire, made on one entire consideration, or whether is it severable in its nature, and deals with matters that are *unconnected with and independent of each other*. It seems to me that the matter alleged in the declaration amounts to one entire agreement, which may very well be, although the contract be to perform several distinct things.

The authorities in *Ontario* are, so far as I can judge, in entire accord with the view here put forward, as are those in the *United States*. All the cases, both in *Ontario* and the *United States*, have been so fully put forward and discussed in the Courts below that it is unnecessary to occupy the time of this Court in going through them again. The Supreme Court of the Province of *New Brunswick*, in *Cashman* v. *L. & L. Fire Ins. Co.* (1), acted on the same principle. There the Plaintiffs insured two buildings and the merchandize in one of them against loss by fire; one of the conditions of the policy declared that if there should be any fraud or false swearing, the claimant should forfeit all claim under the policy. One ground of defence to an action brought on the policy was that the Plaintiff made a false declaration as to the value of the goods lost by the fire. Held, that the contract was entire, and if the Plaintiff was guilty of fraud or false statement in reference to the goods he could not recover any part of the insurance.

Therefore, on principle and authority, to use the words of *Wilde*, C. J., in the case before cited, "Looking at this agreement, it appears to me, that it is one entire and indivisible contract, founded upon one entire consideration," and relates to matters that are connected with and dependant on each other.

(1) 5 Allen N. B. R. 246.

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STRONG, TASCHEREAU and FOURNIER, J. J., concurred.

HENRY, J.:

The rule *nisi* for leave to enter judgment for Respondents was discharged by the unanimous decision of the Court of Common Pleas, and, on an appeal therefrom to the Court of Appeal of *Ontario*, the decision of the Court of Common Pleas was, by a majority of the Court, reversed; and it is now before us, by a second appeal, and, having been heard, we have now to give judgment. The defence is substantially as to the misrepresentations in the application as to the then existing encumbrances, and the subsequent mortgage to *Davies*, or, in case they were not the misrepresentations of the Respondents, that their application omitted to make known facts material to the risk. I do not consider it necessary to say much in regard to the question of the agency of *Rosenblatt* to bind the Respondents as to his acts in regard to the application, as, in the event of a decision that he was not such agent, the Respondents will be found to occupy an equally unfavorable position, for, the section of the Statute incorporated into and forming part of the agreement provides, amongst other things,

That the concealment of any encumbrance on the insured property, or *on the land on which it may be situated*, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written consent of the company thereto, shall render the policy void, and no claim for loss shall be recoverable thereunder unless the Board of Directors, in their discretion, shall see fit to waive the defect.

Mr. *Samo*, in his evidence, admits the agency of *Rosenblatt* to procure the insurance. He says:—

I gave *Rosenblatt* a blank form, partly filled. The questions in it were not answered or filled up.

Again:—

The question in the paper as to encumbrances was not answered

by me. It was to oblige *Rosenblatt* that I dealt with him instead of going to the company's office. I thought *Rosenblatt* would fill up the blanks. I intended trusting him with signing the application, having done the like before. I did not ask *Rosenblatt* to show me the application, not thinking it necessary. The mortgage (to *Davies*) was dated 28th April, 1875, and was for $525. It was on the factory.

The policy in this case was made and delivered to the Respondents in December, 1874. The fire did not take place till the following July. It was for over six months in the hands, for inspection, of the Respondents, and, after having signed a blank application, their duty was to read it, and there they would have seen their own covenant and agreement, that if they were not the sole and unconditional owners of the property insured, unless the true title be expressed herein, *the policy should be void.* Their duty was clearly to have read the policy, and given notice for and send the necessary amendment made or the policy cancelled before loss. If they did not accept the policy as it was, they did not accept it at all, and, therefore, have no action on it. From this evidence, I think the agency of *Rosenblatt*, to make an application binding on the Respondents, cannot be questioned, and that for his misrepresentations the Respondents are answerable. See *Richardson* v. *Maine Ins. Co.* (1), where the assured applied by mail to the agent for insurance. The agent filled up and signed an application, which contained a statement that there were no encumbrances. A policy was issued referring to the application, and accepted, with the application attached to the policy. Held—1st. That by accepting the policy the assured covenanted for the truth of the application, and ratified it. 2nd. That the representation as to the property was material ; and lastly, that the contract was entire, and a misrepresentation as to one of the subjects insured avoided the policy. If, by the acts of an agent, one or

(1) 46 Maine 394, (1859.)

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other of two innocent parties must suffer, the law says it must be the one whose agent he was, provided the acts complained come within the scope of his agency, or was in reference to a matter the agent had authority to deal with. I think that in this case the Respondents are responsible for the acts of *Rosenblatt*, including that of getting *Griffith* to put their names to the application. In addition to the defence raised on the "concealment" referred to it in the Statute, which is virtually a re-enactment of the common law on the point, I think we must hold the Respondents answerable for the misrepresentations in the application.

That they are false is admitted; and, therefore, in respect of the building, there can be no doubt they are fatal to the success of the Respondents.

The same may be said of the consequences of the subsequent assigment to *Davies*. There can be no question, that, under the terms of the policy and section 36 of the Act before mentioned, "the failure to notify the company" of the transfer to *Davies* being a "change in the title or ownership of the insured property, and to obtain the written consent of the company thereto," rendered "*the policy void.*" That provision of the statute is incorporated into and became a part of the agreement for the insurers, the Respondents independently of the other legal principles involved, having adopted it as a condition precedent to their right to recover on the policy, are estopped from denying its application, and cannot ask the Court to pronounce, what they would, for other reasons, be disinclined to do; and which, by the terms of the section in question, which itself makes the provision for the notice "and written consent of the company," it would be prevented from doing, that the requirement, either of the notice or of the written consent is unreasonable or unjust.

It is contended, however, that these objections cannot

be raised against the claim for loss on the goods, although a good one, as to the claim for the loss on the building, and that, therefore, the Respondents are entitled to recover for the loss on the goods.

To determine that question, we must first examine the policy and see the nature of the agreement entered into. By it the Appellants "in consideration of the receipt of one hundred and ninety-five dollars, do insure *J. H. Samo & Co.*, of the City of *Toronto*, * * * to the amount of three thousand dollars for the term of one year * * * as follows, viz: $1,000 on the building only, of their wooden furniture manufactory, and * * * $2,000 on their stock of lumber and materials and furniture manufactured, and in process of manufacture, *contained in same building*." The goods, therefore, and the building are insured for one lump consideration. It is one agreement; and the Respondents covenant in respect to the insurance generally, that if the title of the property be transferred or changed, other than by succession by reason of death, without written permission thereon, or that if the application referred to therein make any erroneous representation or omit to make known any fact material to the risk, or if the assured is not the sole and unconditional owner of the property insured, unless the true title be expressed therein, that *the policy should be void.* The consequence therefore, the policy being legally construed, of the misrepresentation &c., was settled by it, and, being the agreement of the parties themselves, is binding on them; and by it the whole policy is void. Both parties agree by the incorporation of the statute that in any of the cases mentioned the *policy*, not the *insurance on the building*, shall be void. There are few, if any, cases that suggest an opposite construction; but not only in *Upper Canada*, but in the *United States* the ruling authorities are the other way, and properly so,

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as I think. The contract contained no provision that the risk should continue on that part in reference to which no misrepresentation was made, but it was entire, and the risk to cease and the policy to be avoided altogether. It is matter of no small moment that the insurers, in the case of the application for insurance on goods, should be correctly informed in regard to the building containing them. If a party says, "I want to insure on goods in my store, which is a valuable one, totally unencumbered, and there is no "concealment by me of any encumbrance" on the property sought to be insured, "or *on the lands on which it is situated*"; and, upon this application, the risk is taken, we have to say, whether or not under the provision of the thirty-sixth section and the written misrepresentations, the policy would be avoided; if, at the time, the building containing the goods, and the land on which they both were at the time of the application, either did not belong at all to the applicant or were heavily encumbered by mortgages. In the statute and in the policy adopting them, the words are "the insured property or *on the land on which it may be situate.*" The word "property" in the first part of the quotation, includes goods as well as buildings. The words are general and include goods, unless there is something elsewhere to induce a different construction. And, I think, we may construe the Statute and policy, as saying in substance, that if there be any concealment of encumbrances on the land of any building in which goods are insured, it will be sufficient to avoid the policy on the latter. There are good reasons why the insured should be truthfully informed as to the state of the ownership of a building. If unencumbered, more care is reasonably expected on the part of the owner. If it be a rented building, or one in which the applicant has little or no interest, and his

stock be fairly covered, the personal inducements to care and caution are absent. In such a case, truly represented, the insured would have the option of declining the risk or demanding a higher premium. By a false representation of a different state of things the insured would be entrapped and a policy obtained that he would not otherwise have granted at all, or granted only upon different terms. In representations for insurance, where the knowledge of certain things resides wholly or principally with the applicant, the law requires the truest and fullest statements; and when they are not so in respect of important matters, the policy is always avoided. There is not the slightest suspicion of fraud on the part of the Respondents in this case; but were we to decide this matter in their favor, the door would be opened to fraud which might be difficult of proof, and, as I think, legal principles, founded in justice and equity, violated.

There is no more reasonable or necessary requirement than that where one party is induced to enter into a contract with another, the latter is required to give *bonâ fide* and intelligible information in regard to material matters of which the other is ignorant, and in no case is the rule more necessary than in applications for insurance. If in the administration of justice that rule be neglected or slighted, insurance companies could not safely do business; and those who would be careful and truthful applicants, would be made to suffer for the careless and untruthful. It is necessary, therefore, that rules so salutary should be maintained, not only in the interest of insurance companies, but in that of the public. Carelessness and recklessness often mark the conduct of applicants for insurance, and the aid of Courts are constantly invoked to release them from the necessary results; and sometimes with undeserved success. In no class of cases have the legal principles in regard

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to contracts been more strained than in respect of careless applicants for insurance. Experience has shown insurance companies, that certain precautions and guards are necessary for the prevention of fraud and consequent loss. They guard against such by the terms provided in the application and policy. The law gives them the right to dictate the terms and conditions upon which they will issue a policy, and the right to say afterwards, that by the terms of the mutual agreement their liability was at an end and the policy avoided. The Respondents here, by representing that the building in question was theirs and unencumbered may have, by that means, induced the company to accept the risk on the goods contained in it, when they otherwise would not have done so. And by making an application for the joint insurance, and warranting that the representations are all true, the insurers may well say, "we took and accepted the two risks together at a rate less than we would have taken either separately, or we would otherwise have declined the risk altogether. The whole position on that point affected, in our view, the safety of the goods and by your misrepresentations in regard to the building, we insured the goods which we otherwise would not have done; and you, having in that respect deceived us, either innocently or otherwise, we disclaim the contract as a whole."

We have been asked to say, that the words in question may be read so as to avoid the insurance on the building only, but, my reply is, that the parties themselves have agreed that the "policy," not the insurance or any part of it, should be avoided; and all the governing principles and authorities sustaining this view, I am unable to substitute a new or different agreement from that entered into by the parties themselves.

The authorities cited by my learned brother *Ritchie*, I need not repeat.

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I think, therefore, the appeal should be allowed, the judgment of the Appeal Court of *Ontario* reversed, and the rule *nisi* for a judgment for the Respondents discharged with costs.

Appeal allowed with costs.

Solicitor for Appellants: *C. A. Durand.*

Solicitors for Respondents: *Read & Keefer.*

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*Feb'y. 2.
June 3.

THOMAS GRAY.....APPELLANT;

AND

WILLIAM RICHFORD AND ANDREW McCONNELL..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Ejectment—Statute of Limitations—Acceptance of deed by person in possession—Will—"Any issue of his body lawfully begotten or children of such issue surviving him."

In 1830, *James Gray* took possession of East half of Lot No. 13, in 1st concession of *East Hawkesbury*. He resided on the West half of said lot with his sons, and occasionally assisted in working the whole lot, until his death, which occurred in 1857. In 1847-8, while his son *Adam* was working the East half, and in possession, *James Gray* devised it to him by will, and the land was known as "Our *Adam's*." In 1857, *James Gray* made a second will, in which he said: "I give and devise to my son *John Gray*, his heirs and assigns, &c., to have and to hold the premises above

*PRESENT:—Sir Wm. B. Richards, Knight, Chief Justice, and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

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described to the said *John Gray*, his heirs and assigns forever. But if my said son *John* should die without leaving any issue of his body lawfully begotten, or the children of such issue surviving him, then in such case I will and devise the said, &c., to my son *Thomas Gray*, his heirs and assigns, to have and to hold the same at the death of the said *John Gray*."

After the father's death *Adam* remained in possession, and in 1862 he accepted a conveyance with full covenants for title from *John*. On 15th September, 1868, *Adam* conveyed to *A. McC.*, one of the Respondents, and *R.*, the other Respondent, claimed title under *A. McC.* as landlord. In 1874, *John* died without leaving any lawful issue, and on 5th May, 1875, *Thomas* (Appellant) brought ejectment against Respondents, but neither at the trial nor in term was any question raised as to the effect of *John's* deed.

Held,—That *James Gray*, the father, at the time of his death had acquired a title to the lot by length of possession. That, under the will, *John Gray* took an estate in fee, with an executory devise over to *Thomas Gray*, in the event that happened of *John Gray* dying without leaving lawful issue.

2. That *Adam*, having recognized, in 1862, *John's* interest in the land by purchasing from him, by deed of bargain and sale, a limited and contingent estate, its effect was to stop the running of the Statute, and the Respondents cannot set up *Adam's* possession under *John* to defeat the contingent estate.

3. That the Court of Appeal could not refuse to entertain the question as to the effect of *John's* deed, although not raised at the trial nor in term.

APPEAL from a judgment of the Court of Appeal for *Ontario* (1), declaring that the rule *nisi* for a new trial in the Court of Common Pleas be made absolute. This was an action of ejectment to recover possession of E. ½ of lot No. 13, and broken part thereof in 1st Concession of the Township of *East Hawesbury*.

The action was commenced on the 5th January, 1875, and was tried before *Galt*, J., without a jury.

The Plaintiff, *Thomas Gray*, claimed title as devisee under the last will of *James Gray*, dated 30th January, 1857. The Defendant, *William Richford*, besides denying the Plaintiffs title, asserted title in *Andrew McCon-*

(1) 1 App. R. Ont. 112.

nell, under whom he claimed as tenant by virtue of a demise for terms of years, dated 24th March, 1870.

Andrew McConnell, having appeared as landlord, besides denying Plaintiff's title, asserted title in himself as having been possessed thereof by himself and those through whom he claims for a period of twenty years before action commenced, and also claimed title by deeds of conveyance from *John Gray* to *Adam Gray*, dated 31st March, 1862, and from *Adam Gray*, dated 20th June, 1862, 26th April, 1858, and 15th September, 1868.

At the trial the Plaintiff claimed and sought to establish by evidence that *James Gray* entered into possession of the land in question in November, 1830, and continued in possession until his death, in August, 1857.

About 1847-8 *Adam Gray* entered into possession of the east half, with the permission of his father. On the 10th October, 1848, *James Gray*, by will, devised the said east half to *Adam*, his son, with the words: "This considered to become in force after the decease of my wife and myself."

On the 30th of January, 1857, *James Gray*, by another will, devised in fee the said east half to *John Gray*, his eldest son, subject to an executory devise over to *Thomas Gray*, in fee, on the death of *John*, without leaving issue, which event happened in September, 1874, the words used being:—"1st. I give and devise to my son *John Gray*, his heirs and assigns, that tract or parcel of land and premises situate in the Township of *East Hawkesbury*, in the said County of *Prescott*, being composed of the east half of Lot number thirteen, in the First Concession of the said Township, including the broken front thereof, together with all the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, to have and to hold the premises above described to the said *John Gray*, his heirs and assigns forever.

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But, if my said son *John* should die without leaving any issue of his body lawfully begotten, or the children of such issue surviving him, then and in such case I will and devise the said above mentioned premises, with the appurtenances, to my son *Thomas Gray*, his heirs and assigns, to have and to hold the same, at the death of the said *John Gray*, to my said son *Thomas*, his heirs and assigns, forever; subject, however, to this condition, that in case my wife *Janette* should survive me, then whoever of my said son *John*, his issue, the children of his issue, or of my said son *Thomas*, or his heirs, shall then be the owner of the said above mentioned premises, by virtue of this my last will and testament, shall support, clothe and maintain my said wife *Janette* in a comfortable and respectable manner, suitable to her age and condition in life; and should they neglect or refuse to do so, then I will and devise the above mentioned premises, with the appurtenances, unto my said wife *Janette*, her heirs and assigns, to have and to hold the same from the time of neglecting or refusing to support, clothe and maintain my said wife, as aforesaid, unto my said wife, her heirs and assigns, forever." Both wills were registered; the first on the 22nd Oct., 1857, and the second on the 20th August, 1858.

The other documents relied on by the parties were the following:—

Deed of bargain and sale and quit claim, *Adam Gray* to *Andrew McConnell*, dated 26th April, 1858, 50 acres clear, E. ½ lot 13.

Bond, *Adam Gray* and *William McAllister* to *Andrew McConnell*, £140, for payment whereof *Adam Gray* mortgages middle lot, after reduction of the superficial extent of 66 acres sold this day to *Andrew McConnell*, according to form of law of *Lower Canada*, providing "if title held good from *Adam Gray* and wife," said

bond to be void, signed at *St. Andrews*, in the Seigniory of *Argenteuil*, on 17th October, 1859.

Deed, of bargain and sale, *John Gray* to *Adam Gray*, dated 31st March, 1862.

Deed, by way of mortgage, *Adam Gray* to *A. McConnell*, dated 20th June, 1862, E. ½ lot 13.

Deed of bargain and sale, *Adam Gray* to *Andrew McConnell*, dated 15th September, 1868, E. ½ lot 13, and broken front.

Evidence was also given as to *Adam Gray's* and *James Gray's* possession, and the value of the improvements, extracts of which evidence are given at length in the judgments of their lordships.

No question was raised at the trial nor in term as to the effect of *John's* deed.

The learned Judge at the trial found that the testator had acquired title to the lot by length of possession, and on that ground rendered a verdict for the Plaintiff.

The Defendants in the following Term moved to set aside the verdict on the ground that the Plaintiff had not shown a paper title to the land, but had sought to establish a title by statute of limitations in testator *James Gray*, which title was not made out. The Plaintiff showed cause to this rule, claiming that he had shown the testator to have acquired title by 20 years' possession. No other point or question was raised on the argument of the rule.

The Court of Common Pleas gave judgment (1) in favor of the Defendants—they made the rule absolute to set aside the verdict and enter it for the Defendants.

The Plaintiff then appealed to the Court of Appeal, for *Ontario*. That Court acquiesced in the conclusion arrived at by the Court of Common Pleas on the question of possession, but were equally divided in opinion

(1) 1 App. R. Ont. 116.

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upon the effect of *John's* deed, raised in that Court for the first time. The appeal was thereupon dismissed, and the Plaintiff appealed to the Supreme Court.

Mr. *James Bethune*, Q.C., for Appellant:—

The Appellant claimed title under the will of *James Gray*. The evidence establishes the fact that *James Gray*, the father of the Appellant, and of *Adam Gray*, under whom the Respondents claim, was the owner of the land in question, and went into possession of it in November, 1830, and that it was used by the whole family in common for some years. In 1848, *Adam* took possession of the lot under *James Gray*, and until his father's death in 1857, was a tenant at will and could not dispute his title. *Doe Johnson* v. *Baytup* (1). In 1857, *James Gray* devised by will the property to *John Gray*, his eldest son, and the Appellant submits that this case depends very much on the construction of this will. It is contended on the part of the Appellant that the title which *John Gray* got under the will was a fee, with an executory devise over in favor of *Thomas Gray*. *Coltsmann* v. *Coltsmann* (2) is express on the point.

In 1862, *Adam Gray* accepted a conveyance from *John Gray*, and signed the deed of the 31st March, 1862. His possession thenceforward was under the title which *John Gray* acquired under his father's will, and he could not afterwards set up title against the Appellant any more than could *John*.

The Plaintiff's title was saved by the statute, as he could bring no action until the death of *John*. *See James* v. *Salter* (3); *Day* v. *Day* (4); *Brown* on the Statute of Limitations as to real property (5); *Coke* on *Littellon* (6). Other cases, *Persse* v. *Persse* (7); *Kernag-*

(1) 3 A. & E. 188.
(2) L. R. 3 H. L. 121.
(3) 3 Bing. N. C. 544.
(4) L. R. 3 P. C. C. 764.
(5) P. 622.
(6) P. 267 (B).
(7) 3 Ir. Chy. R. 196.

han v. *McNally* (1); and more particularly *Board* v. *Board* (2), show beyond doubt, when a person has entered under a will, it does not belong to him to set up an adverse title.

Mr. *Stephen Richards*, Q.C., for Respondents:

The only question raised on the trial was, whether the Appellant had made out title in *James Gray* (the testator) by 20 years possession. If, as is contended by Respondents, they have failed to do this, the Appellant cannot be allowed to raise in appeal that he showed a possession of the land by the testator previous to *Adam Gray's* possession, and that such possesion is *primâ facie* evidence of ownership, entitling him to recover.

If intended to be relied on, the Plaintiff should have raised the point at the trial: had he done so, the Defendant might have shown as the fact was, that the testator had not the legal title. *Stephens* v. *Allen* (3); *Jones* v. *Duff* (4); *Armstrong* v. *Bowes* (5); *Donnelly* v. *Rawden* (6); *Doe* v. *Needs* (7).

Previous possession is not itself a title, but at most merely raises a presumption of title; if the other facts of the case rebut the presumption it will not prevail. *Doe Carter* v. *Bernard* (8); *Henderson* v. *Munson* (9); *Wallbridge* v. *Gilmour* (10).

Moreover, the Defendants are not estopped from showing that testator had not the legal title. It was intended the land should be *Adam's*. The testator abandoned all possession of it to him, and treated it as his. *Adam* took possession of it, cleared, built and made the improvements on it, and in equity and good conscience it was his.

(1) 12 Ir. Chy. R. 89.
(2) L. R. 9 Q. B. 48.
(3) 2 U. C. Q. B. 282.
(4) 5 U. C. Q. B. 143.
(5) 12 U. C. C. P. 539.
(6) 40 U. C. Q. B. 611.
(7) 2 M. & W. 129.
(8) 13 Q. B. 945.
(9) 18 C. P. 221.
(10) 22 C. P. 135.

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The Plaintiff disclosed at the trial what he claimed was testator's title (namely, a title by statute of limitations) and that having proved defective, it is not to be presumed, in face of what he alleged and set up, that there was any other title. *Doe Woodhouse* v. *Powell* (1).

There is not sufficient evidence of possession by testator to warrant presumption of title in him as against *Adam's* possession, which was actual and real. *Shaver* v. *Jamieson* (2); *Wallbridge* v. *Gilmour* (3).

Previous possession is said to be evidence of title as against a wrong-doer: *Taylor* on evidence (4); but neither *Adam Gray* nor Defendants can be considered as wrong-doers.

As to the Appellant's contention, that *Adam* had not possession for 20 years when the deed of 31st March, 1862, was made by *John Gray* to him, and that the statute ceased to run from that date, and did not commence again until *John's* death, on 14th September, 1874, I submit that the Plaintiff cannot be allowed now to raise this question, not having raised it at the trial. Had it been raised there the Defendant's might have shown in answer to it that *John* had not, and did not claim to have, title under the will, but under a deed which he had acquired from *William Forsyth* for the whole of Lot No. 13, dated 9th April, 1860, or might have met it by other evidence showing under what circumstances the deed from *John* was made and accepted—or might have shown more clearly that *Adam's* possession extended back to more than 20 years before the deed from *John* was given. But *Adam Gray* did not enter under the deed of 31st March, 1862, from *John Gray*, nor was his possession held under that deed, nor did that deed prevent the operation of the statute during any part of the time he or Defendant *McConnell* had possession.

(1) 8 Q. B. 576.
(2) 25 U. C. Q. B. 156.
(3) 22 U. C. C. P. 135.
(4) Sec. 110.

The mere taking of a deed, as Chief Justice *Harrison* says, for value from a person out of possession and claiming under a will, by a person who held independently of the will, should not be deemed such a recognition of the title of the testator as to estop the person accepting the deed from afterwards showing that the right of entry now set up accrued more than twenty years before action, and is now extinguished.

The Respondent further contends that the right construction of the will of *James Gray*, gives a fee tail to *John Gray*, and as tenant in tail he could convey the whole estate. Cons. Stats. U. C., c. 83.

The words "without issue" are to be read "without issue generally."

There is nothing in the will to show that the testator intended to use the words "should die without leaving any lawful issue," in a sense different from their ordinary and legal construction of an indefinite failure of issue.

The learned Counsel referred to, 2 *Jarman* on Wills (1); *Doe d. Cadogan* v. *Ewart* (2); *Doe d. Todd* v. *Duesbury* (3); *Bamford* v. *Lord* (4); *Walter* v. *Drew* (5); *Broadhurst* v. *Morris* (6); and more especially to *Peyton* v. *Lambert* (7); *Jones* v. *Ryan* (8).

Mr. *Bethune*, Q.C., in reply.

Upon the point of the construction of the will, see *Coltsmann* v. *Coltsmann* (9); and *Finch* v. *Lane* (10). It was testator's clear intention that *Thomas* should succeed personally at death, if latter died without children or grand children, for we find the following words "or the children of such issue surviving him." The charge

(1) 2nd Ed. 472-473.
(2) 7 Ad. & El. 636.
(3) 8 M. & W. 530.
(4) 14 C.B. 708.
(5) 1 Comyns Reports, 373.
(6) 2 B. & Ad. 1.
(7) 8 I. C. L. R. 485.
(8) 9 I. Eq. Rep. 249.
(9) L. R. 3 H. L. 121.
(10) L. R. 10 Eq. 501.

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is to be a burthen upon the estate in whosoever hands it should go.

The following authorities were also cited as to the effect of *John's* deed and *James Gray's* possession :—

Bigelow on Estoppel, 359-381 ; *Glynn* v. *George* (1) ; *Orr* v. *Orr* (2) ; *Smith* v. *Smith* (3) ; *Hyde* v. *Baldwin* (5).

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*June 3.

RITCHIE, J. :—

The Plaintiff's evidence in this case shows that *James Gray* went into possession of this lot on November 30, at which time *Adam*, his son, was between 13 and 14 years of age; that *James Gray* worked on the lot, but never lived on it, and that *Adam* worked with his father both before and after he was married; that they " were using it, pretty much all together; that *James Gray* had the control of it, what he said was to be done had to be done;" that his sons never disputed his authority; that he was working on the lot a few days before he died; that for a number of years the father and the sons all worked together; that after *James Gray's* death *McConnell* got control of it; that *Adam*, while *McCallum* was assessor, was assessed for lot, though not living on it, the assessor says: " because he asked me to do so." *McCallum* was first assessor in 1833, and was so 13 years. That *Adam* moved on lot, long before his father's death.

That *McCallum* drew *Jas. Gray's* will, dated October, 1848; that *Adam* was living on W. ½ when will was made; that *Adam* had a house, barn and sheds on the lot, lived on it for a good many years, for 1½ or 2 years, and when he left that *Adam*, *McConnell*, or his tenants, have lived on it ever since; that *Adam* was living on the lot before the last will of *Jas. Gray*, 30th January,

(1) 20 New Hamp. 114.
(2) 31 U. C. Q. B. 13.
(3) 14 Gray, 532.
(4) 17 Pock. 308.

* The Chief Justice was absent when judgment was delivered.

1857, was made, that *Adam* had been living on the lot and in the receipt of the rents and profits to his own use before his father's death; that the last years *Adam* was carrying on work on the lot, he had a house, barn, sheds, stables, and a stock of cattle on the lot of his own, and the crops were put in his barn.

The evidence for the defence of *Jas. Scott* shows that *Adam* built his house and barn on the lot in '47 or '48; that the crops were taken to the west half until he had his own barn built; that he had often heard *Jas. Gray* say the E. ½ was "our *Adam's*;" that *Adam* did statute labor of lot. And by *H. Bradford*, that he knew lot since '46, that *Adam Gray* was in possession of it, for he got wood off it by his permission. *Jas. Gray* sent him to *Adam* and he made the bargain with him in '46, but on cross-examination he says the old man was the owner of the land.

The evidence of *William Gray* shows that *Adam* was in possession of lot from '45 to '60; that his father, brother, *Andrew* and himself were all working together on both E. ½ and W. ½; but he says: "notwithstanding we all worked together, each had his own 100 acres. *Adam* would get the crop off the E. ½. *John* off the W. ½. *Thomas* had 100 acres of lot 14, and *Andrew* also 100 acres of lot 14; *my father paid for the land.*" And, on cross-examination, that *John*, *Adam*, and the old man were working pretty much all together; up to the old man's death, they had to do as the old man ordered them. "My father gave me a deed, gave *John* a deed, he gave *Thomas* a deed and *Andrew* a deed. *He kept the E. ½ half for himself*;" and, on re-examination, he says: "I got my deed in '45 or '46; we got them all at the same time; *none was prepared for Adam*, my father wanted to keep 100 acres for himself."

Andrew McConnell, one of the defendants, says he was often at *Adam's* place, he was living on the E. ½

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separate and apart from the old man. *Adam* was the reputed owner. On cross-examination, he says: "*Adam* told me the land came from his father, the same as the rest of the brothers; he said his father gave it to him and afterwards made a will of it to him. At the time I made the first purchase, there was a dispute between *John* and *Adam* about the title."

Jas. Gray, on being re-called, says: "I built the house on E. ½ under contract with *Adam Gray*, it was built 26 years ago; the barn was previously built; *Adam* was to pay me," and, on cross-examination, "my grand father, *John* and *Adam* were all working together; part of the lumber in the house came from *Cushin's* mill, and part from the old man's mill. The building was, I think, put where my grand father wished it to be;" on re-examination, says: "*John* and *Adam* worked together in the mill after the barn was built on the E. ½; the crops raised on that half were put into it; if more wheat was grown on one ½ lot than on the other, it was divided between them."

And *Andrew McConnell* says: "*Adam Gray* told me before the date of his deed to me that his father had willed the lot to him."

The evidence shows, I think, very clearly this: that the land in dispute was the property of old *James Gray*, and that he owned and paid for it, and was in possession of it while *Adam* was yet but a child, and continued his possession and control over it until the time of his death; for, though it is quite true that his son *Adam* was also in possession, it seems very clear from the evidence that it was conjointly with his father, and with his concurrence and subject to his control. I take it to be a well established principle of law that if two parties are in possession of a lot of land, one having title to it and the other without title, the possession will enure for the benefit of the one having title, and though the land was

called "our *Adam's*," and the father may have intended to give it to *Adam*, and *Adam* may have had reasonable grounds for thinking that he would do so, the evidence very clearly establishes that he never did give it to him in his life time, and that neither the father nor *Adam* considered that it belonged to the latter, or that he had any title to it while the father lived. One of the witnesses for the Defendant proves that while the father gave the other sons deeds "he kept the E. ½ of 13 for himself, and no deed was prepared for *Adam*, because the father wanted to keep 100 acres for himself," and we find the father devising it to *Adam* by his will, dated 10th Oct., 1848, in these words:—

> And lastly, after all my just debts are paid, I give and bequeath to my son *Adam Gray*, and his heirs, my lot of land. being East half of lot number thirteen, in the first concession of *East Hawkesbury*, County of *Prescott, Ottawa* District, and Province of *Canada*, aforesaid, this considered to become in force after the decease of my wife and myself.

And afterwards, revoking this will by another, and devising it to his son *John*; and after the death of the father we find *Adam*, under his hand and seal, propounding the will of his father of the 10th of October, giving him, in the words of the father, "my lot of land to become in force after the decease of my wife and myself," and requiring the same to be registered on the 22nd October, 1857, thereby, so far as he could, virtually adopting that will and recognizing the statement of the testator therein contained, that the lot in question was his at the time of the making of the will, and that he, *Adam*, considered it continued his father's up to and at the time of his death, and he not only then registered that will, but claimed under it. The evidence of *McCallum*, who drew the will, shows that this will was in the possession of *Adam*, and *McCallum*, to whom *Adam* sold, he says:—

> *Adam* told me that the land came from his father, the same as the

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rest of the brothers; he said his father gave it to him and afterwards made a will of it to him.

And again, he says:—

Adam Gray told me before the date of his deed to me, that his father had willed the lot to him.

This will having been revoked by the subsequent one of the 30th day of January, '57, became wholly inoperative, and again we have *Adam* recognizing this last will as conveying the property to his brother *John* by taking a deed of it from him of the 31st March, '62, and under which deed Defendant now claims title, and for which *Adam* appears to have paid the consideration of $1,100. It is now claimed that Defendant has a title by possession, that is to say, by virtue of the united possession of *Adam* and himself, and if not, that he has title under the deed from *John* to *Adam*. Now, as to *Adam's* possesion, *William Gray* says *Adam* was in possession from '45 to '60; this was before he had built on the lot, for Mr. *Scott* says, *Adam* built his house and barn in '47 or '48.

James Gray died in '57, and on 31st March, '62, *John* and *Adam* executed the deed whereby *John* conveyed his interest in the land to *Adam*, so that there is no doubt that up to that time *Adam* had acquired no sufficient possession to give him a title, assuming that he actually went into the exclusive possession of the whole of the E. ½ in '47. It becomes necessary to ascertain what estate *John* took under the will of his father, for it is a proposition too plain to require authority to support it, that if *John* was the lawful owner or had a limited estate, and *Adam* took a deed from him, he must be considered in possession, as under the title, he so acquired from *John*, and if the estate of *John* was a limited and contingent estate, he cannot set up his possession under *John* to defeat the contingent estate, for the very obvious reason, that while he held *John's* title, he

was in of right and could be interfered with by nobody.

The deed from *John Gray* to *Adam Gray*, dated the 31st March, 1862, in consideration of $1,100, purports to convey the land to *Adam*, his heirs and assigns, with a covenant that the grantor is seized in fee, but, as *John's* title thus conveyed to *Adam* is devised under his father's will, the extent of that title necessarily depends on the construction of that will. The devise is in these words:—

I give and devise to my son *John Gray*, his heirs and assigns, the East half Lot No. 13, &c., to have and to hold, &c., to the said *John Gray*, his heirs and assigns, forever. But if my said son *John* should die without leaving any issue of his body lawfully begotten, or the children of such issue surviving him, then, and in such case, I will and devise the said above mentioned premises with the appurtenances to my son *Thomas Gray*, his heirs and assigns, to have and to hold the same *at the death* of the said *John Gray* to my son *Thomas*, his heirs and assigns, forever.

Subject to a condition that in case his wife *Janette* should survive him, then whoever of his said son *John*, his issue, the children of his issue, or of his son *Thomas* or his heirs, should then be the owner of said premises, by virtue of the will, should support, &c., his said wife, &c., and should they neglect or refuse to do so, then:—

I will and devise the above mentioned premises with the appurtenances unto my said wife *Janette*, her heirs and assigns, &c.

What estate, then, did *John* take under this will? I am of opinion he took an estate in fee, subject to an executory devise over in the event of there being no issue of his body lawfully begotten, or the children of such issue, surviving him, living at the time of his death. This depends on the question, whether the testator intended the contingency to depend on a definite or indefinite failure of issue, and this intention must be collected from the will itself. The distinction between a definite and an indefinite failure of issue is very clearly stated by

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a learned Judge in the U. S A., and adopted by Mr. Justice *Blackburn*, in his commentaries, thus :—

A definite failure of issue is when a precise time is fixed by the will for the failure of issue, as in the case of a devise to A., but if he dies without lawful issue living at the time of his death. An *indefinite* failure of issue is a proposition the very converse of the other, and means the failure of issue whenever it shall happen, sooner or later, without any fixed, certain or definite period, within which it must happen. It means the period when the issue or descendants of the first taker shall become extinct, and when there is no longer any issue of the issue of the grantee, without reference to any particular time or any particular event ; or, in the words of the Statute, *de donis*, referring to the first taker, if his issue shall fail.

There are to be found in the books any number of cases on this branch of the law. No doubt the rule is, that where real estate is devised, either directly to or by way of executed trust for, a person and his issue, the word *issue* will be construed a word of limitation so as to confer an estate tail on the ancestor, unless there are expressions *unequivocally* indicative of a contrary lawful intent.

But, I take it to be equally well established that if the testator meant that the limitation was ever to take effect on failure of issue living at the time of the death of the person named as the first taker, then the contingency determines at his death, and no rule of law, as is said, is broken, and the executory devise is sustained, but the difficulty arises in determining whether the testator, by the expression he uses, meant a dying without issue living at the time of the death of the first taker, or whether he meant a general or indefinite failure of issue. In 2 *Sanders* (1), it is said :—

If, however, the testator makes use of words in his will which indicate an intention to confine the generality of the expression of *dying without issue* to dying without issue *living at the time of the person's decease*, they will be so construed to effectuate the intent.

In speaking of the case of *Pells* v. *Brown* (2) ; which

(1) 388 L.

(1) 12 Cro. Jac. 590.

has been called the Magna charta of this branch of the law, a learned judge says :—

Reverting then to *Pells* v. *Brown*, that case settled the doctrine which obtains at the present day that any words which certainly indicate an intention in the testator to confine the failure of issue on which the estate is given over to a dying without issue living at the death of the first taker, will be sufficient to rebut the construction of an indefinite failure of issue.

In *Doe* v. *Wetton* (1); the devise was to the testator's daughter in fee, but if she should happen to die leaving no child or children lawful issue of her body, living at the time of her death, then over, and the limitation over was held good as an executory devise, as indeed it seems perfectly clear.

In *Fetherstone* v. *Fetherstone* (2), *Tindal*, C. J., delivering opinions of judges, says :—

We think the rule of construction laid down by Lord *Alvanley* in his judgment in the case of *Poole* v. *Poole* (3), being at once the result of the former cases, and being consistent with the principles of legal construction and of good sense, is the safe and correct rule to be applied to cases of this description, namely: "that the first taker shall be held to take an estate tail where the devise to him is followed by a limitation to the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it.

And Lord *Brougham* says :—

Agreeing entirely with the opinion of the judges, &c., * * I take the principle of construction as consonant to reason, and established by authority, to be this, that where by plain words, in themselves liable to no doubt, an estate tail is given, you are not to allow such estate to be altered and cut down to a life estate, unless there are other words which plainly show the testator used the former words of purchase contrary to their natural and ordinary sense, or unless in the rest of the provisions there be some plain indication of a general intent, inconsistent with an estate tail, being given by the words in question, and which general intent can only be fulfilled by sacrificing the particular provisions and regarding the expressions as words of purchase. Thus, (he says): If there is a gift first to A. and the heirs of

(1) 2 B. & P. 324. (2) 3 C. & F. 73.
(3) 3 B. & P. 627.

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his body, and then in continuation the testator, referring to what he had said plainly, tells us, he used the words "heirs of the body" to denote a first and other sons, then clearly the first taker would only take a life estate.

In *Lees* v. *Mosely* (1), *Alderson*, B. says:—

The word issue is used in different senses, either as including all descendants, in which case it is, of course, a word of limitation or as confined to immediate descendants, or some particular class of descendants living at a given time. Probably it will be found most frequently used in the former sense, and it therefore most frequently has the effect of giving an estate tail to the ancestor; it might even perhaps be considered that this is *primâ facie* its meaning. But the authorities clearly show that whatever be the *primâ facie* meaning of the word "issue" it will yield to the intention of the testator to be collected from the will, and that it requires almost less demonstrative context to show such intention than the expression of heirs of the body would do.

In *Coltsmann* v. *Coltsmann* (2), Lord Chancellor *Cairns* says:—

The words in the Codicil, then, are these: "And if it should happen that my son *John Coltsmann* die without heirs of his body lawfully begotten, or to be begotten, in that case, and in default of such heirs, I do hereby devise and direct that my lands, castles, tenements and premises, at and about *Flesk Castle*, and mentioned in my said will, together with the plate, furniture and library in said will specified, also, my lands, farms, tenements and premises situate lying and being at *Dick's* Grove near *Castle Island*, all subject to and charged with the payment of the aforesaid annuity to my dear wife of eight hundred pounds a year, and also, with the payment of any reasonable provision made with my consent by my son for his wife, to be paid and payable to her during her natural life, shall, at my son's death, descend and be transferred to my grandson, *Daniel Cronin*, his heirs, executors and assigns forever, the heir for the time being to add the name "*Coltsmann*," to the name "*Cronin*." Also, if it should happen that my son, *John Coltsmann*, die without heirs of his body lawfully begotten, or to be begotten, in that case, and in default of such heirs, I do hereby give and assign out of the monies I have at interest, and specified in my said will, the sum of six thousand pounds to my daughter, *Mary Godfrey*, for her own use and benefit, and so as that the said sum of six thousand pounds shall not nor

(1) 1 Y. & C. 589. (2) 16 W. R. 944.

shall any part of it be subject or liable to the debts, engagements, management or control of her husband, but at the same time, said sum of six thousand pounds shall be subject to and charged with the payment of the said annuity to my dear wife, *Christina Coltsmann.*"

The question as to *Flesk Castle* is, do these words cut down the estate in fee, or *quasi* fee previously given to any estate in tail or *quasi* tail? Or, on the other hand, do they amount to an executory gift over in the event of *John Coltsmann* dying without heirs of his body living at the time of his death? In support of the argument for cutting down the gift in fee simple to an estate tail, it is said, in the first place, that the words "dying without heirs of the body, and in default of such heirs" point not to the non-existence of one heir, but to the failure of a succession of heirs. In the second place, that we cannot suppose that the testator intended that if his son should leave an infant child, who should die under age, the estate should not go over to *Daniel Cronin*, as much as if the son died without issue living at his death. And it is argued, thirdly, that if the estate of *John Coltsmann* remained during all his life subject to an executory devise, he would not be able in his life-time to provide for his issue, as he might do by means of an estate tail.

As to the words of these arguments, I cannot admit that the words "die without heirs of the body" are necessarily inflexible. They are technical words, and they are strong words, but they are notwithstanding words the technical meaning of which may, on construction, be controlled by the context. A gift over "if A shall die without heirs of his body at his death, or living at his death," would imply a failure of heirs of the body at that *punctum temporis* only, and the question in this case is, does the context limit the words "heirs of the body in the same way?" The second argument proceeds upon *à priori* assumption of what the testator would naturally intend, which cannot be allowed to weigh against the proper construction of the words which he has used.

And, as to the third argument, if the testator can be supposed to have contemplated a provision to be made by the son for his issue generally, he must be supposed to have contemplated cutting off of the entail, for in no other way could provision for his issue generally be made, a proceeding which would put an end to the gift over altogether.

I turn, therefore, my lords, to the considerations which satisfy my mind, that as to *Flesk Castle* the codicil created an executory devise operating upon the absolute interest given by the will. In the first place, reading the codicil without the parenthetical or superfluous expressions, it runs thus:

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"If *John Coltsmann* die without heirs of his body and in default of such heirs, I direct that *Flesk Castle* with the plate, furniture and library shall at my son's death, descend and be transferred to *Daniel Cronin*, his heirs, executors and assigns forever."

These words appear to me to be clear and distinct, and the expression "at my son's death" appears to operate on every part of the sentence, and to point to a succession to *John Coltsmann*, which, if it arises at all, is to open upon *John Coltsmann's* death, and at no other time. The exigency of the words was attempted to be surmounted by reading them "at my son's death as aforesaid,"—that is, "at my son's death, without leaving heirs of the body." But this construction, in the first place, interpolates words which are not found in the will, and in the next place, it is open to the even more serious objection, that in an unbroken sentence it attempts to fix the meaning of the first part, and then to square the second part with the meaning so fixed, in place of reading the whole and interpreting the whole together.

The words of this will clearly indicate, I think, an intention on the testator's part to confine the failure of issue on which the estate is given over to a dying without issue living at the death of *John Gray*, the first taker.

The context, I think, shows that the testator did not intend that the words "die without leaving any issue" should receive the general construction. The words as applied to the issue or the children of such issue, coupled with the words, "then in such case to *Thomas*, his heirs and assigns, to have and to hold the same at the death of the said *John Gray*, to my said son *Thomas*, his heirs and assigns for ever," in connection with the condition that, in case his wife *Janette* should survive him, then whoever of my said son *John*, his issue, the children of his issue, or of my said son *Thomas*, or his heirs, shall then be owner, &c., shall support, &c., my said wife in a comfortable &c., and should they neglect or refuse to do so, then I will, &c., unto my said wife, &c.," all point, I think, with certainty to the death of *John Gray*, as the time at which the failure of issue contemplated

is to be ascertained, and indicate very clearly to my mind that he meant a failure at the time of the death of *John Gray*. I think it, therefore, clear that the testator meant to devise the land to *Thomas* if *John* died without issue, of his body or children of such issue living at the time of his death, and this limitation to *Thomas* being, in my opinion, good, by way of executory devise, and *John* dying without issue, I think the title vested in *Thomas*, and, therefore, the learned Judge was right on the trial in ordering a verdict to be entered in his favour.

STRONG, J.:—

The Plaintiff made out a *primâ facie* case by proving: first, the possession of his father, *James Gray*, then, that *Adam Gray*, under whom the Defendants claim, was let into possession by *James*, the father, as a tenant at will in 1847, and lastly, the will of *James Gray*, under which, according to the construction of the court below, with which I entirely agree, but as regards which I have some further observations to make, *John Gray* was the devisee in fee of the land in question, subject to an executory devise over to the Plaintiff in fee on the death of *John*, without leaving issue at his death, which event happened in September, 1874. The first objection urged against this appeal was, that there had been surprise at the trial, the Plaintiff having opened a case of title in *James Gray*, the father, under the Statute of Limitations, failing to establish which, he afterwards fell back on the bare possession of *James Gray* as *primâ facie* evidence of a seisin in fee.

Without expressing any opinion on the sufficiency of evidence of a possession for less than twenty years as establishing a presumption of a seisin in fee, which *Cole*, in his Treatise on Ejectment, says, is insufficient,

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inasmuch as any presumption arising from such possession is destroyed by the conflicting presumption arising from the present possession of the Defendant, a doctrine which at least commends itself as reasonable, I may observe, that in the present case, it was not only shown that *James Gray* had been in possession, but also that *Adam Gray*, under whom the Defendants claimed, had been let into possession by his father, *James*, and so became his tenant at will, which was manifestly to establish a sufficient case. Then, as the Defendants would have been estopped from proving an outstanding title in a stranger, which they might certainly have done, if the evidence had consisted of proof of former possession alone, without the fact of the tenancy at will and consequent estoppel, it does not appear possible that the Defendant could have been prejudiced by the Plaintiff's abandonment of the case, under the Statute of Limitations. As regards the will of *James Gray*, I am clearly of opinion, that the proper construction of that instrument was that which the Court below attributed to it, namely, that *John Gray* took an estate in fee simple, subject to an executory devise over in favor of the Plaintiff, on the death of *John*, without issue at the time of his death. The case referred to *Coltsmann* v. *Coltsmann* (1), is directly in point, and if that case is inconsistent with the previous decision in *Jones* v. *Ryan* (2), the answer must be that the last mentioned case is over-ruled by *Coltsmann* v. *Coltsmann;* but there is, between the two cases, a distinction, though but of one word, which is pointed out by the text-writers and has been supposed to make a difference. In *Jones* v. *Ryan*, the words were "*after* the death of the first taker"—in *Coltsmann* v. *Coltsmann* the words were "*at* my son's death," as in the present case, they are "*at* the death of the said *John Gray*." Therefore, if *Jones* v. *Ryan* is

(1) L. R. 3 H. L. 121. (2) 9 Ir. Eq. Rep. 249.

distinguishable from *Coltsmann* v. *Coltsmann*, this case is governed not by the former, but the latter authority. Indeed, without any reference to authorities, it is hard to see how a testator, who desires to give an estate over in the event of failure of issue not indefinitely, but at the death of the first taker, can do so more effectually than by using the words in which the testator expressed himself in the present case:—

To have and to hold the same *at the death* of the said *John Gray* to my said son *Thomas*.

The defence of the Statute of Limitations has, in my judgment, entirely failed. *Adam Gray* went into possession as a tenant at will to his father in 1847, so that the Statute began to run in 1848, at the expiration of a year from the commencement of that tenancy. *James Gray*, the testator, died in 1857, having made the will already referred to. The Statute having begun to run in the lifetime of the testator, it is well settled, and beyond the reach of controversy, that the Plaintiff is not entitled to the protection accorded by the Statute to remainder-men, reversioners, and other owners of future estates, as he would have been if the Statute had only commenced to run after the testator's death. If, therefore, there had been nothing to interrupt the running of the Statute, a title under it would have been acquired by *Adam Gray*, or the Defendant, *McConnell*, in 1868. That there was such an interruption, however, seems very clear. In 1862, *Adam Gray*, being then in possession, took a conveyance from *John Gray*, the devisee in fee, subject to the gift over to the Plaintiff, under the will of *James Gray*.

The effect of this conveyance does not seem to have been pressed in the Court of Common Pleas, and in the Court of Appeals the learned Judges were equally divided on the question which arose upon it. It appears to me, that from the date of this deed the

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Statute of Limitations was out of the question. I put the doctrine of estoppel aside, not because I do not entirely agree with Mr. Justice *Moss* and Mr. Justice *Patterson* in their well supported judgments on that point, but because I think the same conclusion is arrived at in a more simple way upon the Statute itself.

Mr. Justice *Patterson* points out that the aphorism that when the Statute once begins to run nothing stops it, has reference only to disabilities, and that it does not mean that if a man has been for nineteen years in tortious possession of an estate, and then gets a conveyance of the fee from the true owner, he can, after the lapse of a year, say, he is in with a good title under the Statute. The Statute of Limitations is, if I may be permitted to borrow from other systems of law terms more expressive than any which our own law is conversant with, a law of extinctive, not one of acqusitive prescription—in other words, the Statute operates to bar the right of the owner out of possession, not to confer title on the trespasser or disseisor in possession. From first to last the Statute of 4 *Wm.* 4 says not one word as to the acquisition of title by length of possession, though it does say that the title of the owner out of possession shall be extinguished, in which it differs from the Statute of *James*, which only barred the remedy by action, but its operation is by way of extinguishment of title only.

Mr. Justice *Patterson* quotes from Baron *Parke's* judgment in *Smith* v. *Lloyd* (1) this passage :—

> There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the Statute.

This authority does not controvert what I have just propounded, for in order that the Statute may operate against the owner out of possession, actual possession

(1) 9 Ex. 562.

in fact in another is essential, in order that the rule of law which attributes a possession actually vacant to the person who has the legal title may be rendered inapplicable.

Then applying this view of the Statute to the facts before the Court on this Appeal, let me inquire who was the owner out of possession between the 31st of March, 1862, the date of the deed from *John Gray* to *Adam Gray*, and the 14th September, 1874, the day on which *John Gray* is proved to have died, to be affected by the Statute? Not *John Gray*, for he had conveyed to *Adam*, not the Plaintiff, for his possessory title had not accrued. There was, therefore, no one whom the Statute could affect. It had ceased to operate, for the possession was rightful from that date.

The proposition, that time can never be said to run against a remainder-man, so long as a tenant for life under the same will or settlement is in possession, which is, in effect, the present case, seems so plain that scarcely any authority is called for, but in addition to the case of *Anstee* v. *Nelms* (1), referred to by the learned Judges of the Court of Appeals, I may make a short quotation from text writers to the same effect.

Darby and *Bosanquet*, in their treatise on the Statute of Limitations (2), say :—

> Though the Statute may be running against a settlor at the time the settlement is made, yet the fact of the grantee of a particular estate taking possession under the settlement will re-vest the title of all persons entitled to remainders under the settlement, as well as that of the settlor and his heirs in reversion.

This is a succint statement of the law as I interpret the Statute. In short, the Statute has no application, except so long as the title and possession are separate, when the possession is in the rightful owner Statutes of Limitation are not required.

(1) 1 H. & N. 232. (2) P. 236.

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The learned Chief Justice of the Queen's Bench lays it down as the practice of the House of Lords on Appeals, that a point of law could not be argued upon an Appeal which had not been raised in the Court below, and for this proposition the case of *Oakes* v. *Turquand* (1) was cited. A reference to that case shows, however, that what was there said had no connection with this point, but was in condemnation of the practice, which prevails more or less in most equity appeals, of raising a discussion as to the minutes at the conclusion of the judgment, and was no authority at all for the rule it was assumed to have established, which is directly contradicted by the treatise writers on the practice of the appellate jurisdiction both of the House of Lords and the Privy Council.

I am of opinion, that the order of the Court of Appeals should be reversed, and that the rule *nisi* for a new trial in the Court of Common Pleas should be discharged, with costs to the Appellant in this Court, and in both the Courts below.

TASCHEREAU and FOURNIER, J. J., concurred.

HENRY, J.:—

This case comes to us by appeal from the Appeal Court of *Ontario*. It is an action of ejectment brought to recover a lot of land containing about one hundred and thirteen acres of land, being the eastern half part of Lot 13 in the First Concession of lots at *Hawkesbury*, and the broken front thereof. The suit was brought against *Richford*, and *McConnell* was subsequently admitted to come in and defend as his landlord. The Plaintiff, by his notice, claims title under the last will and testament of his late father, *James Gray*.

The Respondent, *Richford*, by his notice of title, denies

(1) L. R. 2 E. & I. App. 325.

the title of the Appellant, and claims as tenant of the other Respondent, *McConnell*.

The Respondent, *McConnell*, by his notice of title, denies the title of the Appellant, and asserts title in himself, by possession of himself and by those through whom he claims for upwards of twenty years before action commenced. He also claims title by deeds from *John Gray* to *Adam Gray*, dated 31st March, 1862, and from *Adam Gray* to him, dated, respectively, 20th June, 1862, the 26th of April, 1858, and the 15th September, 1862.

The Appellant, claiming title as I have before stated, under the will of his late father, *James Gray*, shows, by evidence uncontradicted, that as far back as 1830, he (*James Gray*) went into possession of the locus; and, according to some of the evidence, continued in possession till he died, in August, 1857, a period of twenty-seven years. When he went into possession, as proved by his son-in-law, *McCallum*, he had three sons, *John*, *Andrew* and *Adam*. The latter was then between 13 and 14 years of age. It is in evidence that *Adam* lived on the locus for some years before the death of his father; but the evidence is not clear that his possession of it was exclusive, for one witness, *James H. Gray*, asserts that he (the witness) lived with his grand father, whose house was on the west half of Lot 13, for many years, and that the east half was worked also by the testator. He says:—

> We were using it pretty much together. My grand-father had control of it. I have worked with him on both the east and west half—the last time I saw him working, which was a few days before he died, was on the east half. *My grand-father had control of both halves of the lot.* What he said was to be done, had to be done—his sons never disputed his authority.

He is re-called by the Respondents, and states that:—

> I built the house on east half under a contract with *Adam Gray* 26 years ago, (that would be in 1850, or about 20 years after *James*

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Gray went into possession). The barn was built previously. *Adam* was to pay me.

On cross-examination, he says :—

My grand-father, *John*, and *Adam* were all working together * * * the building was, I think, put where my grand-father wished it to be. *John* and *Adam* worked together in the mill. After the barn was built on the east half the crops raised on that half were put into it; if more wheat was grown on one half the lot than on the other, it was divided between them.

William Gray, a son of *James*, and a brother of *Adam*, says *Adam* was in possession of the east half from 1845 to 1860. He says his father paid for all the lots his sons had. That, although they all worked together on the east and west halves "*Adam* would get the crop off the east half" and "*John* would get the crop off the west half."

James Scott proves that *Adam* built his house and barn on the east half in 1847 or 1848—he was then married. "The crop was taken to the west half until he had his own barn built—often heard the old man say, the east half was "Our *Adam's*." Heard him and his wife say so in 1842 and 1843.

Henry Bradford says, *Adam* was in possession since 1846. In that year he got wood off it by his permission —his father referring him to *Adam*—and he concludes: "Mr. *Adam Gray* appeared to be in possession until Mr. *McConnell* got it." "I supposed the old man was the owner of the land." On his cross-examination, *William Gray* adds :—

John and *Adam* and the old man were working pretty much all together up to the old man's death—they had to do as the old man ordered them. My father gave me a deed—he gave *John* a deed—he gave *Thomas* a deed, and *Andrew* a deed—he kept the East half of 13 for himself.

On his re-examination, he says, they all got their deeds in 1845 or 1846—"none was prepared for *Adam*. My father wanted to keep 100 acres for himself." Upon the

evidence of the alleged possession of *Adam*, previous to the death of his father, there is some doubt, whether, under all the circumstances, it was sufficiently exclusive in its nature to amount to a disseisin of the whole lot, or any part of it. The line between the east and west half was run. That might have been done not to mark the boundaries of *Adam's* possession, but to divide the lot as between the old man and *John*, who got a deed of the western half in 1845. There is no evidence that the survey had any reference to *Adam's* possession. The lines were not shown to have been run for *him*. According to the evidence, *Adam* admitted the title of his father, and if the latter permitted him to use a portion of the lot, which, by the late Statute, would oust him and those claiming under him of the title in 20 years from the end of a year from the beginning of his tenancy at will, that would not, I take it, divest him of the title to that portion which remained in a wilderness state, and never in the manual possession of *Adam*, but, by contemplation of law, in the possession of his father. *Adam* admitted the title of his father *to the whole lot*, and to hold the whole of it he must show a disseisin of the whole. *Adam's* possession, under the circumstances, must, I think, be "by the foot," and therefore would cover only that part in his actual occupation.

From the time that the possession of *Adam* is alleged to have commenced to the time he received the deed from *John*, he had not possession long enough to give him a title, and so we may presume he himself then considered. By that deed, dated 31st March, 1862, he is shown to have made a purchase of the land for a valuable consideration, for he appears to have paid for it eleven hundred dollars, which, we may presume, was at that time, about its full value. He and those deriving title through him are therefore estopped, I think, from setting up the previous possession. Taking the

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deed, under the circumstances, is an admission of holding solely under *John*. Had he not then purchased, or made some other arrangement with *John*, the latter might have evicted him, through his title under the will. Besides he, by that deed, has a covenant from *John*, that at the time of the ensealing thereof, "he was solely, rightfully and lawfully seized of a good, sure, perfect, absolute and indefeasible estate of inheritance, in fee simple, of and in the land, tenements and heriditaments, and all and singular other the premises thereinafter described," and further, "that the grantor now hath in himself good right, full power, and lawful and absolute authority to grant, sell a lien, convey and confirm" the premises to the grantee, "his heirs and assigns in manner and form aforesaid," with covenants for quiet enjoyment, and for further conveyances and assurances of the title, as might "be lawfully and reasonably devised, advised, or required."

The title under which the Respondent claims is by a deed from *Adam Gray* to him, dated the 20th of June, 1862, less than three months after the deed from *John* to *Adam* of one acre of the lot, with covenants the same in substance as in the deed from *John* to *Adam*. Also, under a mortgage on the lot from *Adam* for £275, with a covenant from the Respondent, *McConnell*, for quiet possession by *Adam*, until default in payment of the mortgage. And a deed from *Adam*, dated 15th September, 1868, "in pursuance of the Act respecting short forms of conveyances" of the east half of the lot for a consideration of $1,660.00, reserving the acre previously conveyed, with covenants for quiet possession, and against encumbrances. A party is not permitted to continue in possession under a deed, and afterwards say that he acquired the property by a possessory title. See *Hawksbee* v. *Hawksbee* (1), also *Anstee* v. *Nelms* (2),

(1) 11 Hare, 230. (2) 1 H. & N. 225.

where it is said by Baron *Martin* and agreed to by *Pollock*, C. B.,

That the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter and then say that such a possession was unlawful, so as to give his heirs a right against a remainder-man.

See *Persse* v. *Persse* (1); *Kernighan* v. *McNally* (2); *Morton* v. *Woods* (3); all which sustain the views I have expressed on this point. The cases all propound the principle that if parties have no other *title* than a will, they are estopped from denying the title under the same will. The principles laid down by Lord *Chelmsford* in *Archibald* v. *Scully* (4) fully accord with the position I have taken, that the possession of *Adam*, up to the taking of the deed from *John*, was in law the possession of *John* claiming under the will. Although by the Statute it is only necessary to show the Plaintiff out of possession twenty years, and there is now no question of adverse possession, is there evidence that, in this case, the parties through whom the Appellant claims were so out of possession? I think not. *Adam*, in the first place, admits the title of his father by receiving possession from him, as his tenant at will, and *John*, as his devisee, would be entitled to claim the benefit of that admission, and *Adam* in purchasing the land from him, *by his own act* admits *John's* title as well as that of his father; and virtually agrees to hold the land as grantee of *John*. *John's* title being then vested in him, and the party (if any) entitled as executory devisee not being able to claim during the life of *John*, there is no one against whom the Statute will run, for the title and possession are both in the same party. It is a general principle, well settled, that when the Statute

(1) 3 Ir. Chan. R. 196.
(2) 12 Ir. Chan. R. 89.
(3) L. R. 3 Q. B. 658, and L. R. 4 Q. B. 293.
(4) 9 H. L. 384.

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begins to run nothing will stop it. The act of the party himself, however, may do it, as I think *Adam* did, by the purchase and conveyance from *John*, even if his possession up to that was an adverse one, which it was not. We are not, however, trying the question of adverse possession in *Adam*; but whether *John's* father and he, together, were out of the possession 21 years from the inception of *Adam's* exclusive possession, if he ever had such.

The possession of *Adam* and his grantees, after the deed was, so far as relates to the interests of the executory devisee the same, I take it, as if it had been that of any other party to whom *John* conveyed. The Statute in that case would only run from the death of *John*. As a question of law, in view of the authorities, *Adam*, having made the purchase of the land from *John*, whose title was solely under the devise from his father, is estopped from saying he had no right to make that devise. See *Broad* v. *Broad* (1).

In that case (in 1873), *R. A.*, being tenant by the curtesy of certain premises, devised them by his will to trustees for his daughter *Rebecca* for life, with remainder to his grandson *William*. Upon the death of testator, *Rebecca* entered into possession of the land purported to be devised, and paid some annuities charged by the will upon the premises, and was suffered by the heir at law to remain in possession, undisturbed, for more than twenty years. *William* conveyed his remainder to the Plaintiff. *Rebecca*, after she had been in possession more than twenty years, conveyed the premises to the Defendant, who, upon her death, took possession. The Plaintiff, the assignee of *William*, the remainderman, having brought ejectment, it was held that *Rebecca*, having entered under the will, the Defendant claiming through her was estopped, as against all those in re-

(1) L. R. 9 Q. B. 48.

mainder, from disputing the validity of the will, and that the Plaintiff was entitled to recover.

In delivering judgment, Mr. Justice *Blackburn* said :—

Rebecca claimed under the will and retained possession under the will, and she, as against everybody interested in the will, is estopped from denying its validity. My brother *Martin*, in *Anstee* v. *Nelms* says: "that the Statute of Limitations can not be so construed that a person claiming a life estate under a will shall enter, and then say, that such possession was unlawful, so as to give to him or his heir a right against a remainder-man." That seems directly in point. It is good sense and good law.

Mellor, J., says :—

It would be contrary to the wholesome doctrine of estoppel to allow a person who takes a limited interest under a will after she has been in possession for twenty years under it to convert her limited interest into a fee. A person cannot say that a will is valid to enable him *to take a benefit under it*, but invalid so far as regards the interests of those in remainder, who claim under the same will.

The case just cited is like the one before us, with the exception that *Adam* was in possession at the time he purchased and got the deed. That possession was not then, however, in any respect an adverse one; but, as the tenant at will of *John*, under his title as devisee, *Adam* never repudiated the title of the testator, or of *John*, but held under them, and finally purchased from the latter. The testator was in possession by *Adam*, as his tenant, and, until by force of the statute, which in the meantime does not alter the character of the holding or the relation of the parties, the possession ripened into a title, the testator was in contemplation of law in possession as fully as the Respondent, *Mc Connell*, claims to be by his tenant, the other Respondent; and, as such, up to the time of his death, might, as the landlord of *Adam*, have come in and defended the title in an action brought against the latter, and he could have made up his title by possession by the addition of his own previous one to that of his said tenant. I think, therefore,

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the learned Judge who tried the cause was on this point quite right in his finding.

How does the possession of *Adam*, after the deed from *John*, operate as regards the executory devise over? The defence upon the point is, that at the death of *John*, the testator and he together had been out of possession 20 years. Suppose *John*, instead of *Adam*, had sold and conveyed to another, and the latter had, in 1862, gone into possession under that conveyance, how then could it be asserted that they were so out of possession. I take it that *Adam's* possession, after he purchased and got the deed, is an admission that he held thence forth under it, and consequently under the will; and I think such possession must enure to the benefit of the executory devisee under the will, in the same way, and to the same extent, as if the possession had been in another party under a similar conveyance. I cannot, on any principle, ascertain why it should not be so.

Having settled the question of possession in favor of the Appellant, the further result will depend upon the construction of the devise in the will. The testator devises the lot of land in question to his son *John*, his heirs and assigns:—

> To have and to hold the premises above described to the said *John Gray*, his heirs and assigns, for ever.

Were these words contained in a deed of conveyance, they would be uncontrolled by a subsequent clause giving any estate less than a fee simple. In a will it is different. In the next clause of the will there is contained this proviso:—

> But if my said son, *John*, should die without *leaving* any issue of his body lawfully begotten, or the children of such issue *surviving him*, then and in such case I will and devise the said above mentioned premises, with the appurtenances to my son, *Thomas Gray*, his heirs and assigns, to have and hold the same *at the death* of the said *John Gray*, to my said son *Thomas*, his heirs and assigns, for ever.

These devises are all subject to a condition, that if

his wife survived him, whoever of his said son *John*, his issue, the children of his issue, or of his said son *Thomas*, or his heirs, should then be the owner of the above mentioned premises by virtue of the will, should support his widow; and on failure to do so, he devised the land, from the time of neglecting or refusing such support, to his wife, her heirs and assigns, for ever.

There is no contention that the construction of the will is to be affected by the latter condition, providing for the support of testator's wife. We have, therefore, to ascertain whether, under the devise to *John*, he took an estate in fee simple with an executory devise over *at his death* to the Appellant, in case he died without issue; in which case, *John* would be held to have but a life estate, and not an estate in fee tail. *John* died unmarried, and leaving *at his death* no child or children "of his body lawfully begotten." If his title was an estate tail, the conveyance to *Adam* would have given him an estate in fee simple, and barred the title or entry of the remainder-man. If, on the contrary, he took an estate in fee simple contingent on his *leaving* children or grand-children *at his death*, with a devise over, on failure at that time, then his estate was one for life, and a title made by a conveyance by him would cease at his death.

The cases in the books have been found somewhat conflicting, and the distinctions have been so closely drawn between the two different estates that for many years in *England*, it will be found, there were, apparently, decisions both ways. For several years past, however, the definitions are more clear, and the decisions uniform, which go to sustain the proposition that *John* took, under the will, an estate in fee simple with an executory devise over to *Thomas*, his heirs and assigns, at *John's* death, in case he (*John*) died without *leaving*

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any issue of his body lawfully begotten, or the children of such issue *surviving him.*

It is by the express terms of the will a devise of a fee simple to *John* determinable on a particular event with a devise over in fee simple to *Thomas*, on the occurring of that event. We have not, therefore, to construe an indefinite devise to *John* to be considered a fee simple, or fee tail, according to other provisions of the will. By the devise, no person taking under it was to have a less estate than one of fee simple. It is true, by the failure to leave issue, *John's* estate was at an end, but while he lived he held a fee simple contingent, and, at and from his death, *Thomas* was to hold a fee simple. I can discover no principle or decision in pursuance of which *John's* estate could, at any time, or under any circumstances, be called an estate in fee tail.

The devise of what otherwise would be an estate tail may be raised to one in fee simple, by a condition on the tenant to pay a sum of money in the shape of legacies and otherwise, and an estate apparently created by a devise in fee simple may be reduced to an estate tail, where it is necessary to carry out the intention of the testator clearly shown in subsequent dispositions or limitations inconsistent with an estate in fee simple; but here there is nothing of the kind. There is no legal prohibition to the testator's executory devise, and the language of it being free from doubt as to his intentions, we have simply to give effect to them by our judgment. To create an estate in fee tail it is necessary to confine the descent to the issue of the donee; but here there was no such limitation, for the estate was, in the first place, given to *John, his heirs and assigns in fee.* And the subsequent provision is not, and was not intended, to, in any event, reduce his holding to that of an estate less than a fee simple.

Had, however, the devise to *John* been limited to him

and his heirs only, it would still have given him a title in fee simple, by the effect of the gift over to *Thomas* at his (*John's*) death, in fee simple, it being considered to denote that the prior devisee should have the inheritance in the alternative event of his leaving issue. If *John* had therefore left the defined issue surviving him, the title of *Adam*, and those claiming under him, would have also been in fee simple, the condition of the devise being then fulfilled to the exclusion of the executory devise. In *Doe* v. *Webber* (1) it was held that by a devise to *M. H.*, her executors, administrators or assigns, forever; "but in case *M. H.* shall happen to die and leave no child or children, then to *J. B.*, and her heirs, forever, paying the sum of £1,000 to the executor or executors of *M. H.*, or to such person as *M. H.*, by her will shall appoint," it was held that the words "child or children," were here synonymous with issue, and that this was not the devise of an estate tail to *M. H.*, but of an estate in fee to *M. H.*, with a good executory devise over to *J. B.*, in case *M. H.*, died leaving no issue living *at her death.*

Per Lord *Ellenborough*, in giving the judgment of the Court:—

> And if the event on which the two tenements named in the will are given over be, as we think it is, to be confined to a failure of issue at *Mary Hile's death*, not only the above case of *Roe* v. *Jeffery* (2); but also the cases of *Power* v. *Bradley* (3) and *Barnsfield* v. *Whelton* (4) are directly applicable to the present case, to show that the prior estate in fee simple, given to *Mary Hiles*, is not by the limitation over upon the failure of her issue at the time of her death, narrowed into an estate tail. * * * We think, therefore, that the first devise gave a fee, and that the devise over is an executory devise and not too remote. Consequently, that it is not barred by the recovery, and that judgment must be for the Plaintiff.

The case just cited is "on all fours" with the one before us. It has never been over-ruled, but, on the

(1) 3 B. & Ald. 713 (in 1818).
(2) 7 T. R. 589.
(3) 3 T. R. 143.
(4) 2 Bos. & Pull. 324.

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contrary, has been cited with approval, and, as far as the reported cases go, is now settled law and doctrine.

Vice Chancellor *Wood*, in his judgment in *Parker* v. *Birks* (1), in 1854, refers to and adopts the ruling of Lord *Ellenborough* in that case. He says:—

> The words were leaving "no child or children," which are as strong as the words in this case, and Lord *Ellenborough*, C. J., said that the gift must be construed as a devise in fee to *M. H.*, which would enable her to give the estate to her issue, if she had any. * * * This is, therefore, like the case of *Roe* v. *Jeffery*, 7 T. R. 589, which was a devise to *J. F.*, and to his heirs, for ever; but in case *J. F.* should depart this life and leave no issue, then the testator devised over estates for life only. In that case, the first devise was held to be in fee and not in tail, and the limitation over a good executory devise upon the event of a failure of issue *at the time of his death.*

The learned Vice Chancellor, after reviewing and quoting previous decisions and authorities, says:—

> In no case in which a clear estate in fee simple has been limited by the first words, has that estate been reduced to an estate tail in order to construe the words of the gift over on the death of the devisee without issue, to be a remainder. It is begging the question to say that the gift over is to be taken to be a remainder, because it is necessary, first to make out that the gift in fee is cut down to an estate tail. * * * I think, therefore, that I must decide according to the authorities of *Doe* v. *Frost*, 3 B. & Ald. 546, and exparte *Davies*, 2 Sim. N. S. 114, and having regard to the clear gift in fee simple to *William Shaw* in this case, that the true construction of this will is, that he took an estate in fee simple, subject to an executory devise over on his death, if he should die without issue.

In *Doe* v. *Frost* the devise was to *W. F.*, the son of the testator, in fee "and if he should have no children, child or issue, the said estate was, on the decease of *W. F.*, to become the property of the heir at law." Held, that *W. F.*, took under this will an estate in fee with an executory devise over to the person, who, on the happening of the event contemplated by the will, should become the heir at law of the testator.

(1) 1 K. & J. 162.

In *Roe* v. *Jeffery* in 1798, cited, as before mentioned, by Lord *Ellenborough*, in *Doe* v. *Webber*, the devise was as already shown, and Lord *Kenyon*, C. J., in giving the opinion of the Court, says :—

We had occasion a few days ago to advert to this doctrine when we said that this is a question of construction depending on the intention of the party, and nothing can be clearer in point of law, than that if an estate be given to A in fee, and by way of executory devise, an estate be given over which may take place within a life or lives in being and twenty-one years, and a fraction of a year afterwards, the latter is good by way of an executory devise. The question, therefore, in this and similar cases is, whether from the whole context of the will we can collect that, when an estate is given to A and his heirs for ever; but if he die without issue then over, the testator meant dying *without issue living at the death* of the first taker. The rule was settled so long ago as in the reign of *James the First*, in the case of *Pells* v. *Brown*, Cro. Jac., 590., where the devise being to *Thomas*, the second son of the devisor, and his heirs, forever, and if he died without issue living, then *William*, his brother, should have those lands to him and his heirs forever, the limitation over was a good executory devise. That case has never been questioned or shaken, but it has heen adverted to as an authority in every subsequent case respecting executory devises ; it is considered as a cardinal point on this head of the law, and cannot be departed from without doing as much violence to the established law of the land, as (it was supposed by the Defendant's counsel) we should do, if we decided this case against him.

In conclusion, I can most profitably adopt and make use of the words and conclusions of the learned Chief Justice :—

On looking through the whole of this will we have no doubt but that the testator meant that the dying without issue was confined to a failure of issue *at the death of the first taker*, for the persons, (person) to whom it is given over were (was) then in existence * * * and, if so, the rule of law is not to be controverted. It is merely a question of intention, and we are all clearly of opinion that there is no doubt about the testator's intention.

The result of all these authorities is, that *John* had only a life interest in the property, and that at his death it vested in fee in *Thomas*, under the executory devise,

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and, therefore, the appeal should be allowed and judgment on all the points given for the Appellant with costs.

Appeal allowed with costs.

Solicitors for Appellants : *Bethune, Osler & Moss.*

Solicitors for Respondents: *Richards & Smith.*

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*Feb'y. 1.
June 3

JOHN FULTON.....APPELLANT;

AND

F. B. McNAMEE AND OTHERS.....RESPONDENTS.

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

Judicial avowal (aveu)—Deed, erroneous statement in—Art. 1,243, *C.C. L. C.*

By notarial deed, dated 3rd May, 1875, *F. McN.* and *P. K.* purchased from one *F. C.* certain printing materials. The agreed price was $5,000, and was paid; but the deed erroneously stated the price to be $7,188.40, which amount was acknowledged in the deed to have been paid and received. *C.* remained in possession, and, after being in partnership with *M.* for several months, failed. On 7th March, 1876, *F. McN.* and *P. K.* claimed the plant, and their petition stated the purchase had been made in good faith, and that they had paid the agreed price, but that the deed erroneously stated the price to have been $7,188.40. The evidence as to the price agreed upon and paid was that of *F. McN.*, and his statement

*PRESENT:—Sir William Buell Richards, Knt., C. J., and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

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was confirmed by. *F. C.* The Appellant, as assignee to be insolvent estate of *F. C.* and *M.*, claimed the payment of $2,188.40, being the balance between the consideration price mentioned in the deed and the $5,000 admitted to have been paid.

Held,—Affirming the judgment of the Court below, that the only evidence in support of Appellant's contention being that of *F. McN.*, the Respondent, the Appellant cannot divide the Respondent's answers (*aveu judiciaire*) in order to avail himself of what is favorable and reject what is unfavorable. (*Strong*, J., dissenting.)

That, although there is an error, or even a false statement, in a deed, the obligation to pay the consideration proven to be the true and legitimate one remains.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (Appeal Side).

In February, 1876, a writ of attachment, under the Insolvent Act of 1875, was issued against *Felix Callahan* and *S. J. Meany*, carrying on business as printers and publishers at *Montreal*, and the Appellant was appointed assignee to the estate of the firm, as well as to the individual estates of each co-partner.

In March, 1876, the Respondents presented a petition to the Superior Court, praying that the Appellant, as assignee of *Callahan* and *Meany*, be ordered to deliver to them certain plant and machinery which Respondents claimed to be their property, in virtue of a deed of sale, in their favor, by the insolvent, *Callahan*, passed before *Phillips*, Notary Public, on the 3rd day of May, 1875. In their petition the Respondents alleged :—

"That the said purchase was made by your Petitioners in good faith, and that they paid for the said articles above enumerated the sum of $5,000, but that the said deed erroneously states the price to have been $7,148.40."

The Appellant, in his answer, admitted the sale, but alleged that the price stated in the deed of sale, and schedule annexed, was the real price of the articles sold, and that the Respondents were only entitled to

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the goods on the paying of $2,188.40, the difference between the amount paid and the price stipulated.

On this issue the parties went to proof.

The facts of the case are as follows: *Felix Callahan*, a printer, being in want of funds to publish an Irish newspaper in *Montreal*, proposed to sell a part of his plant to the Respondent, *McNamee*, and a sale of the articles in question in this case was finally agreed upon for the sum of $5,000, which was to be advanced as Mr. *Callahan* should require the money. The Respondent, *McNamee*, then induced the other Respondent, *Kenney*, to join him in the purchase, and, on the 3rd May, 1875, a notarial deed of sale was executed before *Phillips*, N. P.

A schedule, enumerating the various articles which were sold, was annexed to the deed, and formed part of it. When the parties first went to the notary's office, they had no list of the articles sold, and an adjournment took place to enable Mr. *Callahan* to prepare one. In making the list he added opposite each article the price at which he had bought it. The deed was then drafted, and the price entered was the total of $7,188.40 shown at the foot of the list. No money was paid at the time, but afterwards the price of $5,000 was paid in various amounts as required by Mr. *Callahan*.

Mr. *Callahan* subsequently formed a partnership with Mr. *Meany* for the publication of the "Sun," and the Respondents allowed the firm to continue the use of the plant for the publication of the newspaper.

The Petitioners were examined for the assignee, and *Callahan* and another witness, *Carroll*, were examined for Petitioners in rebuttal.

The Superior Court gave judgment on the 2nd May, 1876, ordering the Appellant to deliver to the Respondents the articles claimed. This judgment was con-

firmed in the Court of Queen's Bench for *Lower Canada* (Appeal Side), on the 15th June, 1877.

Mr. *McMaster*, for Appellant:—

The whole difficulty in this case arises from the following averment in the Respondents' petition: "That the said purchase was made by your petitioners in good faith, and that they paid for the said articles above enumerated the sum of $5,000; but that the said deed erroneously states the price to have been $7,188.40."

The Respondents, I contend, had to prove the error as to the price and what the real price was. The legal instrument showed the price to be $7,188.40, and there is no legal evidence to negative it. The only way of attacking a notarial deed is by a petition in improbation (*Inscription de faux*), or by evidence of equal value. Here, it is the party to the deed who is attacking it. Our Art. 1210 and 1211, *C. C. L. C.* apply in this case. This instrument was complete, and if they want to vary it in part, they must do it in accordance with the articles of the Code.

The question of dividing an admission does not present itself here. The only admission here made is, that the Respondents paid $5,000 for the articles claimed.

The receipt, erroneously styled a discharge, is admitted by *Callahan* to be false and cannot be invoked by the Respondents, who admit they paid nothing when the deed was executed and only subsequently paid the sum of $5,000.

The statements of *McNamee & Kenney*, examined as witnesses, cannot avail themselves. *C. C. P. L. C.*, 251.

The evidence shows the property was worth $7,188.40; that the sale was *bonâ fide*, and that the Respondents paid nothing down; and the assignee, therefore, it is submitted, was entitled to stand by the deed, and have

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it declared by this Court that the Respondents are debtors for the difference.

Reference was made to Arts. 1,496, 1,533, 1,234 *C. C. L. C.*

Mr. *Wurtele*, Q.C., for Respondent:—

The only question in this case is, what was the price paid for the goods and was it paid.

The evidence for the Appellant cannot be divided.

The Appellant invokes the Respondents' admission to prove there was falsity of consideration in the deed. But this same admission proves that the price was only $5,000 and that this sum has been paid; and it further explains satisfactorily, how the error happened. The admission must be taken as a whole, and cannot be divided. The Appellant cannot invoke in his favor, against the full discharge given in the deed of sale, the admission of the Respondents contained in their petition and in their testimony,—that only $5,000 were paid; and reject their declaration,—that this sum was the price really agreed upon, and that the deed erroneously stated the price to be $7,188.40.

The learned Counsel referred more specially to 3 *Merlin, Questions de droit* (1); and also, to *C. C. L. C.* Art. 1,243; *Marcadé* C. N. Art. 1,356 (2); *Demolombe* (3); *Toullier* (4); *Duranton* (5); and *Massé* (6).

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*June 3.

STRONG, J.:

I am of the same opinion as the dissenting judges in the Court of Queen's Bench. There can be no doubt

(1) Vo. Cause des obligations par. 1, No. 3, p., 249.
(2) Vol. 5, p. 213.
(3) Vol. 20, Nos. 80, 81, Vol. 24, No. 373.
(4) Vol. 6, No. 177, Vol. 10, No. 339.
(5) Vol. 10, No. 351.
(6) Droit Commercial, Vol. 5, Nos. 224, 225.

* The Chief Justice was absent when judgment was delivered.

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but that the admission of the Respondents is not divisible in this sense, that it was not competent to the Appellant to reject the qualification to the statement that the whole purchase money specified in the deed was not paid; in other words, the qualification is admissible, and is to be taken into account in the Respondents' favour, but it is not, I think, on the authorities, necessarily conclusive. It is competent for the Appellant to contradict it, and the Court is bound to consider what weight should be attributed to it. Art. 231, clause 2, of the *Code of P. of L. C.* is as follows:—

> The answer of any party to a question put to him may be divided * * when the part of the answer objected to is improbable, or invalidated by indications of fraud, or of bad faith, or by contrary evidence.

The passage cited by Mr. *McMaster* from *Marcadé* (1) is an authority directly in point; *Laurent* (2) also states the law in the same way.

It was not, therefore, competent for the Appellant to reject that portion of the admission which made against him, altogether; but it was competent to him to contradict it and shew that it was not true, or to call upon the Court to discredit it. The question thus becomes one of fact—was the lesser sum of $5,000, and not $7,188.40, as stated in the deed, the true price? Not only is the testimony of the parties to the sale that the lesser sum was the real price inconsistent with the deed, but, in my opinion, the evidence is not sufficient to prove the error alleged.

It would be against the policy of the law, and productive of very dangerous consequences, if in any case the price stated in a solemn deed of sale could be proved to be erroneous by the evidence of the parties themselves unconfirmed by other testimony, when the

(1) Vol. 5, 6th ed., p. 223. (2) Vol. 20, 206.

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rights of third parties have intervened and the contract is sought to be enforced on behalf of creditors by the assignee in bankruptcy of the vendor.

Under a system of evidence which freely admits the testimony of a party in his own behalf, the purchaser's own unsupported evidence would not, in such a case, be deemed sufficient to establish mistake in the statement of price and to cut down the amount stated in the formal deed. For these reasons, I think the Respondents failed to establish the pretended mistake. To use the expression of the article of the *Code of Procedure*, already referred to, I think we ought to declare that part of the admission which is objected to improbable.

I feel, therefore, bound to dissent from the judgment of the Court as delivered by my brother *Fournier*, not on the law, but as regards the sufficiency of the evidence to contradict and vary the deed.

I think the appeal should be allowed with costs, and the petition of Respondents in the Court below dismissed with costs.

FOURNIER, J. :—

On the 3rd of May, 1875, the Respondents purchased by deed before a Notary Public from *Felix Callahan*, of the City of *Montreal*, book and job printer, all the stock of printing materials mentioned and enumerated in a schedule thereof thereunto annexed, which formed part of the deed. The consideration expressed in the deed is $7,188.40, which *Callahan* acknowledged and confessed to have well and truly had and received, previous to the passing of the deed.

The vendor, *Callahan*, having remained in possession of the materials, almost immediately formed a partnership with *J. Meany*, for the publication of a newspaper

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called *The Sun*. After a few months, the firm of *Callahan & Meany* went into insolvency, in consequence of a writ of attachment issued in February, 1876. The Appellant was appointed assignee, and with the property of the firm he took possession of these printing materials.

The Respondents by petition, dated the 27th March following, claimed the plant which they had bought, alleging that the deed of sale of the 3rd of May above cited was their title to the said plant, and that from the date of their purchase it had never ceased to be their property. The consideration alleged to have been paid, is thus worded in their petition:—

> That the said purchase was made by your petitioners in good faith, and that they paid for the said articles above enumerated the sum of $5,000.00, but that the said deed erroneously states the price to have been $7,188.40.

The petition prays that the assignee be ordered to deliver the plant to the petitioners.

The Appellant, in his plea, in answer to the petition does not attack the legality of the deed of sale in question, but alleges that the consideration price is not $5,000 but $7,188.40, being the amount mentioned in the deed, which amount was never paid to *Callahan*; and that the same is now due; and offers and tenders to the petitioners the said articles and effects upon payment of the said consideration price, or of any balance that may remain unpaid of the said purchase price.

The issue was joined by a general answer and the parties proceeded to proof.

The Petitioners, who had already produced in support of their demand a copy of the deed of sale of the 3rd May, 1875, also filed a copy of the insolvent's answers, under oath, given to the questions put to him before the assignee relative to the sale in question, pending the proceedings under the writ of attachment.

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The Respondents rested their case there, in consequence of a decision of the Honorable Mr. Justice *Rainville* stating that the burden of proof was on the contesting party.

The error in the statement of the price, as it appears by the evidence, happened under the following circumstances :—

When the parties first went to the Notary's office, they had no list of the articles sold, and an adjournment took place to enable Mr. *Callahan* to prepare one. In making this list he added opposite each article the price at which he had bought it. When the parties returned to the Notary's office, Mr. *Philipps* drafted the deed, and he entered the total of $7,188.40, shown at the foot of the list, as the price, instead of the sum of $5,000. The parties, when the draft was read over, immediately detected and mentioned the error, and desired the Notary to correct it; but he stated that the amount mentioned in the deed as the price was immaterial, as payment was acknowledged, and the deed was executed as it was. No money was paid at the time; but the price of $5,000 agreed upon was afterwards paid in various amounts, as required by Mr. *Callahan*.

Admitting, even, that the Respondents only paid $5,000, whilst the agreed price was really $7,188.40, the receipt given must, notwithstanding, be considered to be valid, so long as it is not proved that it was either fraudulently or erroneously given. But there is no such averment. By the evidence it is proved that at the time of the purchase, *Callahan* was solvent, and that there was nothing to prevent him from giving a discharge in full, even if the actual consideration price had been $7,188.40, as was contended by the Appellant.

Being unable to contradict Respondents' judicial admission (*aveu*) as to the price, Appellant now claims the right to say that he will avail himself of that part only of Respondents' admission which is favorable to his view, such as the admission that he only paid $5,000, and reject that part relating to the error made in mentioning the price, because it is against him.

However, it is a general rule that a judicial avowal or admission cannot be divided (1). It is only in exceptional circumstances and for special reasons, which are not to be found in this case, that Courts will allow the answer of a party to be divided. The rule which should govern in such cases is thus given in a decision of the *Cour de Cassation*, dated the 13th June, 1872:—

Les aveux peuvent et doivent être divisés, soit que sur certains points de détails ou complexes ils soient reconnus faux, contradictoires et inconciliables avec les principaux faits confessés, soit qu'il en ressorte d'ores et déjà, la preuve d'une situation de fait et de droit entrainant la solution du procès.

Laurent (2) expresses himself on this same subject as follows:

La doctrine et la jurisprudence sont d'accord pour admettre que par *exceptions* à la règle de l'indivisibilité, il y a des cas où l'aveu peut être divisé.....

But when, as in the present case, the party invoking the division of the admission (*aveu*) has no other proof in support of his contention, he cannot have it divided, he must either accept or reject it in its entirety:

Si l'aveu est indivisible c'est parce que c'est la seule preuve du fait allégué; la loi veut qu'on prenne la déclaration tellequ'elle a été faite (3).

The Appellant seems to forget that if, on the one part, the deed of the 3rd of May, 1875, establishes the price to have been $7,188.40, it is, on the other hand, also evidence that the price has been paid.

Therefore nothing is due on the purchase price, and the Appellant has nothing to claim unless he can destroy the effect of the statement made in the deed that the purchase price was paid. He has no other alternative:

L'aveu judiciaire, dit la cour de cassation, est la déclaration que fait

(1) Art. 1243, *C. C. L. C.* (2) V. 20, No. 198, p. 324.
(3) Laurent Vol.. 20, No. 205.

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la partie en justice d'un fait dont il n'existe pas d'ailleurs de preuve et qui n'est établi que par cet aveu lui-même. C'est par cette raison et en considération de cette reconnaisance spontanée que la loi a attaché à l'aveu le caractére d'indivisibilité (1).

In this case there was no obligation on the part of the petitioners to state that the true consideration price was not the one which was mentioned in the deed. He might simply have alleged the discharge or receipt therein mentioned, against which no verbal testimony was admissible. By so doing, he did not in any wise improve his position, and an admission given under such circumstances, must either be accepted or rejected in its entirety. The following passage from *Duranton*, supports this view :—

Lorsque la partie qui a fait l'aveu n'était nullement obligée par quelque circonstance particulière à le faire, parce qu'il n'existait contre elle aucun acte, aucune lettre, aucune preuve testimoniale admissible, on doit croire, que pouvant nier absolument le fait, si elle l'a avoué, avec quelque circonstance qui en a détruit l'effet, ou qui le modifie, elle a dit la chose telle qu'elle existait. Dans ce cas il n'est pas douteux que l'aveu ne doive généralement être pris ou rejeté en son entier. Par exemple, vous me demandez la restitution d'un dépôt que vous prétendez m'avoir été fait par votre auteur, et dont vous n'avez aucune preuve ni commencement de preuve ; j'avoue avoir reçu le dépôt, mais je déclare l'avoir restitué à la personne qui me l'avait confié, mon aveu doit être pris en son entier, sauf à vous à me déférer le serment, si vous pensez que je serai lié par là plus que par l'aveu (2).

L'aveu quand il est la seule preuve produite, ne peut être divisé contre celui qui l'a fait : C. Cass, 18 Nov. 1873.

Art. 231 of the *C. C. P. L.C.*, concerning interrogatories on *faits et articles*, cannot be invoked against the principle above stated ; because by this article the law has defined the circumstances in which the admission (*aveu*) or the answers of the party to such interrogatories can be divided ; whilst, on the contrary, Art., 1243, *C. C. L. C.*, having declared in an absolute and general manner that the judicial admission cannot be divided, we cannot

(1) Laurent ubi supra. (2) Duranton, Vol. 13, No. 55.

qualify the provisions of this latter article by applying to it the dispositions of Art. 231 *C. C. P.* Most frequently the object of *faits et articles* is merely to procure a beginning of proof in writing. In such a case there is no room to raise the question of the indivisibility of the admission, as says *Laurent* (1):

Quand l'aveu sert seulement pour commencement de preuve, l'indivisibilité est hors de cause; les juges ont alors le droit de prendre l'interrogatoire dans son ensemble ou dans ses détails, pour y chercher le commencement de preuve qui leur permet de recourir à la preuve testimoniale. Ainsi le juge appliquera, dans ce cas, les principes qui régissent le commencement de preuve par écrit, et non les principes qui régissent l'aveu.

The Appellant strongly urges the insufficiency of the allegations of the petitioners in reference to what was the real price agreed upon. He contends that the averment is disingenuous because what they omitted to state led him to believe the contrary of what is expressed in the deed. He also criticises the statements of the learned Chief Justice, who speaking of this admission says:—

The Respondents have admitted they have only paid $5,000, but they, at the same time, state, that this was the *only* consideration for the deed.

It has been stated above in what terms this admission is expressed; it comes immediately after the paragraph enumerating the complete list of the articles purchased, and to which articles the following words have reference:—

The *said purchase was made in good faith*, and that they (Respondent's) paid for the *said* articles above enumerated the sum of $5,000.

Is not this a plain averment that $5,000 was the price of the articles purchased. We are unable to take any other view of this admission than that taken by the learned Chief Justice, unless we come to the

(1) V. 20, No. 200, p. 227.

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conclusion that the Respondents in thus expressing themselves wished to waive the benefit of the discharge mentioned in the deed, and intended to acknowledge that there was still due a balance of $2,188.40. This interpretation is so absurd that it is needless to dwell upon it.

The Appellant also claimed that this ingenious admission, on the part of the Respondents, put him in a less favorable position than he would have been otherwise. This clearly cannot be, for had the Respondents rested their petition on the deed and simply alleged the discharge it contains, what would have been the result? The Appellant could have answered only by attacking this discharge as being erroneously given by *Callahan*, or fraudulently executed by him to the detriment of his creditors. If such had been the case, it would then have been for the Appellant to void this discharge, and this, in the absence of other proof, he could only succeed in doing by interrogating the Respondents; so that he would still be forced to rely on their admission (*aveu*). He would thus have been obliged to submit to what has taken place in this suit, viz: interrogate *McNamee* and *Meany* as being parties to the instrument in order to procure evidence that notwithstanding the receipt there was still due a balance on the purchase price.

The authenticity of a document or the laws of evidence are not in anywise infringed, because parties to a deed are questioned as to the truth of the declarations therein contained. On the contrary, it is one of the admitted modes to prove erroneous statements in a deed such as those alleged in this case. The *inscription de faux* is another of such modes, but not the only one, as the Appellant has contended:

La preuve de l'acte authentique peut être détruite par l'aveu de la partie, *e. g.* si *Pierre* a souscrit une obligation devant no-

taires, au profit de *Paul*, sans en recevoir la valeur, et que ce dernier le poursuive pour le paiement, *Pierre* peut le faire interroger sur les circonstances du prêt, pour tirer de ses réponses un aveu qu'il n'a pas fait ce prêt, quoi que l'obligation l'atteste et s'il peut y parvenir elle sera anéantie (1).

This is exactly what the Appellant did when he examined as witnesses *McNamee* and *Meany*, parties to the deed, to prove that the true price of the purchase was $7,188.40, and not $5,000. The Respondents had also that privilege, and they made use of it by producing *Callahan's* deposition in the proceedings in insolvency, and by examining him as a witness.

In his examination before the assignee, as well as in his examination as a witness in this cause, *Callahan* admits that the consideration was $5,000, and that the amount had been paid. There can be no doubt as to the Respondents' right to avail themselves of his admissions. As to what he admitted before the assignee, the following authority suffices to show that such an admission can be adduced as evidence in this cause.

Peut-on opposer l'aveu aux créanciers de celui qui l'a fait? L'affirmative n'est pas douteuse. Quand les créanciers exercent un droit de leur débiteur, ils agissent en son nom, et on peut leur opposer toutes les exceptions qui peuvent être opposées au débiteur. Sauf aux créanciers à attaquer l'aveu comme fait en fraude de leur droit. La jurisprudence est en ce sens. Bordeaux, 2 Mai, 1850. *Dalloz*, au mot "obligation" No. 5,154 (2).

As to the legal effect of such an admission repeated by *Callahan*, when examined as a witness in this cause, it is quite sufficient to state that his insolvency did not render him an incompetent witness. As it has correctly been stated by Mr. Justice *Rainville*, "If the action was between *Callahan* and the petitioners (Respondents), the latter would undoubtedly succeed."

Their position cannot be changed because *Callahan* has become insolvent.

(1) Pigeau, 1 Vol. P. C. p. 233. (2) Laurent, Vol. 20, No. 180, p. 208.

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The Appellant might have rested his case here,—having established his payment by the deed and by *Callahan's* answers to interrogation in insolvency.

As to the objection raised by the Appellant founded on Art. 251. *C. C. P.*, which declares a party examined in a cause cannot make proof for himself, I do not consider it a serious one. The innovation introduced by that article to the law of evidence was simply for the purpose of allowing parties to a suit to be competent witnesses, when examined by the opposite party, with the above restriction, it is true, that a party cannot make proof for himself, a principle which has always existed in our law of evidence. This article does not destroy the effect of Art. 1243 of *C. C.*, with reference to the indivisibility of the judicial admission which is still in force, notwithstanding article 251, of the *Code of Procedure*. A party, therefore who, having no other proof, examines the opposite party as a witness, cannot now contend, any more than before the introduction of this article, that the admission of the party so examined may be divided in order to avail himself of what is favorable, and to reject what is unfavorable.

But in this case, the admission relied upon by the Respondents is that contained in their petition and not the admission made in their examinations as witnesses in this cause, which the Appellant was at liberty to declare he would not make use of as evidence in the cause. Such was admissible, but can only be invoked by the Appellant, if he declares his intention to make use of it, and then in such a case the admission must be taken in its entirety and is indivisible. If the Appellant does not wish to make use of these admissions, there still remains in the record the Respondents' admissions made in their petition, on which they can legally rely as stated in *Laurent* (1). After referring to the necessity

(1) Ubi supra No. 166 of vol. 20.

of taking down in writing the verbal declaration made by a party in Court, he adds :—

Quant aux déclarations faites dans les actes de procédures, elles sont par cela même authentiquement constatées.

These authorities, in my opinion, support clearly the conclusion at which I have arrived, 1st. There is in this cause a judicial admission contained in the petition (*aveu judiciaire*); 2nd. The circumstances under which was made, make it indivisible.

There still remains the following question to be answered, viz :—

The true consideration of the sale not being the one expressed in the deed of sale, can the validity of the obligation be impeached on account of this erroneous statement ?

It is true that an obligation to be binding, must have a legitimate consideration, but it does not follow that an error, or even a false statement, as to the consideration, would render the obligation void and of no effect. In such a case the obligation still remains, provided that instead of the erroneous consideration mentioned a true and legitimate consideration is proven to have been received. All authors agree on this point. To those already cited by the learned Chief Justice, I will add a decision, rendered by the *Cour de Cassation* on 28th August, 1807, *In re heirs of widow Vivien*, which is reported in *Merlin's Répertoire de Jurisprudence* (1). The plaintiff in that case, being examined, was obliged to acknowledge the false statement of the consideration of the obligation on which his action was based, and to declare that the obligation executed by Mrs. *Vivien* was not for moneys lent, but in order to pay the debt of one of her sons-in-law. In the Court of original jurisdiction and in

(1) *Verbo* " *Confession.*"

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appeal, his action was dismissed, but he succeeded before the Court of Cassation, their judgment being reported as follows :

Vu l'art. 1356 du Code Civil ; Considérant que la Cour d'Appel de Paris n'a pu considérer l'obligation dont il s'agit, comme sans cause, qu'en adoptant les aveux de *Gorlay*, en ce qu'il avait reconnu la fausseté de la cause exprimée dans la dite obligation, et en rejetant sa déclaration qui lui donnait une autre cause ; d'où il résulte violation de la loi précitée, qui ne permettait pas de diviser l'aveu judiciaire fait par *Gorlay*, la cour casse et annulle.

See also Laurent :

Je demande le paiement d'un billet causé valeur reçue en marchandises. Le défendeur nie avoir reçu des marchandises et me fait interroger sur faits et articles. J'avoue que la cause est fausse, mais j'allègue une autre cause licite. Mon aveu est-il indivisible. Dans notre opinion, oui, et sans doute aucun. Telle est ausi l'opinion commune, il y a cependant une décision contraire ? (1)

The Respondents' admission under the circumstances proved in this case, must be taken in its entirety and make proof in their favor ; the evidence on behalf of the Appellant confirms as well the truthfulness of their avowal. *Callahan* and *Carroll*, present at the passing of the deed, agree with the Respondents in their statement that the agreed price was $5,000. There is nothing in their testimony which might impeach their credibility ; *Carroll* certainly, whom *Callahan* had turned out of his partnership to take in *Meany*, cannot be said to have been in a disposition to favor by his evidence either *Callahan* or the Respondent.

With regard to the authorities, founded on the English law, cited by Counsel in support of Appellant's contentions, I fully concur with the following remark made by the Honorable Chief Justice *Dorion :*

This case is not a commercial case, and must, therefore, be decided by the rules of evidence applicable to civil cases.

For these reasons, I am of opinion, that the judgment

(1) Laurent vol. 20, No. 197, p. 224.

of the Court of Queen's Bench should be confirmed with costs.

RITCHIE and TASCHEREAU, J. J., concurred.

HENRY, J.:—

The Appellant claims to be entitled to a judgment for the difference (being over $2,000), between the amount stated in a contract of sale of goods as the consideration money and the amount actually paid. The instrument in question contains a receipt for the larger sum and an acknowledgment it was paid. Taking the instrument alone it operates to negative the allegation that anything is due for the goods sold.

Parol evidence is, however, admissible to show that the whole amount of the stated consideration was not paid; but it is also admissible to prove, as was done in this case, that the amount claimed was never due or payable as a part of the consideration money for the goods in question. We are remitted, therefore, to the oral agreement between the parties; and if by it we find that the full sum agreed upon was paid, we cannot adjudge a further payment contrary to the undoubted agreement of the parties. To so decide, would, in my opinion, be against both law and equity.

The Appellant seeks to open up the written agreement that equity may be done. He that seeks equity must do it, and when the written agreement is opened up it is subject to the equities of both parties. No fraud is suggested.

I therefore fully concur in the judgment given by my learned brother *Fournier*, that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for Appellant: *McMaster, Hall & Greenshields.*

Solicitors for Respondents: *Judah, Wurtele & Branchaud.*

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*Feb'y. 5.

June 3.

THOMAS J. WALLACE.....APPELLANT;

AND

FREDERICK BOSSOM.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Plea of Insolvency—Discharge not pleaded—Judgment after certificate granted.

T. J. W. sued *F. B.*, and, on 9th June, 1873, *F. B.* assigned his property under the Insolvent Act of 1869. On 6th August, *F. B.*, became party to a deed of composition. On the 17th October *F. B.* pleaded *puis darrein continuance*, that since action commenced he duly assigned under the Act, and that by deed of composition and discharge executed by his creditors he was discharged of all liability. On the 19th November, 1873, the Insolvent Court confirmed the deed of composition and *F. B's* discharge, but *F. B.* neglected to plead this confirmation. Judgment was given in favor of *T. J. W.* on the 30th January, 1874. On 30th May, 1876, an execution under the judgment was issued, and on the 28th June, 1876, a rule *nisi* to set aside proceedings was obtained and made absolute.

Held, reversing the judgment of the Supreme Court of *Nova Scotia*, that *F. B.*, having neglected to plead his discharge before judgment, as he might have done, was estopped from setting it up afterwards to defeat the execution. (*Strong*, J., dissenting, on the ground that the rule or order of the Court below was not one from which an appeal could be brought under the *Supreme and Exchequer Court Act.*)

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, delivered on the 26th March, 1877, making absolute an order to set aside an execution issued on a judgment rendered on the 3rd of January, 1874, by a Judge who, on that day, after a trial of the cause, in a summary way, gave a judgment for the Appellant.

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*PRESENT—Sir William Buell Richards, Knt., C. J., and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

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WALLACE v. BOSSOM.

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

Mr. *Wallace*, the Appellant in person:

The order was taken out by Respondent to set aside the execution on the ground of his having been an insolvent and obtained his certificate of discharge. This certificate was obtained before the trial or judgment, and as he failed or neglected to plead his discharge, as he might have done, he was forever precluded and estopped from doing so, or deriving any benefit from it in this suit, and the Appellant had a right to issue and enforce the said execution. *Bump's* Bankrupt Law (1); *Bigelow* on Estoppel (2); *Rossi* v. *Bailey* (3); *Rev. Stat. N. S.*, 4th Series, c. 94, sec. 118.

No one appeared on behalf of the Respondent.

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RITCHIE, J.:—

Plaintiff, on 30th January, 1874, recovered judgment in the Supreme Court of *Nova Scotia* against Defendant for $59.19 debt or damage, and $7.57 costs of suit; and on 30th May, 1876, caused to be issued on such judgment an execution against the goods, &c., and for want of goods against the body of Defendant.

On June 20th, 1876, Defendant applied to the Chief Justice to set aside and to stay all proceedings under said execution and judgment, on the ground that the debt for which judgment was entered was discharged previous to issue of execution, and set forth that on the 6th August, 1873, by a deed of composition and discharge, between Defendant, of the one part; *C.A. Bossom*, of the second part; *B. H. Eaton*, of the third part, and

(1) P. 641. (2) P. 615.
(3) L. R. 3 Q. B. 621.

* The Chief Justice was absent when judgment was delivered.

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the creditors of *F. Bossom*, of the fourth part, after reciting that *Bossom* had made an assignment under the Insolvent Act of 1869, and being desirous of procuring a discharge from his creditors, and had agreed to pay a certain composition, the creditors of said *Bossom*, in consideration of the matters in said deed contained, discharged and released said *Bossom* from all his liabilities, in accordance with the terms and provisions of said Act, which discharge was duly confirmed in the Court of Probate and Insolvency, and the said *Bossom* was, by said Court, on the 19th November, 1873, forever freed and discharged of and from all debts and liabilities existing against him at the time of the making of his assignment under said Act, which was 9th June, A.D., 1873.

It appears that the Defendant pleaded to Plaintiff's action on the 23rd May, 1873,

1st. Never indebted.

2nd. That he did not make the note declared on.

3rd. That the note was not stamped as required by statute.

4th. No consideration for making note.

And on the 17th October, 1873, for further grounds of defence, that since commencement of suit, Defendant duly assigned under Insolvent Act of 1867 and Acts in amendment thereof, of which Plaintiff had notice, and by deed of composition and discharge duly executed by the creditors of the Defendant, under the provisions of the Act, Defendant had been discharged from all liability in respect of Plaintiff's claim.

On argument at Chambers, and afterwards before the full Court, it was ordered that the rule *nisi* to set aside the said execution be made absolute with costs.

The cause appears to have been duly tried and judgment entered on the 30th January, 1874. No defence appears to have been set up before or at the trial under the discharge of the 19th November, 1873; and, in the

judgment of the Court, it is stated, "it does not appear that that Act of the Insolvent Court was brought to the notice of the Court at the trial of the cause which took place under the plea of *puis darrein continuance*," nor does it appear that any available defence was brought to the notice of the Court, but the contrary must have been the case, otherwise judgment could not have been given for the Plaintiff. The judgment affirms that after hearing argument the rule must be made absolute with costs. "Sections 94, 98 and 100 of Insolvent Act of 1869, read in connection with section 101, necessitates such a judgment." But this, in my opinion, is by no means the case, assuming the facts stated to be true, that the deed was entered into and confirmed, as alleged; the Defendant had a good defence to the action when it was tried, had he properly pleaded and proved his discharge; and nothing has occurred since the trial and judgment in any way affecting Plaintiff's claim.

Now, it is abundantly clear, that a Defendant can avail himself of his discharge as a certificated bankrupt, or as insolvent debtor, only by a special plea, and if he obtains such discharge after plea and before verdict, if he does not plead and prove it and judgment is obtained against him, he loses the benefit of the discharge; he cannot even plead the certificate to an action on such judgment (1). If the deed discharged Defendant, he had pleaded it, and should have proved it, and there would have been an end of Plaintiff's case; if it did not, but the confirmation of the deed did, he should not have pleaded the deed, but should have waited till the confirmation, and then have pleaded it; and if he felt embarrassed by his plea already pleaded, he should have applied for leave to withdraw it, and for leave to plead the confirmation. Be this as it may, it

(1) *Todd* v. *Mansfield* 6 B. & C. 105.

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is clear that before trial and judgment he had a discharge which he could have made available, had he taken the proper steps at the proper time; not having done so, he has allowed the opportunity to pass and a judgment to be entered against him and execution issued thereon, with which the Court had, in my opinion, no right to interfere. Formerly, relief against a judgment could only be had through the instrumentality of the writ of *audita querela*, but now this writ has fallen into disuse, the Courts under their equitable jurisdiction, give in a summary manner the same relief as under the *audita querela*. In *Comyn's Digest* (1) it is said:—

> Where the party had time to take advantage of the matter which discharges him and neglects it, he cannot afterwards be helped by an *audita querela*.

And in *Bacon's* Abridgment (2) it is said:—

> An *audita querela* is a writ to be delivered against an unjust judgment or execution by setting them aside for some injustice of the party that obtained them, which could not be pleaded in Bar to the action, for if it could be pleaded it was the party's own fault, and, therefore, he should not be released, that proceedings may not be endless.

And 2 Sand, R. 147, note 1, is to the same effect.

The general rule of law, as was laid by *Channell*, B., in *Staffordshire Building Co.* v. *Emmott* (3), and adopted and relied upon by the Court in *Rossi* v. *Bailey* (4), is that the party who might have pleaded and prevented a judgment, and did not, is estopped from afterwards raising that defence. But the Court in *Nova Scotia* says that "Sections 94, 98 and 100 of the Insolvent Act of 1869, read in connection with section 101, necessitates such a judgment." I have read those sections and can come to no such conclusion. No doubt the legislature might have interfered with the general rule

(1) At *audita querela* C.
(2) At *audita querela* 510.
(3) L. R. 2 Ex. 208.
(4) L. R. 3 Q. B. 628.

of law and the doctrine of estoppel, but there is nothing in the sections referred to, or in any other part of the Act, that I can discover, shewing any such intention on the part of the legislature, and section 104 exhibits a contrary intention, as it provides how the discharge is to be proved when the Defendant seeks its protection; it enacts that:

> Until the Court or Judge, as the case may be, has confirmed such discharge, the burden of proof of the discharge being completely effected under the provisions of this Act shall be upon the insolvent, but the confirmation thereof, if not reversed in appeal, shall render the discharge thereby confirmed final and conclusive, and an authentic copy of the judgment confirming the same shall be sufficient evidence, as well of such discharge as the confirmation thereof.

The plea relied on the discharge without confirmation; the obvious inference from the Court giving judgment on the trial in favor of the Plaintiff must be, that he neither made good the proof, the burden of which the law cast on him, nor did he allege and prove by the means pointed out in the Act, the confirmation thereof; and there certainly was ample time between the 19th November, 1873, the day on which the Court confirmed the deed and discharge, and the trial, on the 29th January, 1874, to plead the confirmation. The Defendant having then had a full opportunity of pleading and proving his ground of defence, which sets up the deed of composition, and also, of pleading and proving its confirmation, of all which he neglected to avail himself, though present at the trial by his Attorney and defending the action, and so not having relied on and taken advantage of his discharge and its confirmation, as he might, and should have done, and having thus missed the opportunity afforded him, and allowed a judgment to pass against him, and nothing having since occurred to interfere with the judgment, and Plaintiff's rights under it, he is now concluded, and the Plaintiff is entitled to

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the fruits of the adjudication in his favor, and the judgment of the Court staying or setting aside either the judgment or execution must be reversed with costs.

STRONG, J., gave an oral judgment dissenting, on the ground that the order appealed from was not a final judgment within the meaning of the 17th section of the *Supreme and Exchequer Court Act.*

RITCHIE, J.:—

What my learned brother has said has not raised any doubt in my mind; it was not raised by the parties in the Court, it was not argued before us, no one appearing on behalf of Respondent. I fully agree with my learned brother, that it is quite proper for a matter affecting jurisdiction to be raised by the Court, but, if so, I should have thought it just and right before determining that this appeal would not lie to allow the Appellant an opportunity to argue the question. This is the first I have heard of it. I do not at all agree as to the construction of the words "final judgment," because, I think, whatever argument might be plausibly drawn from the term "final judgment," is entirely negatived by the statute itself, and by the interpretation clause which has given a statutory definition to the term "final judgment." The clause says:—

> The word "judgment," when used with reference to the Court appealed from, includes any judgment, rule, order, decision, decree, decretal order, or sentence thereof; and, when used with reference to the Supreme Court, it includes any judgment or order of that Court.

It strikes me at the first blush of the case, that it would be a most dreadful conclusion to arrive at, if a Court could give judgment in favor of a party, and could next day wipe it out, and by a final order of that kind deprive him of the fruits of his judgment and such final order not be open to an appeal. I think the order

comes within the express wording of the statute which I have read. If I had any doubt raised in my mind by the very plausible argument of my learned brother, I should have thought it right to this Appellant, at any rate, to have stayed my hand in giving judgment against him, and to have given him an opportunity to have been heard before the Court. As at present advised, I think my original judgment was the correct one.

TASCHEREAU and FOURNIER, J.J., concurred with RITCHIE, J.

HENRY, J. :—

I entirely agree with the judgment given by brother *Ritchie*. I considered the case very fully, and having seen his judgment some time ago, considered it necessary to do little more than concur in it. As to the question of jurisdiction I am satisfied. It has not come before me for the first time now, because I have had occasion to consider the effect of the statute giving jurisdiction to this Court in some other cases some time ago. Supposing the judgment were for £5,000, and the party came and were told by the Court below that he has a good judgment, but the Court interferes by some assumed power to prevent his having the benefit of that judgment. To all intents and purposes, as far as the party is concerned, it is a final judgment. By such a decision his regular judgment is virtually set aside, and I consider it therefore to be a final judgment. We are not to suppose that the Court below will hereafter alter its dicision. They have virtually decided that the judgment shall not have any effect, and I think it is as much as if the Court had passed an order directly to avoid the judgment altogether, because if the power of the Court is taken away by its own act to award future process to recover the amount of the judgment, it is as waste

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paper. I think, therefore, an appeal from the decision of a Court which vacates the judgment is virtually an appeal from a final judgment, and, therefore, in respect to the definition clause referred to by my brother *Ritchie*, and regarding it as a final judgment, I think we must consider it one of the final judgments referred to in the Act. I think we have the jurisdiction; and if I had any doubt about it, and felt that the decision of the Court was likely to go against the Appellant, I should consider it but right, before delivering the judgment of the Court, to hear him upon the point. It was not raised, but, I take it, when a party does not come here to argue his case, or take the exception, he admits the right of the Court. It is true that we cannot usurp jurisdiction, and even in an undefended case, if we felt we had not jurisdiction, it would be our duty to say so. I have no doubt on this point, and, therefore, concur with the judgment, that the judgment of the Court below should be reversed, and the appeal allowed with costs.

Appeal allowed with costs.

Solicitor for Appellant: *James McDonald.*

THE REV. JOHN FERGUSON .....APPELLANT; 1878

AND *Feb'y. 5, 6.
June 3, 4.

DONALD McGREGOR FERGUSON.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Construction—Remoteness—Estate tail—Heir-at-Law.

P. F., senr., proprietor of 180 acres of lot 13, 10 concession of the township of *Drummond, Lanark* Co., by a will, dated 3rd December, 1845, devised as follows: "It pleased the Lord to give me two sons equally dear to my heart; to give them equal justice, I leave all my land to the first great grandson descending from them by lawful ordinary generation in the masculine line, to him I bequeath it, and to him I will that it pass free of any encumbrance, except the burying ground and the quarter of acre for a place of worship. To *Duncan Ferguson*, my son, I bequeath my family Bible, and five shillings over and above what I have done for him * * * To *Peter Ferguson*, my son, I bequeath my implements belonging to my farm, and to occupy the farm and answer State due sand public burdens himself, and the lawful male offspring of his body until the proper heir are come of age to take possession, but *Peter* himself and all are restricted and prohibited from giving any wood or timber whatsoever kind away off the land, or bringing any other family on to it but his own. But if he leaves a situation so advantageous, and cannot maintain himself upon it * * * I appoint *Peter McVicar*, my grandson, to take charge of the whole place—farm, and all that pertains to it—and occupy the same for his own benefit and advantage, according to the forementioned restrictions and conditions, until the heir be of lawful age, as aforesaid." The testator died in 1849, leaving two sons, *D.* and *P.*, junr., and three daughters and one grandson, *P. McV.*, being a son of a daughter. When the testator died, the property was subject to a lease, which expired in 1857. *P. F.*, junr., after having gone into occupation, in that year conveyed his interest to *P. McV.* and left the place.

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*PRESENT—Sir William Buel Richards, Knt., C. J., and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

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Subsequently the Appellant, son of *D. F.*, and heir-at-law of *P. F.*, senr., took a conveyance from *P. McV.*, and thereupon the Respondent, heir-at-law of *P. F.*, junr., brought an action in ejectment, claiming that under the will his father took an estate tail which descended to him.

The Court of Queen's Bench gave judgment (1) in favor of the heir-at-law, which judgment was reversed by the Court of Appeal for *Ontario* (2).

Held,—On appeal, that the devise by the testator to his first great grandson being void for remoteness, and there being no intention to give to *P. F.*, junr., any estate or interest independent of, or unconnected with, the devise to the great grandson, there was no valid disposition to disinherit the heir-at-law, and therefore the Plaintiff was not entitled to recover. (*Strong*, J., dissenting).

Per *Ritchie*, J.—Where the rule of law, independent of and paramount to the testator's intentions, defeats the devise the proper course is to let the property go as the law directs in cases of intestacy.

APPEAL from a judgment of the Court of Appeal for *Ontario*, on appeal to that Court from the Court of Queen's Bench.

This was an action of ejectment, and was commenced by writ issued on the 23rd July, A. D. 1875, to obtain possession of lot 13, in the 10th concession of the township of *Drummond*, in the County of *Lanark*.

The Plaintiff claimed title to the premises as heir of entail of *Peter Ferguson*, devisee in tail male under the last will and testament of *Peter Ferguson*, his father, deceased.

The Defendant, besides denying the title of the Plaintiff, claimed the land as heir-at-law of *Peter Ferguson*, senior, his grandfather. The Defendant further claimed title by length of possession and by conveyance from *Peter McVicar*, who derived title as devisee under the will of *Peter Ferguson*, deceased.

It was admitted that *Peter Ferguson* died seized of

(1) 39 U. C. Q. B. 232. (2) 1 App. R. Ont. 452.

the land in 1849, and that the Defendant was his heir-at-law.

The portion of the will in controversy between the parties reads as follows:—

"It pleased the Lord to give me two sons equally dear to my heart; to give them equal justice. I leave all my land to the first great grandson descending from them by lawful ordinary generation in the masculine line, to him I bequeath it, and to him I will that it pass free of any encumbrance, except the burying ground and the quarter of acre for a place of worship. To *Duncan Ferguson*, my son, I bequeath my family bible, and five shillings over and above what I have done for him * * * To *Peter Ferguson*, my son, I bequeath my implements belonging to my farm, and to occupy the farm and answer State dues and public burdens himself, and the lawful male offspring of his body until the proper heir are come of age to take possession, but *Peter* himself and all are restricted and prohibited from giving any wood or timber whatsoever kind away off the land, or bringing any other family on to it but his own. But if he leaves a situation so advantageous, and cannot maintain himself upon it, * * * I appoint *Peter McVicar*, my grandson, to take charge of the whole place—farm, and all that pertains to it—and occupy the same for his own benefit and advantage, according to the forementioned restrictions and conditions, until the heir be of lawful age, as aforesaid."

When the testator died in 1849, *Duncan* was the elder son, *Peter* was the second son, and *Peter McVicar* was the son of a sister; the land at the time was subject to a lease, which expired in 1857. At the expiration of the lease, *Peter Ferguson*, the son of the testator, went into occupation of the land. On the 24th August, 1857, he conveyed to *Peter McVicar*, the grandson, who is named in the will.

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The Defendant, son of *Duncan Ferguson*, besides being the heir-at-law of the testator, proved a deed to himself of the land from *Peter McVicar*.

Peter Ferguson, junr., died in 1864, leaving as his only child the Plaintiff.

At the trial (Fall Assizes, 1875) before *Patterson*, J., without a jury, a verdict for the Plaintiff was entered on the ground that the devise to *Peter Ferguson*, junr., created an estate tail male in him, that the estate tail had not been barred, and that the Defendant had not made out his defence under the Statute of limitations.

A rule *nisi* was obtained to enter a verdict for the Defendant, which was afterwards made absolute by the Court of Queen's Bench.

The Plaintiff then appealed to the Court of Appeal for *Ontario*, which reversed the judgment of the Court of Queen's Bench.

Mr. *MacLennan*, Q.C., and Mr. *Burdett*, for Appellant:

There was no great grandson at the death of the testator, so the will is void either as a lapsed devise or for remoteness. The will reads as follows:—"To *Peter Ferguson*, my son, I bequeath my implements belonging to my farm, and to *occupy the farm*, and answer State dues, &c., and the lawful male offspring of his body until the proper heir are come of age, &c." These are the words relied on by the Respondent as giving to his ancestor the estate tail. The central object of the testator was to give the estate to his great grandchild and the other directions were merely ancillary to, and not in substitution for, the principal devise, the one having failed the other necessarily failed along with it. The effect of this is that the testator died intestate. If the child had been in being when the testator died, he would have taken the estate as a vested estate in fee; not having been born, however, the devise was execu-

tory, to take effect when the child was born: *Jarman* on Wills (1). It is not limited to take effect during or at the determination of the supposed estate tail. Suppose the alleged estate tail to terminate to-day, the child's estate would not arise because he is not yet in being, but the estate, if good, must wait till then and be tied, and we have an estate infringing the rule of perpetuities and incapable of being barred. It follows that the estate to the child is void.

Moreover, the devise to the grandson being a *present* gift, it follows that there can be no present gift to *Peter Ferguson*, otherwise there would be two gifts of the same property to the same person to take effect concurrently, which is impossible and repugnant.

The provisions with respect to *Peter Ferguson* and *Peter McVicar* are made upon the supposition that the gift to the grand child has taken effect, which makes it clear that these persons were to take no estate, but were to be made guardians or caretakers of the property of another during his minority. To hold that the devise to the grandson is executory, is to change and invert the whole frame and structure of the will, to invert and re-arrange its parts to contradict the plainly expressed intention, and to put a fanciful construction upon it.

The Appellant contends, therefore, that the result is that testator's scheme with regard to his property has fallen, and the subsequent provisions in the will, being solely to carry into effect the main object of the will, cannot be given primary importance, so as to make a will the testator never intended. The learned counsel referred to *Christie* v. *Gosling* (1); *Countess of Harrington* v. *Earl of Harrington* (2); *Marcon* v. *Alling* (3); *McKidd* v. *Brown* (4); and *Shaver* v. *Jamieson et al* (5).

(1) Vol. 1, p. 820 (Ed. 1861).
(2) L. R. 1 H. L. 279, 295.
(3) L. R. 5 H. L. 87, 99.
(4) 5 Grant 562.
(5) 5 Grant 633.
(6) 25 U. C. Q. B. 156.

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Mr. *Bethune*, Q.C., for Respondent:

A mere presence of a doubt in the minds of the Court will not justify them in holding a will void, they should struggle against an intestacy. It is clear the testator did not intend an intestacy. The paramount idea was to keep the property in his family as long as possible.

Now, the devise to the great grandson is either void for remoteness, or gives an executory devise to such great grandson, and, for the purpose of determining who should succeed in this action, it matters not which view is adopted. In either view the proper construction is that, an estate tail was given to *Peter Ferguson*. *Tudor's* L. C. R. P. (1); *Jardine* v. *Wilson* (2); *Re Shaver* (3); It must be assumed that the testator intended to devise his whole estate, *Con. S. U. C.*, ch. 82, sec. 12. This construction will best effectuate the intention of the testator, as it may happen that from *Peter* may issue the first great grandson of his sons. In any case it will more nearly effectuate it than any other construction, and upon the doctrine of *cyprès*, the Court will give effect to it. *Stackpoole* v. *Stackpoole* (4); *Tudor's* L. C. R. P. (5).

The deed from *Peter Ferguson* to *Peter McVicar* was not operative to bar the entail, because it was not registered within six months after the date of execution. *Cons. S. U. C.*, ch. 83, sec. 31 The deed does not profess to operate upon anything more than the estate and interest of *Peter Ferguson*, the grantor, and so would not operate under the statute to bar the entail.

The term "offspring," used in describing the gift to *Peter*, is synonymous with *heirs of the body*. *Thompson* v. *Beasley* (6); *Jarman* on Wills (7); *Allen* v. *Markle* (8).

(1) Pp. 531, 536.
(2) 32 U. C. Q. B. 498.
(3) 3 Chy. Chamber's Rep. Ont. 380.
(4) 4 Dr. and War. 350.
(5) Pp. 344, 426.
(6) 3 Drew. 7.
(7) 2 Vol. p. 89.
(8) 36 Pen. R. 117.

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There is nothing to show that the whole estate was to be withdrawn from *Peter*; on the contrary, the terms used, coupled with the absolute bequest of the chattels to *Peter*, shows an intention to vest some beneficial enjoyment in *Peter*. Is there an estate tail to *Peter*? If so, it does not matter what the nature of devise over is.

Mr. *MacLennan*, Q. C., in reply.

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*June 3, 4.

RITCHIE, J. :—

The Plaintiff claims title to the premises in controversy in this suit as heir of entail of *Peter Ferguson*, deceased, who, he alleges, was devisee in tail male under the last will of *Peter Ferguson*, his father, also deceased, who died seized in 1849.

Defendant claims the land as heir-at-law of *Peter Ferguson*, senior, his grandfather.

The only question for our consideration, in the view I take of this case, is, did *Peter Ferguson* take an estate tail under the will of *Peter Ferguson*, senior, his father? If this is answered in the negative, then the Defendant, being the heir-at-law of *Peter Ferguson*, senior, cannot be disturbed in his possession of the premises.

It is not to be wondered at that the very extraordinary will of this apparently eccentric testator should have given rise to litigation. The clause of the will we have to consider is in these words:

Secondly, It pleased the Lord to give me two sons equally dear to my heart; *to give them equal justice*, I leave all *my land to the first great grandson descending from them by lawful ordinary generation in the masculine line*, to him I bequeath it, and to him I will that it pass free of any encumbrance except the burrying ground and the quarter of acre for a place of worship. To *Duncan Ferguson, my son*, I bequeath my family bible and five shillings currency, over and above what I have done for him, with my blessing and prayer for him that by grace he will be able to make the best use of his portion, &c.

*The Chief Justice was absent when judgment was delivered.

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To *Peter Ferguson, my son, I bequeath my implements belonging to my farm, and to occupy the farm,* and answer state dues and public burdens himself, *and the lawful male offspring of his body until the proper heir are come of age to take possession,* but *Peter* himself and all are restricted and prohibited from giving any wood or timber of whatsoever kind off the land or bringing any other family on to it but his own. But if he leaves *a situation* so advantageous and cannot maintain himself upon it—painful and humbling thought of him failing—but in case this happening, I appoint *Peter Mc Vicar,* my grandson, *to take charge of the whole place*—farm, and all that pertains to it—and occupy the same for his own benefit and advantage, according to the forementioned restrictions and conditions *until the heir be of lawful age as aforesaid.*

Peculiar as this devise may be, I do not think it is unmeaning or incomprehensible, and I have not much difficulty in arriving at a conclusion as to what the testator desired to accomplish, but the difficulty I find in the way of giving effect to his wishes is, that the law will not allow him to carry his intentions into effect in the manner in which he has sought to do it, or, in other words, to do what he desired to do and thought he was doing, inasmuch as his devise cannot be brought within the rules of law. He violated the rule against perpetuities, and his devise to the first great grandson of his sons is, in my opinion, consequently of no effect, being void for remoteness.

Mr. Justice *Cresswell,* in *Lord Dungannon* v. *Smith* (1), states the rule:—

> It is a general rule, too firmly established to be controverted, that an executory devise to be valid must be so framed that the estate devised must vest, if at all, within a life or lives in being and 21 years after; it is not sufficient that it may vest within that period, it must be good in its creation; and unless it is created in such terms that it cannot vest after the expiration of a life or lives in being, and 21 years and the period allowed for gestation, it is not valid, and subsequent events cannot make it so.

Concurred in, as accurately expressed, by the Master of the Rolls in *Merlin* v. *Belgrave* (2).

(1) 12 Cl. & F. 563.

(2) 25 Beav. 133, 134.

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In construing a will, and more particularly one written by an unskilled person (and this will bears conclusive internal evidence that it did not come from the hands of a lawyer, but was the testator's own production,) reading the will as indicated on the rule laid down by the Lord Chancellor in *Young* v. *Robertson* (1) that:—

> The primary duty of a Court of Construction in the interpretation of wills is to give to each word employed, if it can with propriety receive it, the natural ordinary meaning which it has in the vocabulary of ordinary life, and not to give words employed in the vocabulary of ordinary life an artificial, secondary, and technical meaning,

the first inquiry naturally is what was the idea uppermost in the mind of the testator? What was the primary and principal object he was seeking to accomplish as indicated by the language he has used?

I think it certainly was not in this case to create and vest in *Peter* an estate tail, and, contingent and dependent thereon, to give to the first great grandson of *Duncan* and *Peter* an estate by way of executory devise. If we take his own words in their ordinary signification, his primary object was to give equal justice to the two sons which it had pleased God to give him equally dear to his heart That equal justice appears to have been to deprive both sons of the property, and to alter the regular course of descent, and select from the descendants of his sons the person who should become his "proper heir" to inherit his estate, and having made such selection, under the impression, doubtless, that he could legally do so, he used plain and unambiguous language, which I cannot doubt he supposed capable of accomplishing his purpose; and having named an heir so remote, his second and subsiduary object seems naturally enough to have been to make provision for the occupancy and care of the estate until the heir so selected

(1) 4 Mac Queen, House of Lord's cases, 325.

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should arrive at lawful age to take possession. These, I think, were the primary and secondary considerations operating on the mind of the testator when he drew the will. Had he selected his grandson *Peter Mc Vicar* (then 14 years old, named in the will) as his proper heir, he would have accomplished his object; the devise to him would have been good; the provisions for occupancy and care of the property would have been reasonable, and could have taken effect without repugnancy and without any necessity for transposing a sentence or for eliminating one word from the will. In such a case, what pretence could there have been for contending that the devise should be transposed, and that *Peter*, the son, should take an estate tail and *Peter*, the grandson, only a contingent estate. To have so held would simply have been to put it in *Peter's*, the son's, power to deprive *Peter*, the grandson, of his inheritance, and so frustrate the testator's intentions. Does this not show that the language of the will is capable of a consistent construction without any transposition or elimination, and was capable, by giving effect to all the language of the testator as used by him, of carrying into effect his obvious intentions, provided always the law would allow him to do what he desired to effect.

Every will must be construed according to the intention of the testator, and I cannot escape the conclusion that the intention of the testator was to base the occupancy by *Peter*, his son, on the previous devise to the first great grandchild of his sons, that is to say, to make it ancillary thereto, and consequently dependent thereon; and I can discover no intention to give to *Peter Ferguson* any estate or interest, independent of, or unconnected with, the devise to the great grand child.

No doubt, in this case the testator did not intend to die intestate, but it is not enough that the will exhibits

an intention to disinherit the heir-at-law, there must be a valid dispostion of the property in favor of some other party. Here the testator has attempted to make such a disposition, but has failed, simply because such a devise as he made could not take effect, the law not sanctioning or sustaining such a disposition. It is clear, then, that the intention of the testator cannot be carried into effect, because the first great grandson descending from his sons cannot be what the testator calls the "proper heir." As to the final disposition of the property, the testator appears to have had only one intent, and that was that this "first great grandson" should be the "proper heir to it," and he appears to me to have made, as I have said, the other provisions subordinate thereto, viz.: that the property should be taken charge of until such "proper heir" came of age to take possession, and for remunerating the person to whom the charge is so confided, authorizing him to occupy the same for his own benefit and advantage until such heir be of proper age, but restraining and prohibiting whosoever may be so occupying and in charge "from giving any wood or timber of whatsoever kind away off the land, or bringing any other family on it but his own;" and, in case of the first person named to whom such charge was confided "leaving a situation so advantageous and unable to maintain himself upon it," appointing another in his place under the same restrictions and conditions, language indicating, in my opinion, an occupation or employment in connection with the property as caretaker, rather than the idea of ownership of, or title to, or a disposing power over, the property, and therefore these conditions seem to me consistent only with the idea of the testator's dealing with the estate for the sole purpose of vesting it in, and preserving it for, the first great grandchild as the proper heir.

But the devise to the great grandchild being void, as

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was said by the Master of the Rolls in *Ring* v. *Hardwick* (1), in respect to certain clauses in the will he was considering, "they are accessories to that which is void, and cannot therefore alter the construction." To hold that the testator intended that *Peter Ferguson* should take an estate tail, is to my mind a strained construction, supported by artificial reasoning, and would produce results never contemplated by the testator, and instead of making the legal consequences depend on the construction, make the construction depend on the legal consequences. If the law allowed a devise under the circumstances to a first great grandchild to take effect, then testator's intentions might have been carried out without any repugnancy, or without rejecting any regulations or conditions imposed by the testator. It is attempted to establish the tenancy in tail by transposing the devise to *Peter*, and reading it as if it preceded the devise to the first great grandchild, and rejecting or eliminating from the devise the restrictions and conditions imposed on the occupancy of *Peter Ferguson* as being inconsistent and incompatible with an estate tail, the estate it is sought to confer. While no doubt words and limitations may be transposed, if warranted by the immediate context or the general scheme of the will, they may not be merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument (2). On the contrary, the obvious intent of the language must be adhered to, even though it renders the will inoperative, unless, indeed, the transposition brings out the true intent of the testator, and thus renders what was before obscure clear, for if the transposition leaves the same uncertainty, only giving a different import, it is not allowable. Mr. *Redfield* (3) says :—

(1) 2 Beav. 359.

(2) 18 Ves. 368, 19 id. 652; 2 Mer. 25.

(3) Vol. 1, p. 432.

If, however, it gives effect to all the provisions of the will, and renders them all harmonious and consistent both with each other and with the general purpose and intent of the will, it affords very satisfactory ground of presumption that it reaches the source of the difficulty and explains the mode in which it arose.

In *Chambers* v. *Brandsford* (1) the Lord Chancellor says :—

Lord *Hardwick* (2) lays down the rule for the construction of wills thus, that the words are often transposed to make sense of a will, otherwise insensible, and to make it take some effect rather than be totally void, but in no case where the words are plain and sensible is a transposition made in order to create a different meaning and construction, much less to let in different devisees and legatees.

Here, it is clear, the transposition proposed and construction contended for, not only fail to give effect to the evident primary object of the testator, but render quite inoperative provisions and restrictions which the testator, no doubt, deemed substantial and necessary to carry out his views in favor of the object of his bounty, the proper heir.

The provisions of the will are, it seems to me, entirely inconsistent with this idea of the creation of an estate tail, and first the devise to the first great grandson—"to him I bequeath it, and to him I will that it pass free from any incumbrance, except the burying ground and the quarter of an acre for a place of worship," is quite inconsistent with a devise of an estate in tail male to *Peter*, and the bequest to *Peter* of "the implements belonging to my farm," but as to the farm itself, simply "to occupy the farm." The restricting and prohibiting the supposed tenant in tail from giving any wood or timber of any kind away off the land, or bringing any other family on it but his own, admittedly inconsistent to sustain the construction, must all be eliminated; so the condition, that in case *Peter* abandons the occupation, or, in the words of the testator, "leaves a situation so advan-

(1) 9 Ves. 652. (2) 2 Ves. 74.

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tageous and cannot maintain himself upon it," he is to lose his situation; that is to say, in case he leaves the situation, the appointment of *Peter Mc Vicar*, his grandson, "to take charge of the whole place and occupy the same for his own benefit and advantage, according to the same restrictions and conditions until 'the heir' be of lawful age," being also inconsistent, it is said, must likewise be cast aside.

The prominent fact that, at all events, there should be a proper heir who should have the estate and the possession of it when he came of age, taken in connection with the fact that *Peter*, if he was tenant in tail, could dispose of the property absolutely and bar the entail, and so make the disposition equivalent to a devise to himself absolutely, and enable him to prevent the possibility of the property ever reaching the proper heir, supposing he could take by way of executory devise, is certainly also inconsistent with the testator's intention of establishing his own proper heir, though I am free to admit that if there was a plain expression of intention, we ought to disregard altogether the legal consequences which may flow from the nature and qualities of the estate, when such estate is once collected from the words of the will itself (1), and construe the will without reference to the possible contingency of carrying that intention into effect. But again, if *Peter* should not bar the entail, and he had lawful male offspring, and his brother *Duncan* had the same, and the first great grandson was *Duncan's* offspring, the offspring of *Peter* would take, as heir of entail, to the exclusion of the testa tor's "proper heir," the devise to whom, by way of executory devise, being equally void for remoteness. All this would be entirely inconsistent with the testator's declared intent. Again, I think the will should not be alter-

(1) *Scarborough* v. *Saville*, 3 A. & E. 897; adopted by Lord Chelmsford in *Atkinson* v. *Holtby*, 10 H. L. 330.

ed and mutilated so as to justify a construction which would give an estate tail to *Peter*, because the intentions of the testator would by no means be thereby accomplished, for never, except, so far as I can discover, in the event of one most remote and most uncertain contingency, could the estate ever come to the "proper heir," and that is, if *Peter* had children and only one great grand-child, and *John* had no great grand-child older than *Peter's*, and the estate had not been barred in the meantime—then the estate would certainly vest in the eldest great grand-child of the two sons, but then, as tenant in tail, and not as the proper heir of the testator, in which right it was the testator's evident wish and intention he should take, and not necessarily when he should come of age. These considerations convince me that the testator never contemplated the creation of an estate from which such consequences would flow; and if the creating an estate will not necessarily effect the object the testator sought to accomplish, the construction that creates such an estate cannot, I think, be the right one.

There was, no doubt, an intention to disinherit the heir-at-law, but it was not, in my opinion, by giving an estate tail to *Peter*, the younger son, which would be anything but equal justice to the brothers, even with the curious views of equal justice entertained by the testator, but the intention was to exclude the heir-at-law only for the purpose of substituting another in his place, and this the testator attempted to do by providing in substitution of the heir-at-law the first great grandson of his, the testator's, two sons as "the proper heir," and as he failed to substitute one whom the law would allow to take, we should, if we adopted a construction that will give to *Peter* an estate tail, to use the words of Lord *Cranworth* in *Hall* v. *Warren* (1):

(1) 9 H. L. 433.

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Be acting in contravention of the well-known rule that the heir-at-law is not to be disinherited, except when the property of his ancestors has been clearly and unambiguously given away from him. We cannot make a new will for the testator simply because the rules against perpetuity prevent his will from being carried out.

And as was aptly remarked by the Vice Chancellor in *Mannery* v. *Bevoy* (1),

> The rules of construction cannot be strained to bring a devise or bequest within the rules of Law.

The fact that the testator did not foresee all the consequences of his disposition is no reason for varying it. I do not think this or any other court has a right to re-cast the will and give effect to it by creating an estate the testator, I think, never intended should exist; because, by so doing, the intentions of the testator may, on the one hand, by possibility, be approximately realized, while, on the other hand, the estate may, with much more probability, go in a direction wholly at variance with the intentions of the testator, and this, too, to the disinheriting of the heir-at-law, who is not to be disinherited without an express devise or necessary implication. We are not to make a will for the testator, but simply to expound the will he has made, and this will, so made, must be construed according to the plain meaning and intention of the testator, notwithstanding that the result of so construing it may be to defeat the object which he had in view. This was exemplified in the case of *Cunliffe* v. *Brancker* (2), in which case, *Jessel*, M. R., says:—

> All I have to do is to construe the instrument fairly, find out what it means, and then to apply the established rules of law to the instrument, and see what the effect will be. I am sorry to say—for it disappoints in this case the intention of the testator—that I cannot bring myself to doubt what the meaning of this will is. The only point in contest, is whether the legal fee in an undivided moiety of freehold land is, or is not, vested in certain trustees. Now, apart from

(1) 8 Hare 48.

(2) 46 L. J. Ch. Div. 128; L. R. 3 Ch. Div. 393; 35 L. T. N. S. 578.

the rule of law about the failure of contingent remainders, I think I may venture to say that no human being who understood anything about real property law would entertain a doubt about the meaning of this will. How far judges may be, or ought to be, able to defeat a rule of law of which they disapprove, I cannot say. I think it is the duty of a judge not to allow himself to be so influenced, but to construe the instrument in a proper way, to arrive at its meaning independently of the results, and then apply the law. This has been laid down over and over again with regard to another rule of law—the rule against remoteness or perpetuity—but I do not see that, because, in the opinion of the judge, the one rule of law is reasonable and the other unreasonable, the rules of construction are to be altered.

On appeal, *James*, L. J., speaking of contingent remainders, says:—

That is the Rule of Law, and we cannot help it. We cannot alter the construction of the instrument to avoid or evade that rule. We must construe the words just as if there were no such rule of law, and then, having thus ascertained the construction, apply the rules of law to the instrument so construed.

In *Gordon* v. *Gordon* (1), The Lord Chancellor (Lord *Hatherley*) said :—

I am aware that if there be a doubtful construction of a will the circumstances of the case may be used to guide our choice; but we must not (as has been done in another class of cases with reference to the vesting of portions) first make the construction, which is clear in itself, doubtful, in order to make what we think a more reasonable will for the testator. It is not enough that a will may admit a forced construction. Of course, if it would not, no circumstances could alter the words; but the first course of construction is to read the will in its natural grammatical sense, and then only, if that fail to produce a clear meaning, to look out for some other possible sense. Where a meaning is plain and clear, grammatically, no other should be sought for.

Lord *Chelmsford*:—

I admit, of course, the canon of construction that you are in the first place to determine the natural and ordinary meaning of the words employed; and to this you must adhere, unless other parts of the will, or the general scope and object of it, plainly manifest that the testator meant them in a different sense.

(1) L. R. 5 H. L. 271.

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Lord *Cairns*, page 284 :

I take the law on this subject to have been expressed with much accuracy and felicity by Lord *Cranworth*, than whom no judge more consistently adhered to sound and strict principles of construction in the interpretation of wills. In the case of *Abbott* v. *Middleton* (1), before this House, Lord *Cranworth* speaks thus :—

"Where, by acting on one interpretation of the words used, we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious or even harsh and unreasonable."

The Lord Chancellor in *Dungannon* v. *Smith* (2) :

If we were to adopt this construction for the purpose of getting out of the difficulty arising out of the law of perpetuities, we should be, in fact, as I consider, making a perfectly new will for the testator; we should be, in the first instance, translating the actual will into a new form, and we should be putting upon that will a construction which, I admit, if the will had been in that form, would have been the true and just construction. I never can lend myself to a measure of this kind, to the process of altering the frame of a will and the phraseology of a will for the purpose of framing, as it were, a new will, in order to put a construction upon it to obviate the difficulties arising out of the law against perpetuities.

Brett, J. :—

The primary rule of construction is to give effect, if possible, to the whole will. If there is a construction which will so operate without doing violence to any part of the will that construction ought to be adopted.

I agree with *Montague Smith*, J., in *Gravenor* v. *Watkins* (3) :

That the will must be read as a whole, and that effect is to be given to all the words as far as it is possible to do so. The intention of the testator can only be arrived at by considering all the language he has employed.

(1) 7 H. L. C. 89. (2) 12 C. & F. 625.
(3) L. R. 6 C. P. 508.

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And endeavoring (as he did in that case) to reach the mind of the testator through the words which he has used, I have come to the conclusion, when a testator makes such an absurd will as this that no reasonable or legitimate construction can be put on it, which will even indirectly or remotely effect what a fair reading of the language used leads to the conclusion the testator desired to do, and the rule of law, independent of, and paramount to, the testator's intentions, defeats the devise, if the testator's selected "proper heir" cannot get the property, I can discern nothing in the will to justify the conclusion that the testator intended the property to go to *Peter* and his children; but the exact opposite.

I adopt the language and ruling of the learned Chancellor, Lord *Campbell*, in *Hall* v. *Warren* (1), and say that:—

> Where there is uncertainty whether the property has been devised or bequeathed away from the heir-at-law or next of kin, the wise course has been to let the property go as the law directs in cases of intestacy.

The judgment of the Court of Queen's Bench was, I think, correct, and should be confirmed, and the judgment of the Court of Appeals should be reversed, and this appeal allowed with costs.

STRONG, J.:—

I am of opinion that the proper construction of this will is that which has been placed upon it by the Court of Appeal, namely: That *Peter Ferguson* took an estate tail, subject to an executory devise over in favour of the first great grandson of the testator in the line of either of his sons. The principal object of the testator was manifestly to give the estate in question to his first great grandson. The other provisions of the will, relating to the disposition of the land until the estate should

(1) 9 H. L. 427.

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vest in a great grandson, are subsidiary to that leading intention.

It is a cardinal rule of construction "that all the parts of a will are to be construed in relation to each other and so as, if possible, to form one consistent whole."

The estate limited to the great grandson is an executory devise, and not a remainder, since it is limited to take effect in abridgment or defeasance of the prior estate or interest given to the testator's son, *Peter Ferguson.*

Then, the only possible way in which effect can be given to the testator's intention of giving the property to his great grandson is by holding the preceding estate to *Peter Ferguson* an estate tail. An estate cannot be limited by way of executory devise to a person not in esse at the testator's death, unless it must, of necessity, vest within a life or lives in being and twenty-one years afterwards.

This is now the established rule against perpetuities, as finally settled by the House of Lords in the case of *Cadell* v. *Palmer* (1). The only exception to that rule is when an estate, which would otherwise be too remote, is limited to take effect immediately on the determination of an estate tail, "because the power which resides in the owner of the estate tail to destroy all posterior limitations, executory as well as vested, by means of a disentailing conveyance, takes the case out of the mischief of, and consequently out of the rule against, perpetuities." The devise to the great grandson must, therefore, be held void for remoteness, unless the provision of the will directing the occupation by *Peter Ferguson*, the testator's son, can be held to give him an estate tail. That provision is in these words:—

To *Peter Ferguson*, my son, I bequeath my implements belonging to my farm, and to occupy the farm and answer State dues and

(1) 1 C. & F. 372.

public burdens himself, and the lawful male offspring of his body until the proper heir comes of age to take possession, but *Peter* himself and all are restricted and prohibited from giving any wood or timber of whatsoever kind away off the land, or bringing any other family on to it but his own.

I think these words confer an estate tail on *Peter Ferguson*. A gift of the beneficial occupation of land is, of course, sufficient to confer an estate in the land on the devisee (1); and when such a beneficial occupation is devised to a man and the heirs of his body, the estate so conferred must be an estate tail. Then a devise to A and his offspring is synonymous with a devise to A and his issue (2); and in the latter form of devise, "issue" is to be construed as a word of limitation and as equivalent to heirs of the body (3). I read the will as though the testator had said: "I devise the occupation and enjoyment of the farm to my son, *Peter Ferguson*, and the heirs of his body, until my first great grandson comes of age," which would have been a clear gift of an estate tail.

Then, what would have been the effect, if superadded to such a devise as I have just propounded, there had been added the provisions regarding personal occupation and restricting the devisee in the use of the timber. Clearly they would have been rejected as repugnant, and so, equally, in the present case are they, in my judgment, to be rejected for the same reason.

I can think of no other construction to put on the word "offspring," used in this connection, than to treat it as a word of limitation equivalent to "heirs of the body." If we are to give effect to the words introducing the gift over to *Peter McVicar*, no doubt clearly implying a personal occupation by *Peter Ferguson*, as indicating that the word "offspring" is not to be read

(1) *Rabbeth* v. *Squire*, 19 Beav. 70.
(2) *Thompson* v. *Bearly*, 18 Jur. 973.
(3) *Slater* v. *Dangerfield*, 15 M. & W. 263.

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as a word of limitation, and so requiring that the interest of *Peter Ferguson* shall be cut down to an estate for life, we should be departing from the *primâ facie* construction of the testator's language for the purpose of defeating the whole scheme of the will. In other words, we should be resorting to the secondary meaning of words with the result of defeating the whole will, whilst the *primâ facie* construction of these same words would give effect to the will to the sacrifice only of some of the minor and subsidiary provisions. Then, referring to Mr. *Jarman's* book, I think this is a case eminently proper for the application of two of his rules:

The rules of construction cannot be so strained as to bring a devise within the rules of law, but when the will admits of two constructions that is to be preferred which will render it valid (1).

And again:

Limitations may be rejected when unwarranted by the general scheme of the will (2).

Here *Peter Ferguson* either takes an estate tail, which the words are amply sufficient to give, and the will stands subject to the rejection of the provision requiring personal occupation and restricting his dealing with timber, or, he takes a life estate, and the will wholly fails; between these two constructions we have to choose, and I am of opinion that both principle and authority require that that construction should be preferred which gives effect to the primary meaning of the words and renders the will valid, rather than that which reads words in a secondary sense and destroys the will, and makes the testator in effect die intestate.

I am of opinion, that the order of the Court of Appeal should be affirmed and this appeal be dismissed with costs.

TASCHEREAU and FOURNIER, J. J., concurred with RITCHIE, J.

(1) Vol. 2 p. 679, Rule 14. (2) Ubi sup., Rule 19.

HENRY, J.:

Both parties to this controversy claim under the title of one *Peter Ferguson*---the Respondent as heir of entail, as devisee in tail male, under his last will and testament, and the Appellant as his heir-at-law. It is admitted that the testator died seized in 1849—also, by the Respondent, that the Appellant is the heir-at-law of the testator.

The Respondent claims as the son of *Peter Ferguson*, who, it is alleged, took under the will an estate in tail male. The sole question then is, did *Peter*, the father of the Plaintiff, take such an estate.

After the devise of a burying ground and a quarter of an acre of land for a church, the testator in his will says :—

Secondly, it pleased the Lord to give me two sons equally dear to my heart; to give them equal justice, I leave all my land to the first great grandson, descending from them by lawful ordinary generation in the masculine line, to him I bequeath it, and to him I will that it pass free from any encumbrance, except the burying ground and the quarter of an acre for a place of worship.

Then, after a devise of a bible and five shillings to his other son, *Duncan*, he bequeathed to *Peter* the farm implements,

And to occupy the farm, and answer state dues and public burdens himself, and the lawful male offspring of his body, until the proper heir are come of age to take possession.

Then follow a restriction and prohibition against *Peter* or any one giving any wood off the land, or bringing any other family on it but his own; and, with this condition, that if *Peter* ceased to occupy the land, he appointed *Peter McVicar*, his grandson,

To take charge of the whole place—farm and all that pertains to it, and occupy the same for his own benefit and advantage according to the forementioned restrictions and conditions until the heir be of lawful age as, aforesaid.

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The first, and, as I think, the only devise in the will of the lands in question is to a great grandson, not in being, or who might never exist. There is, therefore, no one to take or hold the title, and, if there were nothing further contained in the will, the title would on the death of the testator devolve on the heir-at-law. He could only be divested by a good devise to operate in favor of some other capable of holding. Was there, then, such a devise to *Peter* and his heirs? The will does not contain such, as I read it. The testator, no doubt, intended and so ordered, that on certain conditions and with certain restrictions *Peter* was to *occupy*, but not for his life, but only so long as he resided upon the property. With that condition annexed to his right, not to *own*, but merely to *occupy*, it surely could not be construed as placing him in a position to sell and give a good title immediately on the death of the testator. If he were a tenant in tail he could do so. If he could, where then would be the restrictions and prohibitions of the will against the continuance of his occupancy. The right of occupancy of *Peter Mc Vicar* was based on the failure of *Peter* to reside on the property, and it was to be on exactly the same terms. Suppose *Peter*, the son, died without male offspring before the testator, and that *Mc Vicar* took his, *Peter's*, position as occupant of the property, could he for a moment withstand the right of the heir-at-law? No one will contend that he could. He was to occupy (if he lived so long) "until the proper heir be of lawful age, as aforesaid." He could not, for a moment, be said to have an estate in fee tail, and still his *occupancy* was to endure as long as that of *Peter* and his male offspring *Peter* had no life estate under the will, for the devise, if any at all, determined his occupancy and all claim upon the happening of an event mentioned in the devise, during his lifetime. The testator limited, as he had power to do, the oc-

cupancy of *Peter*, and when the event happened (as it did in this case) which was to determine it, we cannot say the testator should have ordered and willed differently. If the will gave him clearly an estate for life with a valid remainder over, we need not enquire as to the validity of the devise to the great grandson. The latter is void, amongst other reasons, because there is no legal provision for the holding of the title from the death of the testator. The intention of the testator is clear and plain, but he cannot do what the law forbids, keep the title of his property in abeyance for an indefinite period after his death. To give effect to the will in one respect would be completely to frustrate its object in every other. I cannot perceive what benefit it would be for the Respondent were we to transpose the clauses of the will as suggested, for unless provisions and words are also added, I fail to see how the transposition would alter the construction favorably for the Respondent. If the will first gave the *occupancy* merely under conditions and prohibitions to *Peter* and his heirs, until the proper heir was of age, and, pointing out the heir, made a devise to him, as is done by the will, it would not, I think, better the position. The defect is substantially in the reference to *Peter* and the lands. It cannot be construed into a devise of a fee of any kind, for the words to make it such are not in the will; and because the devise to the great grandson is inoperative, we cannot, for that reason alone, create by our judgment an estate in *Peter's* heir which the will does not create. One controlling reason is, that our doing so would not only not be in accordance with, but diametrically opposed to, the clear intentions of the testator. I am, therefore, of opinion the judgment appealed from should be reversed, and the appeal allowed with costs.

Appeal allowed with costs.

Solicitors for Appellant: *Mowat, Maclennan & Downey.*

Solicitors for Respondent: *O'Gara, Lapierre & Remon.*

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*Feb'y. 5.

June 4.

THOMAS WALLACE.....APPELLANT;

AND

WILLIAM FRASER AND THOMAS FRASER, ...RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Distress, exemption from—Replevin.

W. let an unfurnished house to one Mrs. *M.* to be used as a boarding-house. Mrs. *M.* applied to *F. & Son* for furniture, which they refused to supply unless *W.* would guarantee that it would not be distrained for rent. *W.* thereupon signed the following mem. which was delivered to *F. & Son* by Mrs. *M.*: "The bearer, Mrs. M., being about to purchase some furniture from *Wm. F. & Son*, and my rent being guaranteed, I hereby agree not to take the furniture so to be furnished by *Wm. F. & Son* for any rent that may become due." *F. & Son* then delivered the furniture to Mrs. *M.*, the said furniture to be paid for by monthly payments, and "to remain the property of *F. & Son* till paid for in full." *W.* levied upon the furniture, *F. & Son* replevied and obtained a verdict which the Court below refused to set aside.

Held,—That the mem. signed by *W.* constituted a binding contract or arrangement with *F. & Son* not to distrain, and that the judgment of the Court below should be affirmed.

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, discharging a rule *nisi* to set aside a verdict in favor of the Respondents.

This was an action of replevin, brought by the Respondents against the Appellant, to recover certain household furniture, set out and described in the pleadings and belonging to the Respondents, and which had been seized by the Appellant for rent alleged to be due to him, in respect of the house occupied by one Mrs. *C.*

*PRESENT:—Sir William Buell Richards, Knight, Chief Justice, and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

Maurice, in whose possession, in said house, the said furniture was at the time of the seizure.

The declaration is in the ordinary form in cases of replevin under the *Nova Scotia* law and system of pleading, and the pleas are five in number.

The Defendant pleaded:—

" First, that he never detained the goods mentioned in the Plaintiffs writ.

Second, that the said goods were not the goods of the Plaintiffs, but were the goods of one *Emily Maurice*.

Thirdly, that the said goods were not the goods of the Plaintiffs, but were the goods of one *Creighton*, as Assignee of the said *Emily Maurice*.

Fourthly, that the said goods were not the goods of the Plaintiffs.

Fifthly, that one *Emily Maurice* occupied a part of a building or house as tenant to the said Defendant, at a yearly rent of $500, payable quarterly—that previously to the time of the alleged detention of the said goods there was due and owing to the Defendant, from the said *Emily Maurice*, $203, being a balance due on two quarters rent, which fell due respectively on the first day of November and February, then last past, in respect of the said building or house so occupied and leased by the said *Emily Maurice* from the said Defendant —that the said goods were in that part of said dwelling house so occupied by the said *Emily Maurice*, and the said rent being so due and in arrear, the said Defendant distrained among other goods the said goods, being then in the said dwelling house, for the said rent, as he had a right to do, and the Defendant was justly detaining them as and for such distress for the said rent so due and in arrear at the time of the issuing of said writ, which rent was at the time of the issuing of said writ still due and unpaid, which is the detention complained of in said writ."

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The Respondents joined issue on the first four pleas, and replied to the fifth plea on equitable grounds, that the Appellant, by fraud and misrepresentation, by a certain paper writing directed to the Respondents, induced the Respondents to furnish the said furniture to the said Mrs. *Maurice*, who was then a tenant of the Appellant, agreeing in said paper writing, that he, the said Appellant, would not distrain upon any furniture that the Respondents might so supply to the said Mrs. *Maurice*, in consequence, as stated in said paper writing, of his, the said Appellant's, rent for said house and premises having been secured to him, but that in violation of his said agreement and representation, he, the said Appellant, had seized and levied upon the furniture supplied to the said Mrs. *Maurice* by the Respondent, in consequence of said agreement, which was the seizure relied upon in the Appellant's fifth plea.

The evidence showed that Mrs. *Maurice*, desiring to purchase some furniture, applied to the Respondents, who were furniture dealers in the City of *Halifax*, for that purpose. The Respondents refused to supply the furniture without a guarantee or agreement by the Appellant, that the furniture, if supplied to Mrs. *Maurice*, would not be seized or taken for the rent of the premises occupied, or to be occupied, by the said Mrs. *Maurice*. Thereupon the following paper was signed by the Appellant, and delivered to Respondents:

"The bearer, Mrs. *Maurice*, being about to purchase some furniture from *William Fraser & Son*, and my rent being guaranteed, I hereby agree not to take the furniture so to be furnished by *William Fraser & Son* for any rent that may become due.

"T. J. WALLACE."

23rd June, 1874."

The articles were then given to Mrs. *Maurice* upon

the terms mentioned in the following paper, signed by her :—

" *Halifax, N. S.*, June 23rd, 1874.

Received from *W. Fraser & Son* the following articles of furniture, for which I am to pay $220.25, or more, in monthly payments of twenty dollars each month from date ; the said furniture to remain the property of *W. Fraser & Son* till paid for in full, and in the event of non-payment monthly, the said *W. Fraser & Son* can take the furniture back.

(Sgd.) " EMILY MAURICE."

The goods were specified.

The evidence further showed that Mrs. *Maurice* made some payments, but that a large sum was still due at the time Appellant seized the furniture for his rent.

The Appellant offered no evidence, but moved for a non suit, which was refused.

The jury found a verdict for the Respondents, and to set aside this verdict a rule *nisi* was obtained by the Appellant, which, after argument, was discharged. The grounds of the Appellant's motion for the rule were :—

First, because the said verdict was against law. Secondly, because it was against evidence. Thirdly, because the Jury were misdirected by the Judge who tried the cause, the pleading not having been brought to their notice, nor the fact that the replication admitted the Defendant's plea of justification or avowry. Also, in their not being told that there was not evidence to sustain the replication, or that there was no consideration for the agreement signed, or no sale of goods to Mrs. *Maurice*, as contemplated by the agreement, and also for other causes of misdirection. Fourthly, for the improper reception of testimony on the part of the Plaintiffs. Fifthly, because there was no evidence to support the replication of the Plaintiffs. Sixthly, because the issue was not a correct issue, but contained a repli-

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cation pleaded improperly and without authority. Seventhly, because the Judge accepted an issue and went into the trial, which issue did not agree with the record, and although protested against and objected to by the Defendant. Eighthly, because the issue contained a replication, pleaded after the lapse of more than thirty days from the filing and serving of the pleas without the consent of the Court, or a judge, or of the Defendant.

A judgment was pronounced by the Supreme Court of *Nova Scotia* on the 6th March, A.D., 1877, discharging the rule for a new trial. Against the latter judgment the Appellant appealed to the Supreme Court of *Canada*.

Mr. *Wallace*, Appellant, in person:—

The Plaintiffs did not perform their part of the agreement, which was an agreement contemplating an unconditional sale of furniture to Mrs. *Maurice*. The agreement between *Fraser & Son* and Mrs. *Maurice* is indefinite as to price—it says $220.25, *or more.*

The agreement signed by Appellant was in the nature of a guarantee and should be construed strictly. A notice of acceptance of the agreement was necessary, and notice of the terms upon which goods were furnished should have been given. If Respondents sold goods as was contemplated by paper signed by Appellant, their remedy, if any, would be in the nature of an action on the case and not in replevin, as they would, in the event of a sale, have in right of property or of possession. And if they did not sell absolutely, they did not do what they were obliged to do to obtain any rights under that paper, and could not sustain any action. *Benjamin* on sales (1); *Parsons* on contracts (2); *Addison* on contracts (3). There was misdirection

(1) Pp. 227, 626, 630, 658, 660, 667, 685. 727.

(2) Vol. 1, 439 et seq.

(3) 7th Ed. pp. 226, 235.

on the part of the learned judge, who, in his charge, gave a positive direction to find a verdict against Appellant. *Hilliard* on new trials (1). The replication being pleaded after 30 days should have been pleaded by leave of the Court or a Judge. *Rev. Stats. Nova Scotia,* ch. 94, sec. 142.

Mr. *Ferguson,* for Respondents:—

Plaintiffs were in a position to bring replevin. This is shown by the mem. of sale. It is proved that it was on the faith of the representation given by Mr. *Wallace* that the goods were sold; and that the sale was not an absolute one makes no difference. The facts constitute an estoppel in *pais. Addison* on contracts, last *American* ed (2); *Packard* v. *Sears* (3); *McCance* v. *L. & N. W. Ry. Co.* (4); *Freeman* v. *Cooke* (5); *Walker* v. *Hyman* (6); *Erie Ry. Co.* v. *Delaware Ry. Co.* (7); *Trowbridge* v. *Matthews* (8); *Gregg* v. *Wells* (9); *Regnell* v. *Lewis* (10).

It is not necessary to plead an estoppel in *pais.* Evidence of it may be given under the general issue: *Taylor* on evidence, 4th Eng. ed. (11); *Bullen & Leake's* Precedents of Pleadings under title of "Estoppel." There is nothing to show that any exceptions were taken to judge's charge: *Gibbs* v. *Pike* (12); *Green* v. *Bateman* (13); *Cotterell* v. *Hindle* (14). As to waiving right to distance *Horsford* v. *Webster* (15).

Mr. *Wallace,* in reply.

(1) Pp. 274 et seq.
(2) Sec. 249.
(3) 6 Ad. & E. 474.
(4) 13 H. & C. 343.
(5) 2 Ex. 654.
(6) 1 Ont. Ap. Rep. 345.
(7) 21 N. J. Equity 283.
(8) 28 Wis. 628.
(9) 10 Ad. & E. 90.
(10) 15 M. & W. 517.
(11) Pp. 104, 105.
(12) 1 Dow. N. S. 409.
(13) L. R. 4 H. L. 591.
(14) L. R. 2 C. P. 470.
(15) 1 C. M. & R. 696.

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*June 4.

RITCHIE, J.:—

This was an action of replevin. The circumstances were very simple indeed. The Defendant owned property in the City of *Halifax*, and he was about to lease it to a Mrs. *Maurice*, she intending to keep a boarding house and restaurant, and it became necessary, of course, in the occupation of a house under any circumstances, but more particularly one of that character, to have furniture, and a quantity more than would be otherwise necessary. She had not that furniture, and was about making an arrangement with *Fraser & Son*, the Plaintiffs in the present action; and *Fraser & Son*, fearing that if they gave her the furniture it might be distrained for rent, as it was not to be paid for immediately, insisted that the property should remain in them, and required before delivery that they should have a guarantee from the Defendant, the landlord, that the property should not be liable to be distrained for rent. Mrs. *Maurice* procured from Mr. *Wallace*, the landlord, and delivered to the Plaintiffs, the following written undertaking:—

The bearer, Mrs. *Maurice*, being about to purchase some furniture from *William Fraser & Son*, and my rent being guaranteed, I hereby agree not to take the furniture so to be furnished by *William Fraser & Son* for any rent that may become due.

T. J. WALLACE.

23rd June, 1874.

Before acting on this guarantee, Mr. *James Fraser*, on behalf of the Plaintiffs, called upon Mr. *Wallace* with the order or authority signed by him, and he recognized it as his own, and stated that it was in his handwriting, and in no way repudiated, either its existence as an instrument from him, or its binding effect as indicated upon its face. The Plaintiffs, after getting the paper, delivered the furniture on the faith of it to Mrs.

* The Chief Justice was absent when judgment was delivered.

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Maurice, and it was put into the house leased by the Defendant, their agreement with Mrs. *Maurice* being in these words:—

Received from *W. Fraser & Son* the following articles of furniture, for which I am to pay $220.25, or more, in monthly payments of twenty dollars each month from date; the said furniture to remain the property of *W. Fraser & Son* till paid for in full, and in the event of non-payment monthly, the said *W. Fraser & Son* can take the furniture back.

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The goods were specified and the receipt was dated Halifax, N.S., June 23, 1874.

The rent being in arrear, the Defendant subsequently distrained, and the goods not having been paid for, Plaintiffs replevied them as their property, and as having been distrained in defiance of Defendant's undertaking to the contrary.

The Supreme Court of *Nova Scotia* sustained the Respondents' contention in this case, and the Defendant has now appealed to this Court, and desires that this Court should hold that that furniture was distrainable while on the premises. I think there is not the slightest pretence for any such contention. It is clear that the landlord had a substantial interest in getting Plaintiffs to furnish his tenant with furniture to enable her beneficially to occupy the premises and carry on her business as a restaurant and boarding house keeper, for which a certain amount of furniture was indispensable, and so enable her to pay her rent; and having taken the precaution to get his rent guaranteed, he appears to have been willing to rely on this guarantee, and to waive his right of distress so far as Plaintiffs' goods were concerned. If that guarantee has proved valueless, surely that can be no reason why his undertaking not to distrain should be likewise of no avail to protect the furniture of Plaintiffs from seizure. This instrument given by Defendant is not a contract between Mrs.

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Maurice and Mr. *Wallace*, but evidently a contract or arrangement entered into between Mr. *Wallace* and Messrs. *Fraser & Son*, because he does not say: "I agree with Mrs. *Maurice* that this property shall be free from distress;" and so make a contract between Mrs. *Maurice* and himself, but he says: "The bearer, Mrs. *Maurice*, being about to purchase furniture, &c.," showing he gave it to her only as a carrier or bearer. To whom then did he intend it to be delivered, and with whom did he intend to stipulate? Evidently, the Respondents, because he goes on to mention their names, and agrees not to take the furniture so to be supplied by them. This Defendant sends by Mrs. *Maurice* to *Fraser & Son*, and thus agrees with them, that, if they put their furniture on the leased premises, it shall not be distrainable for rent.

A number of points were raised. One chiefly relied on was, that this guarantee only protected furniture which was to be sold, and in which the property passed from Messrs. *Fraser & Son* to Mrs. *Maurice;* but the whole scope of the arrangement is, in my opinion, inconsistent with that contention; for, if the property was to pass out of *William Fraser & Son* and into Mrs. *Maurice*, and so *W. Fraser & Son* were to be denuded of all interest in the property, what possible benefit could it be to Plaintiffs that it should not be distrained, because it would be Mrs. *Maurice's* and no longer their property. Then, it is contended, that this is not a sale at all—not such a sale as was contemplated. I think it is just what was contemplated, by which the tenant was to obtain furniture on certain terms, but the property was to remain subject to the vendor's right to resume possession of it on certain conditions, and the form they adopted amounted to this: "I retain the property in these goods solely as a security for the payment of the money." I think that Mr. *Wallace*, having stated

that his rent was guaranteed, and having agreed, if the Respondents' supplied this property, that he would not distrain, and they, the Respondents, having, on the faith of that, supplied the furniture, *Wallace* had no right to interfere with the property; his allegation that the guarantee for his rent became worthless, is neither a justification nor excuse for distraining in direct opposition to his agreement, and affords no reason why the guarantee he gave Messrs. *Fraser & Son* should not be valid and binding. I think, if Mr. *Wallace* could be allowed to get property under such circumstances on his premises, and then subsequently to distrain on it, it would, as Mr. Baron *Gurney* said in the case of *Horsford* v. *Webster* (1), "just be a trap in which to catch the man's property." There are many authorities in reference to this matter.

In *William's* notes to *Saunders* (2), *Poole* v. *Longueville* and others, we find:—

It was held, that cattle going to *London*, and put into a close with the consent of the landlord, and leave of the tenant to graze for a night, might be distrained for rent; *Fowkes* v. *Joyce*, 2 *Vent.* 50, but the owner of the cattle was afterwards relieved in equity on the ground of fraud in the landlord, who had consented to the cattle being put into the close, and afterwards distrained them for rent, and he was decreed to pay all the costs both of law and equity. And it should seem that at this day a Court of law would be of opinion, that cattle belonging to a drover being put into a ground with the consent of the occupier to graze only one night, on their way to a fair or market, were not liable to the distress of the landlord for rent.

In *re Giles* v. *Spencer* (3), *Willes*, J., delivering the judgment of the Court, says:—

In *Horsford* v. *Webster* (4), no difficulty was suggested on the Bench or at the bar as to the specific effect of an agreement by a landlord not to distrain the goods of a stranger upon the land.

Bullen on Distress (5), says:—

(1) 1 Cr. M. & R. 702.
(2) 2 Vol. p. 675.
(3) 3 C.B. N.S. 244; 3 Jur. N.S. 820.
(4) 1 C. M. & R. 699.
(5) P. 171.

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The right of distress for rent, of whatever kind, may be taken away or suspended by an express or implied agreement not to distrain. Thus, where certain eatage, amongst other things, belonging to the tenant of a farm, was about to be sold by a creditor under a bill of sale, but before the sale took place the landlord put in a distress for rent; whereupon it was agreed that the sale by the creditor should proceed, and the landlord be paid his arrears out of the proceeds of the eatage and other things; the Court held that a contract by the landlord might be inferred not to distrain the cattle of a purchaser put on the land to consume the eatage. *Horsford* v. *Webster*, 1 C. M. & R. 699.

So in the case of *Cairncross* v. *Lorimer* (1), The Lord Chancellor says:—

The doctrine will apply which is to be 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 had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct.

I had not any doubt, individually, upon the case when it was argued, and I have had no doubt since upon it. I am satisfied that that instrument was given to the Respondents for the purpose of inducing them to put that property on the premises under the assurance and undertaking of Mr. *Wallace* that his rent was guaranteed to him, and he would not distrain upon it. I do not propose to refer to all the cases in point, because they are familiar to all of us. Law and justice are both so unquestionably with the Respondents, that I am astonished the case should ever have been brought here.

I have, therefore, no hesitation in expressing the opinion that the judgment ought to be affirmed and the appeal dismissed with costs.

(1) 3 Macqueen H. L. C. 829.

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STRONG, J. :—

The only point on which I had any doubt was as to the sufficiency of the defence set up by the equitable plea and whether the Plaintiff's remedy was not a cross action. It occurred to me that, the property in question being chattels, a Court of Equity might have refused to take jurisdiction. I think, however, on consideration, that it is clear there was jurisdiction in the present case. Equity will not interfere to restrain a sale of chattels, unless they are of peculiar value, or some fiduciary relationship exists between the parties. In the present case, however, the last reason applies, for by the agreement between the Plaintiffs and Mrs. *Maurice*, a trust was constituted of these chattels, and the Defendant was a party bound by that trust. That a Court of Equity will always interfere to protect fiduciary ownership of chattels of any kind, is a proposition for which many authorities may be cited. I need only refer to two: *Wood* v. *Rowecliffe* (1); *Pooley* v. *Budd* (2).

Lord *Cottenham* says, in *Wood* v. *Rowecliffe* :—

> When a fiduciary relationship subsists between the parties, whether it be the case of an agent, or trustee, or a broker, or whether the subject matter be stocks, or cargoes, or chattels of whatever description, the Court will interfere to prevent a sale, either by the party interested in the goods, or by a person claiming under him through an alleged abuse of power.

These authorities are conclusive, and it is most satisfactory to me to be able to concur in the judgment of the Court dismissing this appeal with costs.

TASCHEREAU and FOURNIER, J. J., concurred.

HENRY, J. :—

I concur in the judgment. I think the reason given by

(1) 3 Hare 304; 2 Phillips 382. (2) 14 Beav. 34.

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the Defendant for avoiding the effect of the document he signed---that the sale was a semi-conditional one—cannot be maintained, because his document was a general one. It had an object—to keep property sold by *Fraser* on conditions to that woman free from his right to distrain under any circumstances. I consider with my brother *Ritchie*, that this bargain was virtually made with *Fraser & Son*. Their names are mentioned in the body of it as the persons who were to see it, and be governed by it, and I think it is just the same as if directed to them at the top or bottom of the letter. The substance is exactly the same. He agrees---and it appears to me it must be with *Fraser* he agrees. Therefore, I think the party, by what he did, induced *Fraser & Son* to sell this furniture and place it in possession of this woman in the house of the Defendant, and, therefore, having induced them to place it in that position, and having agreed that he would not interfere with it when so placed, I think he is estopped from doing that which he himself undertook he would not do. I think, in regard to all the points that were raised on the part of the Plaintiffs and of the Defendant, the judgment should be in behalf of the Plaintiffs.

Appeal dismissed with costs.

Solicitor for Appellant: *Thomas J. Wallace.*

Solicitor for Respondents: *C. J. McDonald.*

RODERICK McLEAN.....APPELLANT; 1878

*Feb'y. 6, 7.

AND June 4.

BENJAMIN BRADLEY .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Absent and absconding debtors Act of Nova Scotia, Ch. 97, Rev. St. of N. S.—Attachment—Demurrer—Conversion by Sheriff—Corporation, sale by—Justification under Order of Court—Seal.

One *H.* instituted proceedings against the *L. C. M. Company*, the officers of which resided in the *United States*, but which did business in *Nova Scotia*, and, on the 25th May, 1872, caused a Writ of Attachment to be issued out of the Supreme Court at *Amherst*, under the absent and absconding debtors Act of *Nova Scotia*, (1) directed to the Appellant, the High Sheriff of the County of *Cumberland*. Under this Writ, the Appellant seized certain chattels, as being the chattels of the said Company. On the 12th November, 1872, an order was issued out of the said Court, directing the Appellant to sell, and the Appellant did sell said chattels as being of a perishable nature. On the 11th December, 1874, a discontinuance was filed in the said cause by *H.* On the 30th May, 1876, the Respondent commenced an action against the Appellant for the conversion of the chattels in question, contending that the Company, having failed in its operations and being desirous of winding up its affairs, and being indebted to him, had sold and conveyed to him the said chattels by a certain memorandum of sale, dated July 5th, 1867, "signed on behalf of the Company," by one "*Hawley*, agent." To this memorandum a seal was affixed which did not purport to be the seal of the Company. The Appellant pleaded to the Declaration, that he did not convert; goods not Plaintiff's; not possessed; and also a special plea of justification, setting forth the proceedings by *H.*, and that he had seized and sold the goods as the goods of the Company, in obedience to the attachment and order issued in said proceedings. The Respondent replied, setting up the dis-

*PRESENT:—Sir William Buell Richards, Knt., C.J., and Ritchie, Strong, Taschereau, Fournier and Henry, J.J.

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continuance. The Appellant rejoined that the proceedings were not discontinued, and that the discontinuance was not filed till after the sale. He also demurred, on the ground that being bound to obey the order of the Court, he could not be affected by the discontinuance. At the trial a verdict of $500 damages was rendered for Respondent. The Appellant obtained a rule *nisi* to set aside verdict, and the rule and demurrer were argued together. The Court below refused to set aside the verdict and gave judgment for Plaintiff on the demurrer.

Held,—That the appeal should be allowed; that the plea of justification showed a sufficient answer to the declaration; that the replication was bad, and that the verdict must be set aside and judgment be for the Defendant on the demurrer.

Ritchie, J., dissented, on the ground that the seizing under the attachment, and not the sale, constituted the conversion; that there was sufficient evidence to show that the chattels in question had been transferred by the Company to Respondent, and that under Sec. 15, ch. 53 of the *Revised Statutes of Nova Scotia*, the sale of the chattels did not require to be under the corporate seal of the Company.

Per *Strong*, J.: The sale, and not the seizure, was the conversion complained of, and to this the order of the Court was a sufficient answer. *Semble*, a mere taking of the goods of a third person under a *mesne* attachment against a Defendant to keep them *in medio* until the termination of the action is not a conversion.

Per *Henry*, J.: The order for sale would not have been a justification for the original levy on the goods, as well as for the sale, if they had been the property of the Respondent, but the evidence failed to show a sale by the Company to the Respondent. Such a sale would require to be under the corporate seal of the Company, and did not come within the meaning of Sec. 15, ch. 53 of the *Revised Statutes of Nova Scotia*.

THIS was an appeal to the Supreme Court of *Canada* from the judgment of the Supreme Court of *Nova Scotia*, giving judgment on demurrer in favour of the Plaintiff (Respondent), and discharging a rule *nisi*, granted to the Defendant (Appellant), to set aside the verdict for the Plaintiff.

The *Lawrence Coal Mining Company*, a body corpo-

(1) Ch. 97 Revised Statutes of Nova Scotia, 4th Series.

rate, incorporated out of *Nova Scotia*, in the State of *Massachusetts*, in the *United States of America*, under the Joint Stock Companies Act of *Nova Scotia*, commenced coal mining operations in 1862 on a colliery property at or near river *Hebert*, in the County of *Cumberland*, in the Province of *Nova Scotia*, purchased from one *George Hibbard*, and continued to work the same until 1865, when the Company became hopelessly insolvent. *Hibbard*, the former owner, who resided on the spot, continued from the outset to be a Director, and was the only resident Director in *Nova Scotia*, and was Managing Director from 1862 up to the spring of 1867, excepting only one season in 1864, and as such had charge of all the property of the Company. He also attended all the annual meetings of the Company held at *Boston*.

To enable the Company to carry on its operations, the Company, through *Hibbard* as Managing Director, obtained from *Bradley* a loan of $10,000, for which *Hibbard*, as Managing Director, gave a note or notes and a warrant to confess to *Bradley*, the Respondent, on which judgment was entered up by *Bradley* for $10,022.75, for principal and interest, on the 11th September, 1865. In 1866 the real and personal property was advertized for sale under Respondent's judgment, and the real estate was sold to him for $3,975, leaving $6,025 still due; the personal property was not sold, and remained on the premises until July, 1867, when *Hawley*, as agent of the Company, transferred it to Respondent, who, in consideration of the transfer, gave up notes and claims for about $1,500. *Hawley*, at the same time, gave the following memorandum of sale (filed in the case as exhibit A):—

"RIVER HEBERT, CUMBERLAND COUNTY,

"NOVA SCOTIA, July 5th, 1867.

"Know all men by these presents, that *Benjamin*

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Bradley, of *Boston*, Commonwealth of *Massachusetts*, *United States of America*, has this day purchased through *T. R. Hawley*, authorized to sell the same, the following described property, with the exception of two horses previously sold by his representative, *Ezra C. Dillingham*.

"Signed on behalf of the Company by

"T. R. HAWLEY, Agent, (Seal).

"Signed in behalf of *Benjamin Bradley*, the purchaser, by

"EZRA C. DILLINGHAM, (Seal)."

Witness: { GEORGE MOFFAT, (Seal). NATHAN J. HOEY, (Seal). JESSE E. HOEY, His x Mark. (Seal).

There was no seal to this document purporting to be the seal of the Company, nor had any resolution been passed by the shareholders authorizing a sale by *Hawley*, but at an adjourned meeting of the Company, held on the 26th February, 1866, it had been, on motion, voted that Messrs. *Hawley*, *W. G. Howe* and *Alden*, should be and were thereby authorized to sell all the real and personal estate, and also the leasehold of the Company for such sum or sums, and on such terms as in their judgment would be for the best interest of the Company, and pay the proceeds of such sale into the hands of the Treasurer for the benefit of the creditors of said Company, and if the amount of such sale exceeded the debts the balance to be paid *pro rata* among the stockholders.

From the date of the sale, *Bradley*, and others claiming under him as proprietors, employed an agent to take care of the property, and paid all taxes and expenses connected with it. The mem. of sale was delivered by *Hawley* to *Alden*, who acted as Secretary of the Company.

No meetings of the Company were held subsequent to that of the 26th February, 1866, until December 30 and 31, 1874, when the Company, being still largely indebted to Respondent on his judgment, by a resolution unanimously adopted by the shareholders present, further resolved that all the interest of the Company in the mining lease of the Company be transferred to Respondent.

On the 25th May, 1872, *Hibbard*, who claimed $1,760 from the Company, brought an action against the Company, and caused a writ of attachment to be issued out of the Supreme Court at *Amherst*, under the absent or absconding debtors Act of *Nova Scotia* (1), directed to the Appellant, as High Sheriff of the County of *Cumberland*, requiring him to seize, and in obedience to the writ the Appellant did seize, certain chattels as being the chattels of the said Company.

On the 12th November, 1872, an order was issued out of the said Court, directing the Sheriff to sell the said chattels, as being of a perishable nature within the meaning of sec. 6, of the last mentioned Act ; and they were sold by the Sheriff.

On the 11th December, 1874, a discontinuance of the cause "and all proceedings thereunder," was entered in the action brought by *Hibbard* against the Company.

On the 30th May, 1876, the Respondent, contending that the chattels in question were his property, commenced an action of trover against the Appellant, the Sheriff, for the conversion of the said chattels.

The Appellant pleaded to the declaration :—1st. That he did not convert. 2nd. That goods were not the property of the Plaintiff. 3rd. Not possessed. And 4th. A special plea of justification setting forth the proceedings by *Hibbard*, against the *Lawrence Coal Mining Com-*

(1) Rev. Stat. *Nova Scotia*, 4th series, ch. 97.

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pany, and that the Defendant, as Sheriff, under the said writ of attachment, and the said order made in such proceedings, seized and sold the chattels in question as and being the chattels of the Company.

The Plaintiff replied to the fourth plea, that after the proceedings aforesaid the said proceedings were discontinued.

The Defendant rejoined that the proceedings were not discontinued, and that the discontinuance was not filed till after the sale in the fourth plea mentioned.

He also demurred to the replication, on the ground that, being bound to act in obedience to the order of the Court, he could not be affected by a discontinuance of a suit under which property was sold.

The Plaintiff joined in demurrer.

The issues of fact were tried at *Amherst* on the 16th October, 1876, before the Chief Justice, Sir *William Young*, and a jury, when a verdict was rendered for the Respondent for five hundred dollars damages.

The Appellant obtained a rule *nisi* to set aside the verdict, and the said rule *nisi* and the demurrer were argued together.

The Court below, after argument, gave judgment refusing to set aside the verdict, and, on the 2nd April, 1877, a rule was made ordering that the rule *nisi* be discharged with costs, and that the Plaintiff have judgment of the demurrer with costs.

The Appellant, thereupon, appealed to the Supreme Court of *Canada*.

Mr. *Gormully*, for Appellant :—

The Respondent claims title to the chattels in question by a transfer or conveyance thereof from the *Lawrence Coal Mining Company*. If once admitted to be the property of the Company, they must so remain until divested. The principal question is whether

there was an actual sale of the goods; whether exhibit A had the effect of transferring the chattels to *Bradley*; I contend it had not. That document must operate either as a contract or conveyance. If it operates as a contract, it must be regarded as a contract under seal, or as a simple contract. It is not binding on the Company, because it does not purport to bind them, and because the seal affixed is not the corporate seal of the Company, which was necessary, there having been evidence of the existence of one. Sec. 15, ch. 87, *Rev. Stat., N. S.*, 3rd series, only establishes as a rule of statute law what was formally a rule of common law. It has been held that as to personalty a corporation could sell it, but whether they could do so, except under seal, is another question.

The Statute says: "Acts within the scope of their charter." This sale, purporting to convey all the property, and showing an intention to abandon the object for which the Company was incorporated, should have been under seal.

Hawley never was duly authorized. There never was a meeting respecting the sale, and no evidence of that concerted action which was necessary.

D'Arcy v. *The Tamar, Kit Hill and Callington Railway Co.* (1); *Ridley* v. *Plymo Grinding Co.* (2). There is no evidence that the Company delegated their power; and further, if they did delegate it, they had no right to do so. The last delegation of authority is to *Hawley*, *Howe* and *Alden*—and this was a power which must have been exercised by all three, and was not a power which could be delegated. The Respondent was bound to know what was being done. *Exparte Brown* (3).

The transaction was a fraudulent one as against the

(1) L. R. 2 Ex. 158. (2) 2 Ex. 711.
(3) 19 Beav. 97.

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statute of *Elizabeth* (1), there was no change of possession, and this was a document which should have been registered under the statute.

The learned counsel then proceeded to argue that the learned judge who tried the action had improperly admitted evidence and had misdirected the jury; and that as to the demurrer, the Appellants fourth plea was good in law, and replication bad because it admits and does not sufficiently avoid the plea.

Mr. *Haliburton*, Q. C., for Respondent:—

The Company became indebted to *Bradley* for an advance of $10,000. In 1865, they find themselves insolvent. *Hibbard*, from whom the Company purchased their mine, was the only director resident in *Nova Scotia*, and was the only person up to this date who had any benefit from the Company. He attended all the meetings and was familiar with all that was done. In 1865, meetings were called, but nothing was done, and at last *Bradley* enters up judgment and issues execution. He unwisely allowed the matter to stand over to save Sheriffs' fees, and a conveyance became necessary from the Company. Five days after the sale of the personal property, *Hibbard* renders an account, showing $25 due him. The Company set off against that the rent, and considered they had paid every body; they supposed all claims were paid both in *Canada* and the *United States*. The Company authorized *Hawley* to go to *Nova Scotia* to sell the property.

[RITCHIE, J.:—Will you show us from the evidence that he was authorized by the Company?]

There is no one at present claiming the property except *Bradley*. The Company did not claim it, nor any shareholder or director on behalf of the Company.

[THE CHIEF JUSTICE:—A question has been raised

(1) Twyne's case 1 Coke 80; 1 Sm. L. C. 1.

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which seems important. This property was sold by order of the Court as perishable property. How can the Sheriff be held responsible for selling this specific property under the order of the Court?]

I am prepared to show that the Sheriff, under the circumstances, was not justified in selling.

Where there is a seal, the seal must be presumed to be the seal of the Company. *Ontario Salt Co.* v. *Merchants Salt Co. (limited)* (1).

[RITCHIE, J.—Where is the evidence that *Hawley* had any right to use the seal of the Company?]

It is to be presumed he had the right.

[RITCHIE, J.:—What evidence raises this presumption?]

The Company took this man's money, which was the consideration for the sale.

[RITCHIE, J.:—If you can show that this party was professing to act for the Company and entered into this sale, and afterwards the Company had known of the facts and received the money, you will have good evidence that the sale was the sale of the Company.]

In 1874 a general meeting of the Company was called, and it is to be presumed the Company ratified the action of Mr. *Hawley*. When proceedings have been manifestly illegal between a Company and an individual, and the Company choose to continue these dealings, that is a ratification by the Company of such dealings.

[HENRY, J.:—The difficulty seems to me to be that there were no meetings, and no Company.]

It is to be presumed all necessary by-laws were passed to continue the Company, and the meeting of 1874 was a ratification of what was done before.

The transfer purporting to be signed and sealed by *R. Hawley*, as their agent, was given to the Secretary of

(1) 18 Grant 555; Rev. Stat. Nova Scotia, 3rd. series, ch. 87, s. 1.

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the Company, and was never repudiated by them, and *Bradley* continued thenceforth to be in undisputed possession of the property and paid taxes on it, and employed an agent to take charge of it.

Even though the Company could not contract directly except under seal, yet they could without the corporate seal appoint an agent, whose acts and contracts within the scope of his authority were binding on the Company. 3 *P. Wms.* 419. 1 *Fonb.*, 305 ; *Phil.* Ed , n. o. *Abbott's* Dig. of Law of Corporations (1).

The sale was not *ultra vires*, but was a lawful means of making the most of the assets of the Company to discharge its liabilities. *Featherstonehaugh* v. *Lee Moor Porcelain Clay Co.* (2) ; *Burrell* on assignments, 36.

The promises and engagements of a Company may as well be implied from its acts and the acts of its agent as if it were an individual. *Abbott's* Dig. of Law of Corporations (3).

In a case like the present the law presumes *omnia rite acta* and, unless the contrary appears, that all necessary by-laws and resolutions have been passed necessary for the validity or ratification of the acts performed by the Company's agent. *Field* on Corporations (4).

The Company, after notice to it of sale by *Hawley*, did, by their acquiescence for so many years in the possession of Respondent of the personal property sold to him, by their accepting therefor notes, &c., to the amount of $1,500, and by their unanimous vote in 1874 in further satisfaction of the balance due Respondent, that the lease of the mine should be transferred to him, ratify and confirm the sale of the personal property to Respondent by *Hawley*, as their agent ; and it must be assumed that all necessary by-laws and resolutions had been passed and adopted to ratify and confirm the sale

(1) Pp. 5 and 6.
(2) 35 L. J. N. S. 84.
(3) 578, S. 96-8, 579 S. 100-5.
(4) P. 287 & 296.

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by *Hawley*, as agent of the Company. To enforce an executory contract against a corporation it may be necessary to show that it was by deed: but where the corporation has acted upon an *executed contract*, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. *Doe dem. Pennington* v. *Taniere* (1); *Wilson* v. *Miers* (2); *Royal British Bank* v. *Turquand* (3); *Reuter* v. *Electric Tel. Co.* (4); *Australian Steam Navigation Co.* v. *Marzetti et al* (5); *Crook* v. *Corporation of Seaford* (6); *Buffalo and Lake Huron Railway Co.* v. *Whitehead* (in appeal) (7); *Brewster* v. *The Canada Co.* (8); *Mayor of Stafford* v. *Till* (9); *Angel & Ames* on Corporations (10); *Bigelow* on Estoppel (11).

If any question could be raised as to the power of the Company to sell, or the agency of *Hawley*, or as to the validity of the sale by him, or as to the ratification of such agency, or of such sale by the Company, it is settled by the provisions of the *Nova Scotian* Act respecting factors and agents. *Rev. Stat. Nova Scotia*, Fourth Series, App. 63, secs. 1—10.

The Respondent further contends that Appellant's plea of justification is bad in substance, for the following reasons:—

Because it appears by it that the attachment under the *Nova Scotian* Act respecting absent or absconding debtors, was issued against "a body corporate doing business in *Nova Scotia*," the said Act not extending to such a company, but only to companies "incorporated

(1) 12 Q. B. 998, 13 Jur. 119, 18 L. J. Q. B. 49.
(2) 10 C. B. N.S. 367.
(3) 6 E. & B. 331.
(4) 6 E. & B. 347.
(5) 24 L. J. Exch. 273.
(6) L. R. 6. ch. App. 554.
(7) 8 Grant 157.
(8) 4 Grant 443.
(9) 4 Bing. 75.
(10) P. 172.
(11) 477, 447 N. 2.

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out of the Province and doing business by an agent within the Province." *Rev. Stat. Nova Scotia*, Fourth Series, ch. 97.

Because, even if sec. 6 of the said Act refers to such foreign companies doing business in *Nova Scotia*, it does not appear that the goods in question were exhibited to the Sheriff as the goods of the Company, nor does it appear that they were valued by two sworn appraisers, or that the amount of appraisement was endorsed on writ of attachment, or that the Sheriff levied on such part of the goods as would be sufficient to refund the sum so sworn to, &c.

Because, if sec.7 is also applicable to such foreign companies, it does not appear that notice of such assessment was given to the agent of the Company, or that the three days were allowed him to find security; nor does it appear that the prothonotary had any power to issue the order for sale in consequence of the absence of a judge. *Rex.* v. *Croke* (1).

Because the plea of justification does not show that the Sheriff has made a return of the writ of attachment, without which he cannot be allowed to justify in such a case. Rev. Stat. Third Series, ch. 40, s. 13. *Rowland* v. *Veale* (2); *Cheaseley* v. *Barnes* (3); *Freeman* v. *Bluett* (4); *Williams* v. *Babbitt* (5); also, American cases cited in 2 *Greenleaf* on Ev., 597.

And Respondent further contends:—That as it is only service of summons on the agent of a foreign company doing business in the Province by an agent, which the statute says "gives jurisdiction to the Court," and as it appears that the summons was served on the agent of Respondent, and not of the company, the Court had no jurisdiction, and the writ of attachment and order

(1) 1 Cowp. 30.
(2) 1 Cowp. 20.
(3) 10 East 81.
(4) 1 Salk. 409, Ld. Ray. 633.
(5) 14 Gray 141.

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for sale, and all proceedings thereunder, were null and void; that a Court of law has in itself no inherent power or right to order perishable goods seized under attachment to be sold, *La Rochelle* v. *Piche et al* (1); and that sec. 6 and 7 of Absent or Absconding Debtors Act does not extend to foreign companies doing business in the Province by an agent, and the Court has no power to order a sale of their property under the said Act, and that all proceedings for a sale of such property are therefore null and void. "When the Court has no jurisdiction of the cause, the whole proceeding is *coram non judice*, and actions will lie against the above mentioned parties without any regard to the precept or process, and in this case it is not necessary to obey one who is not judge of the cause." *Broom*, L. M. 90, *Taylor* v. *Clemson* (2). *Factum a judice, quod ad officium jure non pertinet, ratum non est.* "A plea of justification by a constable acting under the warrant of a justice will accordingly be bad, if it does not show that the justice had jurisdiction over the subject matter upon which it is granted." *Taylor* v. *Clemson* (3); *Broom's Prac.* (4); *Broom*, L. M. (5).

As to evidence necessary in support of defence, see *Crocker* on Sheriffs (6).

Mr. *Gormully* in reply:—

RITCHIE, J.:—

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*June 4.

This was an action brought against the Sheriff of the County of *Cumberland* for converting to his own use Plaintiff's goods. Defendant, as such Sheriff, levied on these goods under an attachment. There is a provision in the Act under which these goods were seized, giving

(1) 1 L. C. Jur. 158.
(2) 2 Q. B. 1034.
(3) 2 Q. B. 1031.
(4) 667 et seq.
(5) 95, 96.
(6) P. 867.

* The Chief Justice was absent when judgment was delivered.

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power to the Court to order perishable goods to be sold (1). The Court did in this case order the goods to be sold, and they were sold, and after such sale all the proceedings under the attachment appears to have been discontinued. If the Sheriff had properly taken the goods in the first instance, and if they were legally in his hands, and he sold them under the order of the Court, I think that order would protect him; but, in this case, in my opinion, the conversion of the goods took place when the Sheriff levied on them. The evidence shows the goods originally belonged to the *St. Lawrence Coal Mining Company*, the officers of which were domiciled in *New York*. The Company appears to have failed in its operations, and all their property in *Nova Scotia* was disposed of, except that now in question, and all debts in that Province, except $28, appear to have been settled, leaving a large debt due to the Plaintiff, who had been connected with the Company, and for which he held the promissory notes of the Company. The Supreme Court of *Nova Scotia* held there was evidence of a sale of these goods; and there appears to me to have been ample evidence for the consideration of the jury of a *bonâ fide* sale, for a valuable consideration, by the officers of the Company to the Plaintiff, for the purpose of discharging the lawful indebtedness of the Company. I think this was within the legislative power given to incorporated companies under ch. 53, sec. 15, *N. S.* Acts, which makes acts performed within the scope of their charter, or acts creating them, valid, notwithstanding they may not be done under, or authenticated by, the seal of the Company, if such an authentication was needed, but which, I think, was, in this case, wholly unnecessary (1).

The Company having in the due course of its busi-

(1) Sec. 6, ch. 97 Rev. Stats. N. S., 4th Series.

ness become indebted to the Plaintiff, I can see no reason why it might not as well pay that liability by a sale and delivery of personal property to their creditor in discharge thereof, as by handing him the amount in money, or selling the property to third parties, and handing over the proceeds to the creditor.

With reference to the conversion, I think the very circumstance of Defendant's levying on the goods, and subsequently selling them, was a clear conversion. There was not, it is true, evidence that the goods were on the levy moved, but it is clear the Sheriff did levy on them, and it is equally clear that the Court ordered the goods, thus in his hands and under his control, to be sold, as being in his possession under the levy, and that they were so sold.

The definition of a conversion, as given by the editor of *Bacon's* abridgment "Trover" (B), is this:—

> The action being founded upon a conjunct right of property and possession, any act of the Defendant which negatives or is inconsistent with such right, amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the Defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of Plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use."

I think when a Sheriff levies on property he does take possession of it, as against the party, and does convert it. If he exercises control in defiance of the party who had the right, there is a conversion, and he may be sued for the conversion, and, as said by *Alderson*, B., in *Fouldes* v. *Willoughby* (1),

> For this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or another, it is a conversion.

(1) 8 M. & W. 548.

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I think the Plaintiff's right of action did not commence at the time of the sale, but so soon as the Sheriff levied upon the goods, and so exercised a claim and dominion over them adverse to the Plaintiff and inconsistent with his general right of dominion.

Under these circumstances, I think the Plaintiff has made out his case, viz.: that the Company, by its officers, was competent to sell the goods in question, that there was evidence to establish the sale of the goods to the Plaintiff, and of a conversion by the Defendant. I state this with hesitancy, only because the views of my learned brethren are at variance with the conclusion at which I have arrived.

STRONG, J.:—

The conversion complained of by the declaration was the sale, not the seizure or taking of the goods. The 4th plea justifies the sale under the order of the Court, and avers that to have been the act complained of in the declaration. The Plaintiff is therefore confined to the sale as the conversion for which he sues. If he wanted to insist on the taking as constituting a conversion he should have new assigned. I should doubt, however, if a mere taking of the goods of a third person under a mesne attachment against a Defendant, to keep them *in medio* until the termination of the action, is a conversion. A conversion is defined to be a taking of chattels with an intent to deprive the Plaintiff of his property in them, or with an intent to destroy them or change their nature. Taking under a mesne attachment does not, like taking under a writ of *fieri facias* with intent to sell, imply any such intention. But, be that as it may, the conversion here must, on the pleadings, be taken to be the sale. Now, this sale was under an order of the Court, and was the act of the Court, not the act of the

Sheriff. It was not the case of a writ of execution or attachment being placed in the Sheriff's hands against the goods of A, and a seizure under it of the goods of B, which the exigency of the writ did not warrant; but these specific goods being already in the Sheriff's hands, having been seized under the attachment, the Court orders them to be sold. The Sheriff is, therefore, protected by the order for sale. The issue, it is true, on this line of pleading, is narrowed to this: Was the discontinuance after or before the sale? It appears that the sale took place on the 7th November, 1866, and that there was no discontinuance until December 11th, 1874. The issue on the rejoinder to the replication to the plea of justification ought, therefore, to have been found for the Defendant. But it was proper to consider, whether the plea did disclose a good justification, since there would be no use in granting a new trial if in point of law the Sheriff could not justify. As regards the other point argued, there can, in my judgment, be no doubt that the Company was one to which the Rev. Stats. p. 8, (4th Series), ch. 97, was applicable. I am, therefore, of opinion that the verdict ought to have been set aside with costs, and a new trial ordered.

TASCHEREAU and FOURNIER, J. J., concurred.

HENRY, J.:—

The points to be decided in this case are in an action of trover, brought by the Respondent against the Appellant, who, as Sheriff of the County of *Cumberland*, sold certain chattel property claimed by the Respondent to belong to him to recover its value.

To the charge of conversion in the Respondent's writ the Appellant pleaded:—

1st. That he did not convert to his own use the Plaintiff's goods, as in the writ alleged.

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2nd. That the goods were not the property of the Plaintiff.

3rd. That the Plaintiff was not possessed, nor was he entitled to the possession of the said goods.

And by a fourth plea, he justifies the taking of the goods, as and being the goods of the *Lawrence Coal Mining Company*, under a writ of attachment at the suit of one *George Hibbard*, against the said *Lawrence Coal Mining Company*, directed to him as Sheriff of the County of *Cumberland;* and the subsequent sale thereof under an order issued by the Supreme Court and signed by *A. S. Blenkhorn*, Esquire, Prothonotary of the said Court at *Amherst* in the said County of *Cumberland*, whereby he was ordered and required, amongst other things, as such Sheriff, as aforesaid, to put up and sell the said goods at public auction to respond the judgment which might be obtained. The Plaintiff replied to the latter plea:—

That after the proceedings in the plea mentioned, taken by the said *George Hibbard*, the suit instituted by the said *George Hibbard* against the *Lawrence Coal Mining Company* was discontinued by him, and the attachment and all proceeding thereunder were thereby abandoned; which said discontinuance is on the fyles of this honorable court.

To that replication the Appellant rejoined, first, that the said cause was not discontinued, and second:—

That the said discontinuance was not filed until after the goods in said writ mentioned were sold under the order in his said plea mentioned, and the proceeds applied as therein mentioned.

On the trial of the issues of fact, leave was given to the Appellant to demur to the replication of the Respondent, which he did, and therein says that the Plaintiff's replication is bad in substance, inasmuch as the Sheriff is justified by his writ of attachment and order for sale, and was bound to execute it:—

That the act of the Plaintiff in the cause under which the attachment was made, in discontinuing the cause after the Sheriff had sold the property in question, cannot and does not affect his justification, as pleaded.

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Marginal note on the demurrer :—

Matter of law to be argued—that the Sheriff, being bound to act in obedience to the order of the Court, cannot be affected by a discontinuance of a suit under which property was sold.

Joinder in demurrer by Respondent. Under the charge of the learned Chief Justice of *Nova Scotia*, before whom the cause was tried in October, 1876, the jury found a verdict for the Plaintiff for $500, and a rule *nisi* was granted to set it aside on the following grounds :—

1st. That the verdict was against law and evidence.

2nd. That the learned Chief Justice misdirected the jury.

3rd. That evidence was improperly received.

4th. That evidence was improperly rejected, and

5th. That there was no sufficient evidence of the conversion of the goods.

This rule and the demurrer were argued before the whole Court at *Halifax*, and by a majority of the Court the rule *nisi* was discharged with costs, and a judgment on the demurrer given in favor of the Respondent.

In the majority judgment, the fourth plea is pronounced bad, and a doubt expressed as to the sufficiency of the replication to it. Hence the judgment on the demurrer. The appeal to this Court is from that judgment on all the points, both as to the facts and the law.

I will first deal with the demurrer. I would not question the correctness of the judgment if the fourth plea is defective, but I don't think it is.

To decide that point, we must first consider the nature of the position held by the Appellant when he received the order for the sale of the goods. He had previously levied on the goods under the attachment, but had not removed them. Section 6, ch. 97 of the *Revised Statutes of Nova Scotia*, entitled : " Of suits against absent and absconding debtors," provides that :—

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Where the goods consist of stock, or are shown by affidavit to be of a perishable nature, and the agent shall not, within three days after notice of the appraisement, give security for their value, a judge, or a prothonotary of the county, in his absence, may, at his discretion, cause the same to be sold at public auction, and the proceeds thereof shall be retained by the Sheriff, or paid into Court, to respond the judgment.

The prothonotary of the county made an order under the provisions of that section, and directed to the Sheriff, to sell the said goods under the terms thereof.

On receipt of that order it was the Sheriff's duty to execute it. He could have been compelled by legal and summary means to do it, and would also be answerable to the Plaintiff in that suit for any resulting loss or damage to the goods, in case he eventually obtained judgment. So far, therefore, as the conversion *by the sale*, the order to sell the specific goods would be a complete justification and the plea to that extent is a sufficient answer.

If the plea admitted the goods were the property of the Plaintiff it would have been bad; but, on the contrary, it alleges them to have been, when levied upon, the goods of the *Lawrence Coal Mining Company*, and that, with the other allegations contained in it, forms a perfect answer to the writ; and, as a whole, is consequently a good plea. The Respondent virtually says:— they were not the Plantiff's goods, but those of the *Lawrence Coal Mining Company*, and I, as Sheriff, levied upon them under the attachment, and subsequently sold them.

A special plea of justification is only necessary where goods of one party are taken out of the possession of another, and is only necessary as a justification for interfering with the possession. If goods are not taken out of the possession of the Plaintiff the right is tried by a simple denial of ownership. The justification in this case would only be necessary in case the goods in

question, were, when taken, in contemplation of law, in the possession of the Respondent.

The replication to the plea is bad, for the simple reason that the Respondent could not, by any possibility, be affected by any subsequent act of the Plaintiff in regard to the discontinuance of the suit. I think, therefore, the judgment on the demurrer must be in favor of the Appellant.

Under that ruling the judgment on the facts submitted to the jury should also be for him, if the order for sale would be a justification to the officer for the original levy on the goods, as well as for the sale, even had they been the property of the Respondent; but, as it is not, the result must be affected by the question as to the ownership of the goods when the levy was made. If, then, they were not the Respondent's, he cannot recover; but the whole case, as far as the rule *nisi* for a new trial goes, depends altogether on the settlement of that question. The property, as admitted by both parties, was that of the *Lawrence Coal Mining Company* up to the date of the transfer claimed by the Respondent. Did he, then, obtain the property in the goods by the document signed by "*J. W. Hawley*, agent." If not, he had no property in them. In determining that point we must see if, in the first place, *Hawley* had sufficient authority to divest the Company of the ownership. The alleged transfer is signed by him on the 5th of July, 1867. He, the Respondent, and others were appointed Directors of the Company on the 18th of January, 1865, *for one year* from that date. No subsequent appointment of Directors was ever made, and there is no provision to be found anywhere, as far as the evidence goes, as is sometimes the case in respect of public officers, that the Directors should hold office till others were appointed in their place. There may have been such a provision in the

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by-laws of the Company, but evidence of it is wanting. On the 18th of January, 1866, the Directors ceased to be so; and, as such, could not collectively or individually bind the Company. Resolutions of the stockholders were passed in April and December, 1865, authorizing certain Directors named, to sell on certain conditions the real and personal property of the Company; but *Hawley* was not one of them. On the 26th of February, 1866, at a meeting of the stockholders, a resolution was passed authorizing Messrs. *Hawley*, *W. G. Howe* and *Alden*:—

> To sell all the real and personal estate, and also the leasehold of the Company for such sum or sums, and on such terms, as in *their* judgment will be for the best interest of the Company, and pay the proceeds of such sale into the hands of the Treasurer for the benefit of the creditors of the said Company, and if the amount of such sale exceeds the debts, the balance to be paid *pro rata* among the stockholders.

No one will pretend for a moment that *Hawley* alone had power to make the sale to the Respondent, which the document signed by him purports to have been made. The delegated power by the Company was to *three*, and the *three* were to exercise *their judgment* in regard to it; and besides, none of them, nor the three together, had power to give any portion of the property *in payment of any particular debt.* It was to be sold for cash, and that paid into the hands of the Treasurer. The Respondent was himself a Director; and was quite aware, no doubt, of the nature of the authority given to *Hawley*, *Howe* and *Alden*, and is concluded thereby. There is no evidence of any ratification of the sale by the Company. In fact, there was but one meeting of the Company after that of February, 1866, and that was in 1874, which appears to have been called for the purpose of authorizing a transfer of the lease of the mines to the Respondent, which was done; and that only.

Some oral evidence was offered of the authority of *Hawley* to sell the personal property; but it was objected to and cannot be received for the obvious reason that no meeting had ever considered the subject. In the absence, then, of legitimate evidence, and when considering, too, that if any Directors existed at the time of the transfer, the Respondent was one, and could not become a purchaser through a sale by the Directors, he having with them a fiduciary authority to sell, if any such existed, I must say I can see no authority for the transfer to bind the Company, even if it had been made in the name of the Company and under its seal.

The instrument in question does not purport to be a transfer by the Company. It contains no words making a transfer. It only says baldly that the Respondent *has purchased* through *T. R. Hawley*, authorized to sell the same, the property mentioned in the schedule. A mere naked purchase, without evidence of any consideration given, or any delivery of the property, will not pass it. I cannot think the instrument of any more value than a letter to some person would have been, containing the same substance. It does not say who owned the property, or by whom he was authorized to sell it, and it is signed by "*T. R. Hawley*, agent." Agent of whom? It discloses no consideration or terms for the purchase. No consideration is shown either by, or *dehors*, the instrument by any one present at the alleged purchase. I will not say a *written* transfer was absolutely necessary, but I am of opinion the document *per se* is insufficient to make it. There is no other evidence of it; for neither of the parties to the transfer, *Hawley* and *Dillingham*, or any of the witnesses to it, or any other person present, was examined; and there is, therefore, no legal evidence of it. *Alden's* hearsay evidence upon this point, objected to at the trial, cannot be received.

The Respondent, in his evidence, says:—

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Alden, Dillingham, Hawley and *Wentworth*, were all creditors of the Company, and were the four interested with me in the transfer of the personal property—

under his honorary obligation. Thus, then, was *Hawley* undertaking to act as the agent of the Company to convey, with the assistance of *Dillingham*, the property of the Company to the Respondent for his, *Hawley's*, *Dillingham's* and *Wentworth's* benefit. Surely the Company, at any time, could repudiate such a transfer; and, if void, as against the Company, it must be so as against a creditor of the Company, as *Hibbard* appears to have been.

And, now, in conclusion, as to the seal. I have carefully examined all the authorities, and have had no difficulty in arriving at the conclusion that, in the absence of statutory enactment, the contract in question could only be valid under the seal of the Company.

By the registry of the articles of association in evidence, this Company was incorporated, not as a trading company, but:—

> For the special purpose of opening and working mines and veins, or deposits of coal and oils in the River *Hebert* Settlement, * * * and the exporting and making sale thereof, and of constructing and operating railways, tramways, or plank roads, necessary for transporting the said coal, when mined, to tide water, and for the purpose of constructing piers, docks and buildings necessary for carrying on said business, and of doing all other business which may be lawfully undertaken and connected therewith.

This is not, then, a "trading" Company, and therefore rules as to buying and selling stocks in trade will not apply to it.

The "selling" contemplated by this Company was to be of coal and oil, not the houses, buildings, or plant. The intention was to keep the latter as means to enable the Company to carry out the intentions of the charter.

The intention is clear and obvious, and I cannot strain words declaring, as do those of section 15, chap. 53 of the *Revised Statutes of Nova Scotia*, that:—

The acts of incorporated companies performed within the scope of their charters, or acts creating them, shall be valid, notwithstanding they may not be done under, or authenticated by the seal of such corporations,

to mean that a company may, without seal, sell and dispose of their whole property, and thereby wind up the company. Such a power is certainly, to my mind, not given by the section just quoted; for that section clearly has reference, as to this Company, to acts done "in the opening and working mines, &c." and the exporting and making sale of "coal and oil, &c." It, in fact, only applies to a *going* Company, and cannot be applied to the expiring flicker, or final sale of the houses, plant, &c., of a bankrupt company. For the reasons given, I think, the rule for the discharge of the rule *nisi* herein should itself be discharged and the said rule *nisi* made absolute with costs.

Appeal allowed with costs, and new trial ordered with costs in the Court below.

Solicitor for Appellant: *Charles T. Townshend.*

Solicitor for Respondent: *W. Inglis Moffat.*

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*Feb'y. 7,8,9.
*June 4.

WILLIAM T. RICKABY.....APPELLANT;

AND

ADAM R. BELL.....RESPONDENT.

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

Insolvency—Fraud or Illegal Preference—Presumption—Insolvent Act of 1875, *sec.* 13, *sub. secs.* 1 *and* 3, *and Insolvent Act of* 1869, *secs.* 86 *and* 88—*Arts. C. C. L. C.* 993, 1033, 1035, 1040—*Doctrine of Pressure opposed to Art.* 1981, 1982 *C. C. L. C.*

T. F., an hotel keeper, being largely indebted, sold to *A. B.*, his principal creditor, on the 19th January, 1875, by notarial deed, duly registered, certain movable and immovable property, being the bulk of his estate, comprising the hotel and furniture, for $15,409.50. The immovable property, valued by official assessors at $22,000, was sold for $10,000. The sale was, also, made subject to a right of redemption by *F.* on re-imbursing, within three years, the stipulated price of $15,409.50, and interest at the rate of 8 p.c., with a provision that, in case of insolvency or default of payment, this right of *reméré* should cease. No delivery took place, and ten months later *F.*, who remained in possession of the property under a lease from *A. B.* of the same date as that of the sale, also became bankrupt. In the meantime *A. B.*, with *F.'s* consent, had leased the furniture to *T. & J.*, in whose hands they were when Appellant, (*F.'s* Assignee) revendicated them as part of the insolvent estate. *T. & J.* did not plead, but *A. B.* intervened and claimed the effects under the deed of sale above mentioned. The Assignee contested the intervention, alleging that deeds passed on the 19th January, 1875, had been made by *T. F.* in fraud of his creditors.

Held,—That there was sufficient evidence to prove that the object of the transaction was to defeat *F.'s* creditors generally, and therefore the deeds of sale and lease of 19th January, 1875, were null and

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

void under Arts. 1033, 1035, 1040 and 993 *C. C. L. C.*, and secs. 86 and 88 of Insolvent Act of 1869, and sec. 3, sub. sec. 13 of Insolvent Act of 1875.

THIS was an appeal from a judgment of the Court of Queen's Bench for *Lower Canada* (Appeal Side), dated 8th June, 1877, reversing a judgment of the Superior Court for the District of *Three Rivers*, (*McCord*, J.) rendered on the 23rd November 1876.

The Appellant, assignee of the insolvent estate of one *Thomas G. Farmer*, sued out a writ of *saisie-revendication*, to attach from Messrs. *Trihey & Johnson*, lessees of Respondent, furniture and chattel property to the alleged value of $3,817.62, as belonging to the insolvent, and forming part of his estate. To this action the Defendants did not plead. The Respondent intervened, and alleged that the Defendants, to the knowledge of the Appellant and of the creditors of the insolvent, held the property seized as lessees of him; that he was owner of the property under a deed of sale from *Farmer*, dated 19th January, 1875, and that, at the time of the attachment in insolvency, he was in possession of this property through *Farmer*, who held it under a lease from him, also dated 19th January, 1875.

The Appellant filed a contestation of this intervention, alleging that *Farmer* was insolvent at the time of the deed of sale; that *Bell* knew of his insolvency; that this deed, and likewise the deed of lease from *Bell* to *Farmer*, were both executed in fraud and to the detriment of *Farmer's* creditors, and were passed in contemplation of insolvency, for the purpose of giving *Bell* an unjust preference over the other creditors.

By the evidence of record, the following facts were established :—

On the 16th of December, 1874, *Bell* wrote to *Farmer* the following letter :—

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Montreal, Dec. 16th, 1874.

"*T. G. Farmer*, Esq.,

DEAR SIR,—*I asked Mr. Wurtele to what way I could be secured in your claim* or amount, so he told me you would require to make out a list of all the furniture in the hotel, to attach to our agreement; *do it yourself—make a list of each room;* commence at No. 1, and so on. *You need not let any one know of it;* this is the simplest way of securing the whole, and then all I will trouble you for will be an amount not exceeding 8 p. c. on the whole debt to run till March, 1878. Your running amount is $6,000, and then the $10,000; the whole sale will be for $16,000, and then you will pay me every three months 8 p. c. and have it in your power to redeem the whole in March, 1878, by paying me $16,000, and by doing this every thing is secure both for you and me, and then all I trouble you for is the rent at 8 p. c., so that you can pay others quite easily and not be troubled any. I will bring the papers down with me for you to sign now. By having every thing secured for me, if you at any time require my assistance I shall only be too happy to oblige you. Of course this course is the only one as things stands at present. Neither you nor me can tell how long we live and things has been done rather loose, it is all very well as long as we are attending to things ourselves. Attend to make out the list, or if you are too busy I will send my son to assist you, so that you and him can do it very quietly between yourselves.

Hoping you and your good lady are well.

Yours truly,

ADAM R. BELL."

On the 12th of January, 1875, *Bell* wrote another and most pressing letter, in which he tells *Farmer* that "he cannot renew his notes for ever and lay out his interest without such security as he asked;" that "under the prospects of things he has invested enough already;"

that "he wants the security now on the time mentioned and in the order of things mentioned."

On the 13th, *Bell* again writes: "Be careful in making the list to have a price to every article and mention every article of furniture, setting down price opposite; this you will find turn out good for yourself as well as me."

....."Go quietly around and write down every thing. It is no one's business to meddle with you in our settlements, and when this is arranged you may require to use me again which I hope I shall be in a position to serve you."

Upon these letters, *Farmer* went to *Montreal*, and, on the 19th of January, 1875, sold to Respondent "The British American Hotel," at *Three Rivers*, and all the furniture it contained, together with a lot of land on the outskirts of the city, and £700 stg. of fourth preferential bonds of the *Grand Trunk Railway Company*. This sale was made for $15,409.50, of which $6,000 were in payment of a *bailleur-de-fonds* claim, $4,000 in payment of a mortgage, and the balance of $5,409.50 was declared to have been paid at the time of the signing of the deed. The sale was made subject to a *droit de réméré* by *Farmer*, on reimbursing, within three years, the stipulated price of $15,409.50 and interest at the rate of 8 p.c., payable quarterly, with a provision that, in case of insolvency, or default of any payment within sixty days after it was due, this right of *réméré* should cease.

The list of articles which is annexed to the deed of sale does not altogether agree with the furniture in the hotel, but it is alleged by *Bell*, in his intervention, that, notwithstanding very considerable discrepancies, the intention was to sell all the furniture in the hotel at the time of the sale.

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The sale included:—

1st. The hotel, which, at the time was assessed by the Corporation of *Three Rivers*, on a valuation made by the assessors, under oath, at..... ..... $22,000 00

And which on the the following year was assessed at $26,000:—

2nd. The furniture and chattel property, including 1,500 bushels of potatoes, the whole valued at..... 4,109 50

3rd. The lot of land near the city..... 1,000 00

4th. The Grand Trunk bonds..... ..... 300 00

Total $27,409 50

Sold for $15,409.50, as mentioned in the deed. The hotel being put down for $10,000. A number of witnesses say that it was fully worth the value it was assessed at, and even something above, while others say it could not have been sold, at a forced sale, for more than $10,000. On the same day, *Bell* leased to *Farmer*, for three years, for $1,237 a year, payable quarterly, all the property he had purchased from him. The two deeds were passed before *Jobin*, notary, at *Montreal*, and the deed of sale was subsequently registered at *Three Rivers*, on the 1st day of February, but the lease was not registered. No delivery took place, and *Farmer* remained in possession of the whole, as before the transaction, until the 27th day of November, 1875, when a writ of compulsory liquidation issued against him, and the property was seized in his possession by an Interim Assignee. On the 3rd December, 1875, *Trihey & Johnson* took possession of the hotel and furniture, as lessees of *Bell*, apparently under some understanding between *Bell* and the Interim Assignee, the nature of which is not well explained in the cause.

After a protracted *enquête*, the Superior Court declared

the sale to have been made in fraud of the creditors of *Farmer*, dismissed *Bell's* intervention, and declared the *saisie revendication* valid. This decision was reversed on appeal to the Court of Queen's Bench—the Chief Justice and Mr. Justice *Tessier* dissenting.

In the Supreme Court the question argued was, whether the deeds of sale and of lease of the 19th January, 1875, could be declared void on the ground of fraud, or of unjust preference, in contemplation of insolvency.

Mr. *H. T. Taschereau*, Q. C. and Mr. *Honan*, for the Appellant.

Mr. *McDougall*, Q. C., for Respondent.

The arguments and authorities relied on sufficiently appear in the judgments.

RITCHIE, J.:—

This is a proceeding to set aside a deed by which one *Farmer* transferred to the Respondent a large amount of property. I understand that under the civil law an entirely different principle prevails from what prevails at common law, where a party may make a preference, if it be a *bonâ-fide* transaction, even if made for the purpose of delaying or defeating a specific creditor, but that under the *Civil Code*, *L. C.*, such preference would not be good.

The question in this case appears to be one of fact only, viz.:— Whether, under the circumstances of the case, the result of this transaction was the delaying or defeating of creditors? The Court of original jurisdiction determined that the effect of this transfer was to delay and defeat creditors; that it was, in fact, a preference given to the Respondent, which, under the Code, he was not entitled to have, the principle of the Code being that a party cannot, when in insolvent circumstances,

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prefer one creditor to another; that all have an equal right to a distribution of a debtor's goods upon the same basis as that of a bankrupt's property.

After carefully reading and considering the evidence, I am unable to dissent from the able judgment of Chief Justice *Dorion*, who goes into all the circumstances, and points out the particulars in which he thinks the effect of this transaction was to defeat and delay creditors, and to invalidate this deed. I cannot say—perhaps, because I have always been so strongly acting upon a different rule—that I can go with the learned Chief Justice in all the reasons he gives, but, in many of them, I entirely agree with him, sufficiently so, at any rate, to come to the conclusion at which he has arrived—that this deed cannot stand.

It is clear that *Farmer* was very largely indebted at the time of this transaction; that under this deed the whole of his property (with the exception of the wine cellar) was transferred to Respondent, the value of which would seem to have been much greater than the Respondent was to pay for it. The effect of this transfer was to render *Farmer* insolvent, and not leave property for the discharge of his other liabilities. The transaction was carried out with secrecy, and *Bell*, evidently, must have known that the effect of it was to delay and defeat all *Farmer's* other creditors. It is true an opportunity was given *Farmer* of redeeming the property if he could do so, but even this was put in such a way that *Farmer's* creditors could know nothing about it, and, coupled with the secrecy of the whole transaction and its obvious effect on *Farmer's* position in reference to his other creditors, shows it to be a transaction entirely opposed to the principle of the *Civil Code of Lower Canada*, and, therefore, must be set aside.

STRONG, J., concurred.

TASCHEREAU, J. :

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Les faits de la présente cause sont à peu de chose près, les suivants :

Thomas G. Farmer possédait une propriété immobiliaire située à *Trois-Rivières* et connue sous le nom de *British American Hotel*, dans lequel il exerçait le métier d'hôtelier ; il possédait dans cette maison un mobilier considérable qui était utilisé pour les fins de son négoce comme hôtelier. Le 19 janvier 1875, *Farmer* vendit à l'Intimé cet hôtel, avec le mobilier, plus un lot de terre et quelques *preferential bonds* de la compagnie du Grand-Tronc, au montant apparent de £700 *sterling*, le tout pour le prix de $15,409.53, dont $6,000 furent stipulés être en prime d'un montant à lui dû par privilége de bailleur de fonds sur l'hôtel, $4,000 pour une hypothèque sur la même propriété, et le reste, savoir $5,109.50 comme argent payé au moment de la passation de l'acte en question. Cette vente fut faite avec droit de reméré en faveur du vendeur sous trois ans, en payant les $15,409.50 avec intérêt à 8 pour cent, et avec la singulière stipulation qu'en cas d'insolvabilité ou à défaut de paiement d'intérêt à chaque trimestre ce droit de reméré cesserait. Et chose aussi extraordinaire, *Bell* consent en faveur de *Farmer* le même jour, un bail de cette propriété et du mobilier susdit, moyennant un loyer annuel de $1,237 payable par quartier. Il n'y eut pas de livraison actuelle, mais *Farmer* resta en possession jusqu'en décembre 1875, époque à laquelle *Farmer* ayant été forcé de faire une cession de biens, l'appelant *Rickaby* fut appointé syndic à la banqueroute de *Farmer*, et en février 1876 il réclama, par saisie revendication, les meubles, comme partie des biens de la faillite de *Farmer*, contre les nommés *Trihey* et *Johnson*, à qui *Bell*, avec le consentement d'un syndic *ad interim*, avaient consenti un bail de ces effets et de la propriété.

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Trihey et *Johnson* firent défaut de comparaître à cette demande de *Rickaby*, et *Bell* intervint pour réclamer tout ce que *Farmer* lui avait vendu. Le jugement en première instance, prononcé par M. le juge *McCord*, donna gain de cause à *Rickaby*, et annula la vente que *Farmer* avait consenti à l'intimé *Bell*. Sur appel à la Cour du Banc de la Reine à *Quebec*, ce jugement fut renversé par trois sur cinq honorables juges composant ce tribunal, et c'est de ce jugement dont cette cour est actuellement saisie.

De l'exposition des faits de la cause telle que constatée par le dossier, nous avons à déclarer si les actes du 19 janvier 1875, exécutés entre *Farmer* et l'Intimé doivent être considérés comme faits et exécutés en fraude des créanciers de *Farmer*, et si comme tels ils doivent être annulés.

La première question est celle de savoir, si à l'époque de l'exécution des deux actes du 19 janvier 1875, *Farmer* lui-même et *Bell* savaient que *Farmer* était incapable de rencontrer ses engagements. L'affirmative me semble prouvée de la manière la plus positive par les nommés *McGibbon*, *Dawes*, *Mountain* et par *Farmer* lui-même, par les lettres singulières de *Bell* à *Farmer*, du 14 décembre 1874 et 12 janvier 1875, qui indiquent clairement chez l'un et l'autre la conviction de l'insolvabilité de *Farmer*, surtout lorsque le tout est suivi de l'exécution des deux actes du 19 janvier 1875. Ces lettres et les deux actes du 19 janvier 1875 sont la preuve complète du pitoyable état des finances de *Farmer*, et de la grande pression que *Bell* voulait exercer sur son débiteur dans le but de se protéger, et ce en se faisant transporter tout son actif à un prix comparativement vil comme le dossier le constate, et de fait à peine 50 p. 100, et ne laissant rien à espérer pour ses autres créanciers.

Si l'on prend en considération que la vente de tout

l'actif de *Farmer*, dont la valeur approximative était de $27,409, a été faite pour $15,409, on ne pourra se défendre d'un fort soupçon de la sincérité de l'acte de vente, mais même nous devons dire que cette vente n'était ainsi consentie que dans le but de protéger *Bell* à l'exclusion des autres créanciers de *Farmer*, en un mot, de lui donner une préférence indue. D'ailleurs, l'acte contient une déclaration fausse du paiement de $15,409.50 lors de la passation de cet acte, puisqu'en réalité tel paiement n'a pas eu lieu, et que ce paiement prétendu n'était que l'extinction d'une dette antérieure chirographaire pour des avances d'argent et fournitures pour lesquelles *Bell* n'avait aucun gage ni sûreté quelconque.

La preuve, je le répète, que l'on trouve au dossier, me convainc que ces deux actes ne furent que l'exécution d'un projet bien arrêté de la part de *Bell* et de *Farmer* de donner au premier une préférence indue, et ce au détriment des créanciers de *Farmer* et entre autres de *Rickaby*. J'avoue que la fraude, qui résulte de l'exécution de ces deux actes, n'est pas prouvée avec l'exactitude que l'on pourrait attendre dans une transaction ordinaire de la vie, mais d'un autre côté la loi, sans présumer la fraude, n'en défend pas la preuve par tous les moyens possibles, par toutes les circonstances possibles. En effet la fraude serait le plus souvent insaisissable, si la preuve des circonstances tendant à l'établir n'était pas permise.

M. *Chardon* (1) dit:

> Les créanciers doivent prouver et le dommage qui leur est fait et l'intention qu'a eue leur débiteur de leur faire; mais comment établir cette intention? Dans cette occurence, comme dans beaucoup d'autres, si la preuve directe n'est pas possible, il en est d'indirectes que fournissent les présomptions offertes par les circonstances.

Et *Bedarride* (2) dit:

(1) En son traité du dol, vol. 2, No. 203, page 369.

(2) En son traité de la fraude, vol. 1, No. 254.

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Dans tous les cas où la preuve testimoniale est admissible, la preuve par présomption l'est également.

Or, dans le cas présent, les faits prouvés prouvent abondamment l'intention de frauder, au moins dans le sens légal, car *Bell* n'ignorait pas, ne pouvait ignorer, l'insolvabilité de son débiteur ; et les autorités vont même jusqu'au point d'établir que si le débiteur au moment de son transport, ne laisse pas assez pour payer ses dettes, il doit être considéré comme ayant été insolvable, et que le cessionnaire doit en subir les conséquences.

L'élément de fraude que l'on trouve dans les transactions en question consiste 1o. dans l'insolvabilité évidente de *Farmer*, bien connue de *Bell*, et qu'il ne pouvait ignorer, quoique le public en général ne pût que la soupçonner :

2o. Dans le fait que, quant à la somme de $5,109.50, que *Bell* prétend avoir payée à *Farmer* comme partie du prix total de $15,109.50, *Bell* absorbait ainsi à lui seul une somme de $5,109.50 représentant des meubles et effets appartenant à *Farmer*, qui étaient le gage commun de ses créanciers en général, et sur lesquels meubles *Bell* n'avait aucun privilége ni lien quelconque. C'était donc, au moins quant à cette somme, une perte de $5,109.50 :

3o. Dans le fait que la propriété mobilière qui est entrée dans l'estimation de *Bell* comme partie du prix de vente des $15,109.50 n'y est estimée qu'au montant de $10,000, tandis qu'à l'époque de cette vente, l'hôtel était estimé de $22 à $26,000 par les estimateurs officiels de la corporation de la ville de *Trois-Rivières* :

4o. Dans le fait de la vente à reméré, qui indique que la vente n'était pas sérieuse, mais fait dans le but seul de protéger le créancier et le débiteur, au préjudice des créanciers du débiteur, en empêchant ces derniers de pouvoir exercer leur recours immédiatement contre

Farmer sans avoir au préalable fait annuler ces actes comme frauduleux.

Il me paraît de toute évidence que, comme le dit M. le juge en chef *Dorion* en ses notes de jugement, l'intimé *Bell* se trouve dans ce dilemme bien évident, savoir, si la propriété valait $26,600 et qu'il l'avait achetée pour $10,009, *Bell* et son débiteur commettent une fraude palpable et punissable comme fraude en violation de la loi de faillite, et si la propriété ne valait que $10,000, *Farmer* était alors insolvable sans espoir de se rétablir, et conséquemment il était passible d'une punition, dont son créancier qui s'y était associé partageait le risque, savoir: de voir ces actes de vente annulés par les tribunaux comme faits en fraude des créanciers de l'insolvable.

Les articles 1033, 1035, 1040, 993 du *Code Civil* et les provisions de l'acte de faillite de 1869 me semblent s'appliquer à la présente cause et militent avec force contre les prétentions de l'intimé.

Les autorités que l'on trouve au factum de l'appelant, savoir: *Caprina*(1), *Bell's* Commentaries(2), *Bedarride*(3), établissent une bien saine doctrine, savoir: que si un débiteur paie un créancier en tout ou en partie au préjudice des autres, il y a présomption ou doute de fraude, et un créancier sera réputé avoir connu l'insolvabilité de son débiteur, si à l'époque d'une transaction il était en position de connaître l'état de ses affaires, ou si ses transactions indiquaient chez lui un fort doute de l'insolvabilité de son débiteur, et qu'il n'est pas même nécessaire d'établir que le débiteur fut insolvable à l'époque de la transaction; et il est suffisant de prouver qu'en faisant cette transaction il s'est réduit à l'état d'insolvabilité. La clandestinité est aussi un indice de fraude,

(1.) Pages 44 et 57 de la "Révocation des actes faits en fraude des créanciers."
(2.) Page 226 et 232.
(3.) Vol. 4, No. 1446, 1448, 1451, 1452, 1454.

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telle qu'une vente à reméré sans tradition publique. Nos tribunaux de la province de *Quebec* ont maintenu la doctrine que la clandestinité était un indice de fraude. Or nous voyons tous ces indices et tous ces éléments de fraude dans les transactions du 19 janvier 1875, savoir: insolvabilité indubitable, clandestinité, défaut de tradition par *Farmer* à *Bell.* Voilà pour le droit commun. Maintenant la loi statutaire, acte de faillite 1869, section 13, sous-sections 1 et 3 de l'acte de 1875 et sections 86 et 88 de l'acte 1869, frappe de nullité des actes faits sous les mêmes circonstances.

Mais l'intimé a prétendu que l'appelant ne pouvait demander la nullité de la vente des immeubles. Il y a une double erreur dans cette prétention, car 1o. la propriété avait été vendue à bas prix, savoir, $10,000 au lieu de $26,000 ou environ qu'elle valait. En effet *Bell* aussitôt après l'acquisition la fit assurer, savoir : la construction seule pour $16,000, ce qui avec le terrain la portait à une valeur de plus de $20,000 ; et 2o. il y a une seconde erreur dans cette prétention de l'intimé en ce que les actes, étant attaqués comme frauduleux entre commerçants et commerçants, la fraude sur un point quelconque important étant prouvée elle affectuait toutes les transactions du 19 janvier 1875.

Si l'intimé a une hypothèque valable sur la propriété de l'hôtel, son droit est sauvegardé et complètement protégé devant le syndic officiel, qui la fera vendre et paiera les hypothèques et dettes privilégiées tout aussi bien que le ferait un shérif. Ainsi, le jugement de cette cour, en annulant ces actes du 19 janvier 1875, remettra les parties au même état dans lequel elles se trouvaient à la date de ces actes frauduleux, et leurs droits et priviléges et ceux de tous les autres créanciers que le syndic présent appellant est par la loi obligé de protéger renaîtront comme s'ils n'avaient jamais été affectés.

Le jugement de cette cour sera à l'effet de renverser

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le jugement de la Cour du Banc de la Reine à *Québec*, d'annuler comme frauduleux les deux actes de vente du 19 janvier 1875, avec frais et dépens tant en cour d'appel que devant cette cour.

FOURNIER, J., concurred.

HENRY, J.:—

I do not think it necessary in this case to refer to the *Civil Code of Lower Canada* to sustain the judgment the Court has announced, so far, in regard to the case before us. The Statute of 1869, the general Act of the Dominion Parliament, authorized as it is by the Imperial Act to legislate on the subject of insolvency, if sufficient in itself, could not be controlled by any Act previously existing in any of the provinces; and, therefore, if, on looking at that Act, the assignment is not legal, we have no necessity to refer to the *Civil Code*. The 88th section of the Statute reads:—

All contracts, or conveyances made and acts done by a debtor, respecting either real or personal estate with intent fraudulently to impede, obstruct or delay his creditors in their remedies against him, or with intent to defraud his creditors, or any of them, and so made, done or intended with the knowledge of the person contracting or acting with the debtor whether such person be his creditor or not, and which shall have the effect of impeding, obstructing or delaying the creditors of their remedies, or of injuring them or any of them, are prohibited and are null and void, notwithstanding that such contracts, conveyances or acts be in consideration, or in contemplation of marriage.

A similar enactment is in force in *England*, and decisions have already been had upon it, which, I think, are in the spirit of the words of this clause. The interpretation given to these words and their equivalent in the English Courts, may be gathered from the following cases:—See *Ex parte Bailey* (1); *Lindon* v. *Sharp* (2); and *Oriental Bank* v. *Coleman* (3).

(1) 3 DeG. M. & G. 534. (2) 7 Scott N. C. 730.
(3) 4 L. T. N. S. 9.

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RICKABY v. BELL.

Under the Statute, we have, then, first to enquire as to the knowledge of the party to whom the assignment is made. I think the evidence is abundant to show that he knew the party was indebted to others and insolvent, and, in fact, by his conduct generally, he shows he knew everything, and got the property for the purpose of shielding it from the other creditors. That is sufficient to satisfy the terms of this Act. The decisions of the Courts in *England* make all these assignments fraudulent, not necessarily in the intention of the party who makes them, but by the operation of the Statute, and I conceive there is no difficulty in coming to the conclusion that, if that is the construction to be given to the Statute, the assignee here knew everything that was required to be known to give effect to that section of the Act, and that this assignment was made by the insolvent while he was largely indebted to other people, and, therefore, the assignment was made in a manner which is prohibited by the Statute. Under all the circumstances, therefore, I think the case is plainly and fully made out, so much so that no jury would hesitate in regard to it. I agree with the judgment already given, that the assignment is void in law, and that the judgment originally given should be carried out, with costs of the Court of Appeal below and of this Court.

Appeal allowed with costs.

Solicitor for Appellant: *M. Honan.*

Solicitor for Respondent: *William MacDougall.*

JOHN CAVERHILL, *et al*..... .....APPELLANTS; 1878

AND *Jan'y 30.
June 4.

ULYSSE J. ROBILLARD.....RESPONDENT.

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

Damages—Nuisance—Possession of wharf built on public property—Right of action for trespass.

C. et al. built a wharf in the bed of the River *St. Lawrence*, which communicated with the shore by means of a gangway, and had enjoyed the possession of this wharf and its approaches for many years, when *R.*, on the ground that the wharf was a public nuisance, destroyed the means of communication which existed from the wharf to the shore. *C. et al.* sued *R.* in damages, and prayed that the works be restored. After issue joined, *R.* fyled a supplementary plea, alleging: that since the institution of the action one *C. R.*, through whose property *C. et al's* bridge passed to reach the street on shore, had erected buildings which prevented the restoration of the bridge and wharf.

Held,—That *R.*, having allowed *C. et al.* to erect the gangway on public property and remain in possession of it for over a year, had debarred himself of the right of destroying what might have been originally a nuisance to him, and that, notwithstanding the subsequent abandonment of this wharf and gangway, *C. et al.* were entitled to substantial damages.

THE judgment appealed from was rendered by the Court of Queen's Bench for *Lower Canada* (Appeal Side) on the 3rd of February, 1876, confirming the judgment of the Superior Court and dismissing the action brought by the present Appellants.

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*PRESENT—Sir William Buell Richards, Knt., C. J., and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

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By their action brought in March, 1863, the Plaintiffs alleged: that they had been for upwards of eighteen years owners of certain lands, *emplacements*, in the village of *Beauharnois*, and had constructed stores, and that in 1846 they erected at great cost in lake *St. Louis*, opposite the village, a certain wharf connected with the shore by a bridge resting on the property of one *Charles Rapin;* that these erections had been made openly without any interference by the government, but with their consent, and that they had occupied such wharf and used it until the Defendant, the now Respondent, in 1862, erected certain stone buildings in the bed of the lake, in rear of *Charles Rapin's* property, and in doing so stopped and blocked up the bridge, destroying part of it, removing the materials and interrupting all communication between the wharf and the shore, thereby preventing the Plaintiffs from using or leasing their wharf; that the Defendant's erections also prevented the use of the beach and bed of the lake, and were made without permission. The Plaintiffs pray that Defendant be condemned to remove the erections by him made preventing communication with the wharf, and to restore the same within a period to be determined by the Court, and in case of a removal to pay a hundred pounds damages, and in case of failure seven hundred pounds with interest and costs.

The Defendant's plea first denies that the wharf in question was ever constructed with the sanction of any public authority, and states that it was in a navigable part of the river and had become a public nuisance in the possession of the Plaintiffs; that in erecting the said buildings mentioned in the Plaintiffs' case, the Defendant had only exercised an unquestionable right of property, having erected them on his own land; that by a deed executed before *Hainault*, notary, dated 10th March, 1860, the Defendant and several others had be-

come partners for the purpose of purchasing and maintaining the wharf in question, and that it had been leased by the said company in the interest and for the benefit of its shareholders; that Defendant had brought a barge there on the 28th September, 1862, and was prevented from using the wharf by the violence of *Coll McFee*, the agent of Plaintiffs, (*le représentant des dits démandeurs au regard du dit quai,*) he having removed some of the *madriers* of the wharf, and thus prevented communication with the land, "*et que par tel fait,*" the wharf had become a public and private nuisance, "*une nuisance publique et privée que le defendeur et tous ceux que en souffraient avait le droit de démolir,*" and that it encroached on the waters of the *St. Lawrence* and deprived Defendant of the right of making use of the river in front of his property.

Answer to plea: that the wharf was not built on Defendant's property, but on the beach of Lake *St. Louis;* that the *emplacement* of Defendant and that of *Charles Rapin*, behind which the wharf of Plaintiffs was built, formed part of the same lot, No. 7, and fronted on *St. Lawrence* street, whence they had the same depth to the beach of the lake—that is to say, 8 perches and 11 feet—and the surplus is occupied by the erections made by Defendant on the beach (*grêve*) of the lake. That *Coll McFee* was not *le représentant* of Plaintiffs, nor could his malicious or illegal acts he set up against Plaintiffs.

On the issues thus raised the parties went to proof, and, after twelve witnesses had been examined on behalf of Plaintiffs, the Defendant was allowed, on motion made by him, to that end, to fyle a supplementary plea of *puis darrein continuance.* This plea contains two allegations, namely: That since the institution of the action, and the fyling of the plea, *Charles Rapin*, upon whose land the bridge or gangway rested on the shore

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end, had made some erections, "*a fait des constructions et nouvelles œuvres qui rendent le rétablissement des lieux impossible ;*" and second, that the wharf in question had been carried away or destroyed partly by water, "*par les eaux,*" and partly from decay, and that therefore the re-establishment of the wharf would only be a public nuisance without any utility.

By the judgment of the Superior Court, Appellants' action was dismissed with costs.

The Court of Appeals affirming the judgment of the Superior Court, rested their judgment upon the fact that the Appellants had no right to build the bridge or gangway, which by their action, they complain Respondent destroyed, but that the Appellants by their action prevented the Respondent from using the said bridge or gangway, and thereby the bridge or gangway became and was a nuisance and injurious to Respondent. The judgment also maintains that there was no portion of damages suffered by the Appellants.

From the evidence it appears, that the building of the wharf and gangway in question by Plaintiffs, was about and probably anterior to the year 1848, and that down to the end of September, 1862, they continued in possession by themselves or tenants, and that the wharf was resorted to by the public by means of the bridge in question.

That one *Coll McFee*, who was tenant of the wharf in question, did, on one occasion, in 1862, take up some of the planks of the gangway, but put them down again that day or the next. Respondent, on *McFee's* taking up the planks, said he would continue to take them up, and gave orders to his men to take up the gangway, which was done. The Respondent then erected certain stone buildings in the bed of the river, and in doing so stopped and blocked up the bridge and destroyed part of it.

That Appellants, after the institution of their action, allowed the wharf to go to ruin, and removed part of it, to rebuild it at another part of the river, and that at the time of the trespass Appellants derived an annual revenue of $200 to $300.

Mr. *Robertson*, Q C., for Appellants:—

This was an action complaining of Respondent's interference with Appellants' wharf. The complaint, in effect, says: "We were long in possession of a wharf built by us in Lake *St. Louis*, without objection by the public authority; you, in 1862, interfered illegally with the wharf and the approaches to it, and rendered it useless; and, therefore, we ask, that you put it in its first state, and pay us the damages we have suffered." The Respondent answers: "Your lessee maliciously removed some planks of the gangway, and thereby the wharf became a public and private nuisance, which gave me the right to demolish, and after bringing your action, one *Charles Rapin*, through whose property your bridge passed, has lawfully erected buildings which prevents the restoration of the wharf and its approaches." Now the judgment of the Superior Court in favor of the Respondent is based upon an implicit abandonment by my clients of their rights in the wharf, and that no damage occurred subsequent to the date of action. Now, the damage suffered was partly in removing and destroying the gangway, and partly the erection of a permanent *hangard*, in the position formerly occupied by the gangway, thereby rendering the old approach to the wharf impossible, and damaging the property. Now, the principle is laid down, and is applicable to this case, that a Plaintiff is at liberty to prove, and a Court or jury is bound to take into consideration, the direct and immediate consequences of the acts complained of, which are so closely with them as that they would not of themselves form a distinct cause of action.

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The Court of Appeals took another ground, and rested their judgment upon the fact that the Appellants, having built their gangway upon public property, and one of their lessee's having prevented the Respondent from using the gangway, it became a public nuisance.

Appellants contend that the Respondent can raise no plea in his favor from there being no evidence of any permission or license from the Government in favor of Plaintiffs to build the wharf.

It is not in Defendant's mouth to urge the want of authority from the Government to build the wharf as an authority to him to pull it down in the manner proved.

There is no attempt to prove that the wharf or gangway was an obstruction to navigation: they are shewn to have been useful to it, and a convenience to the public, as well as a means to Plaintiffs and their successors in their stores adjoining *Richardson* street, to load their grain and receive their goods without paying other wharf owners the usual rates of wharfage.

The proprietor who builds a wharf, although he cannot invoke against Government any right of prescription, may well invoke as against third parties his possession of the wharf as giving him a right to contiuue it. If the possession is long enough to give him title by prescription, "il sera prouvé (*by that very fact*) qu'il ne peut nuire à personne, et que le propriétaire qui l'a fait bâtir, aura acquis la propriété *du droit de la conserver;* un système contraire entrainerait les plus étranges conséquences. Il n'y aurait pas de terme de l'exigence de la production d'une permission; un établissement qui aurait plusieurs siècles d'existence pourrait être detruit." *Garnier, des Eaux* (1); *Daviel des cours d'eaux* (2); *Toullier* (3).

(1) No. 1,099, 4 vol., See also 2 vol. Nos. 621, 622.

(2) Nos. 346, 369.

(3) Vol. 3, No. 674.

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Moreover Appellants' lessee was not "*leur représentant*," nor could his illegal or malicious acts be set up, or be of any effect against them, who had brought their action solely to be protected in their rights against the illegal acts of the Respondent.

Mr. *L. Laflamme*, for Respondent:

Appellants have, since the institution of their action, allowed the wharf to go to ruin, and having rebuilt it in another part of the river and obtained a direct communication to it, they have impliedly renounced the rights which they had, or might have to obtain a judgment against the Respondent. Moreover, the gangway was on public property and was a nuisance and injurious to the Respondent.

The non-interference on the part of the Government would not validate the encroachment on the public domain by Appellants, and no possessory right could be obtained by the use of a servitude on private property even with the toleration of the proprietor. It is evident, therefore, that this gangway was either on the property of the Defendant, or it was on the public domain with respect to that portion connecting the wharf with *Richardson* street. If it was resting on private property it could not be considered in any other light than a servitude on Defendant's property, and, therefore, the Plaintiff, having no title and being incapable of obtaining any possessory right, whatever use he would have made of the portion of private property, could in no manner constitute a right, even a possessory one, and the Defendant was entitled at any time to remove any obstruction so existing on his property or to cease tolerating such servitude. If it was below the water edge and the limit of Plaintiff's property, the Defendant, as riparian proprietor, was the only individual who could take advantage, according to law, of the use of the beach

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for the purpose of constructing thereon, and the only authority which could interfere with the exercise of his right was the public through the crown, the Plaintiff having no claim whatever to prevent him so long as the crown did not interfere with the exercise of such privilege. Reference was made to the following authorities: *C. C. L. C.* (1); *Proudhon* (2); *Enyot* (3); *Garnier* (4); *Code Nap.* (5); *Dubreuil* Legislation sur les eaux (6); *Proudhon* (7).

One of the honourable judges dissenting in the Court of Queen's Bench, Chief Justice *Dorion*, stated, as one ground of his dissent, that the Defendant had failed to prove that the structures he had made were on his own property, but that the fact was that he carried a wharf from his property into the river and erected upon it. The admission made by the honorable judge is enough to justify the conclusion of the Court. If it be established that the Defendant built from his property into the river, or extended his property into the river and erected a store upon it, there can be no question that such construction cannot be interfered with, except by public authority, and that he alone, according to the above authorities, was entitled as riparian proprietor to the use of the river opposite his property for such purposes to the exclusion of all others; but Respondent respectfully submits that there is sufficient evidence in the record to prove conclusively that the buildings in question were erected on the Defendant's own property.

Now, Respondent submits that the Court should take

(1) Art. 400, 499, 500, 507, 549, 550 and 585.
(2) Domaine Public, Vol. 3, p. 17, No. 680; p. 70, No. 734; p. 34 & 35, No. 701 et seq.; p. 71, No. 735; p. 93, No. 748, p. 94, No. 750; p. 266-7, Nos. 201, 202.
(3) Rep. de Jur. Vo. *Voies de fait.*
(4) Régime des Eaux. Nos. 73, 74.
(5) Art. 650.
(6) No. 252, p. 14 & Nos. 290, 293.
(7) Domaine Public, No. 843.

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into consideration the fact that the Appellants, by their action, claimed £100 of damages, when not one cent of damage up to that time could be proved, and that the reconstruction of the bridge was simply a question of one day's work, and as they asked that Respondent be condemned to repair the bridge, they failed to prove any damage whatsoever up to the institution of the action.

This total absence of any proof of damages was the main ground for dismissing the appeal, but was an additional reason tending to show that, even from the Plaintiff's standpoint, this appeal is reduced virtually to a question of costs. And as it has already been held that a Court of Appeal is not disposed to interfere with judgments of the Court below, when only a question of costs was involved, this is an additional ground for maintaining the judgment of the Court below.

The Respondent holds, moreover, that, even granting to the Appellants all they claim in this action, taking into consideration the authorities above cited, they could not bring their action before this Court, it being simply an offence, *delictum*, which was of the jurisdiction of a magistrate or of the Trinity House of *Montreal*.

See 2nd. Vic. ch. 19, sec. 1, 3 and 7 Act of 1849, ch. 117.

Mr. *Robertson*, Q.C., in reply.

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*June 4.

RITCHIE, J.:—

Defendant's contention in this case, so far as I can appreciate it, seems to me practically neither more nor less than this: The Plaintiffs, having erections in a navigable river which are convenient, useful and valuable to him, and the Defendant, being desirous of having a similar accommodation, claims the right to remove such

* The Chief Justice was absent when judgment was delivered.

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erections, which he calls obstructions, and substitute structures equally objectionable, though convenient, useful and valuable to himself, in lieu thereof.

This, I think, he cannot do; and with this I understand the Courts below agree.

But, as Plaintiffs, after action brought, and pending litigation, by which they sought damages and a removal of Defendant's erections, and a restoration to his original position, removed a portion of what was left by Defendant, and in the meantime sought and obtained other accommodation, it was considered they had estopped themselves from recovering any other redress than for the actual damage they had sustained, previous to the bringing of their action, and no actual pecuniary damage having been shewn, their action was dismissed.

It was certainly an infringement of Plaintiffs' rights to have their property destroyed and themselves inconvenienced, and every injury imports a damage; and, if Defendant had no right to interfere with Plaintiffs for the wrongful invasion of their property, they would be entitled to some damages, though they might be of small amount, or even nominal. I fail to see on what principle Defendant can claim immunity, merely because Plaintiffs do the best they can to remedy the inconvenience Defendant has imposed on them, till they can obtain a judgment compelling Defendant to remove his works and restore them to their original position. I think the damages suggested of $50 moderate in the extreme.

STRONG, J., delivered an oral judgment holding that the appeal should be allowed.

TASCHEREAU, J., (translated):

The Appellants, by their action brought in March, 1863, claimed a sum of seven hundred pounds damages

from the Respondent for having disturbed them in their lawful ownership and possession of certain lands on which they had constructed stores, *hangards* and buildings, for their trade and commerce, and of a wharf built at a great expense out to deep water, which was connected with the shore by a wooden bridge, built in the bed of Lake *St. Louis*, which comes down to the shore and rested there on the property of one *Charles Rapin*; they also alleged that these constructions were erected for the benefit of their trade, and had also been of use to the public.

They further averred, that these erections had been made openly and with the knowledge of the Government, and that they had been in peaceful possession of the same for upwards of eighteen years by themselves or by their tenants.

The conclusions of the declaration were that the Respondent be condemned to remove the erections by him made, and which prevented communication with the Appellants' wharf, and in case of removal to pay £100 damages; and to pay £700 damages in case of failure in removing the obstructions. The Defendant's plea was that the wharf was not built with public authority, nor for the public good; that it had become a nuisance to the public and to the Defendant, and that, in destroying part of the bridge, Defendant had simply exercised a lawful right, and that Plaintiffs had suffered no damage.

On these issues the parties went to proof, and after twelve witnesses had been examined the Defendant was allowed to fyle a supplementary plea, *puis darrein continuance*, alleging: 1st. That since the institution of the action, *Charles Rapin* had made some new erections upon his land, on which rested the gangway which rendered impossible the rebuilding of the erections "*a fait des constructions et nouvelles œuvres*

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qui rendent le rétablissement des lieux impossible." 2nd. That the wharf in question had been carried away or destroyed partly by water, and partly from decay, and that therefore the re-establishment of the wharf would only be a public nuisance without any utility.

The judge of the Superior Court at *Beauharnois* dismissed the Plaintiffs' action on the 30th October, 1864, on the ground that they had proved no damage, although he did not deny to them their right of action. His judgment, carried into appeal, was confirmed by three out of five members of that Court; the minority holding that the Appellants had a good right of action, and ought to have been adjudged damages. One of the honorable judges forming part of the majority states, that, in his opinion, the Appellants had a good right of action, but that they failed to prove any damage. He added:—

> It was then a matter of costs, and this Court is not disposed to interfere with the decision of the Court below, which dismissed the action with costs.

The first question which arises is, whether the Appellants had a right to bring this action against the Respondent.

I am of opinion, that, inasmuch as the Appellants had publicly and with the knowledge of the Respondent, and with the implied consent of public authority, built the said wharf in the bed of Lake *St. Louis*, and had peaceably enjoyed the possession thereof during 16 to 18 years, they were entitled to the benefits of their peaceful and public possession of this wharf, and that the Respondent had no right whatever *vi et armis* to destroy the gangway or means of communication which existed from the wharf to the shore. The Appellants, being disturbed in their possession, had a right of action *en complainte* against the Respondent. All authors agree on this principle, and specially *Garnier*, *Daviel* and

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Toullier. The Appellants, it is true, could not avail themselves of prescription against the rights of the crown on any part of the beach and lands reclaimed from the river or of the lake in question, but they could acquire such a possession as would justify them in bringing this action as first occupants without any objection on the part of the Crown. This doctrine is clearly laid down in the following authorities :—

Garnier des eaux :

Il n'appartient qu'à l'état de se plaindre de la construction d'un établissement sans autorisation et si l'état ne se plaint pas, soit que dans la réalité l'établissement est utile, soit pour tout autre motif, pas de droit en faveur de l étranger. Et quant à l'action en réintégrande a plus forte raison le possesseur peut l'intenter même sans une possession annuelle ni celle *d'animo domini.*

Daniel (1) says :—

C'est une maxime de politique fondée sur le but essentiel de toute société, de permettre aux particuliers l'usage de choses publiques en tout ce qui n'est pas contraire à leur destination commune.

I might add a great many French and English authorities in support of Appellants' contention, but it is not necessary, as all the judges, with one exception, of the Court of original jurisdiction, as well as of the Court of Appeal, have admitted this doctrine. The only judge who did not concur in this opinion qualified his dissent by stating that if this bridge prevented the Respondent from communication with the river it became a public nuisance, and that, therefore, the Respondent had the right to destroy it *proprio motu*, &c., &c.

I fail to see in the record before us any evidence that this wharf was either a public or private nuisance ; on the contrary, I can find proof that this wharf was of a public utility to the persons of that locality as well as to those of the surrounding localities, on account of the facility it gave the steamboats and other vessels

(1) No. 346.

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to land and take away the products of agriculture and articles of commerce.

As I have already stated, the judge who tried the case admitted in principle the Appellants' right, but because they allowed the wharf to go to decay, the honorable judge concluded two things:—1st. That the abandonment of the gangway was an implicit abandonment by the Plaintiffs of their rights in the wharf, and of obliging the Respondent to demolish and take away his new works. 2nd. That the Appellants had suffered no damage. This is the second question raised by this appeal.

I cannot admit for a moment the reasoning of the learned judge on this ground. In allowing their wharf to go to waste in 1864 and 1865, the Appellants were forced to submit to the natural and immediate consequences which followed the Respondent's trespass. They never waived their right to real and vindictive damages, which damages were continuing and increased from day to day after the institution of the action. Moreover, the evidence of *Alexander Parker*, *William Henderson*, *Frederick Ward* and *James Linch* clearly establishes the fact that by means of this wharf the Appellants derived an annual revenue of $200 to $300. We have, therefore, a good base to estimate the damages which the Appellants must have suffered from the month of July, 1862, until the institution of this action in March, 1863. This would give at least $75, on allowing Appellants $200 per annum, and if we add to this amount vindictive damages, which a jury or a Court might have given under the circumstances, I think there were ample means of estimating the damages. This was the opinion of the two judges of the Court of Queen's Bench who were in the minority.

It was also argued on the part of the Respondent that one *Coll McFee*, who was a tenant of the Appellants,

had been guilty of a trespass (*voie de fait*), by taking away a certain number of deals from the gangway, which had the effect of cutting off the communication with the shore, and that the wharf then became a public and private nuisance, and this would give the right to the Respondent to destroy it. Admitting for a moment the truth of this allegation, I am of opinion that there is no evidence in the record which would warrant us in coming to the conclusion that *Coll McFee*, although their tenant, was the Appellants' representative or authorized agent to commit such a trespass (*voie de fait*). Moreover, this act on the part of *McFee* seems somewhat justifiable from the fact that the Respondent at the time was obstructing the wharf and its approaches by taking considerable time in loading his carts on the wharf; even this light obstacle was removed the next day, as the deals were immediately replaced. The only right of action the Respondent could have was, in my opinion, not against the Appellants, but against *McFee*.

The above facts being satisfactorily established to my mind by the printed case, I cannot arrive at any other conclusions than the following :—

1st. That the building of the wharf in question by the Appellants was not a public nuisance, but that, on the contrary, the said wharf was of advantage to that locality in particular, and to the public in general.

2nd. That by allowing the wharf and other erections appertaining to the same to go to waste, the Appellants did not thereby waive their right to recover substantial damages against the Respondent.

3rd. That the Appellants, under the circumstances, had the right to bring their action, and that the Respondent could not, without exposing himself to pay damages, take upon himself to destroy the approaches to Appellants' wharf.

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4th. That Appellants have proved that they are entitled to $50 damages.

I am, therefore, of opinion, that the judgment appealed from should be reversed, and that the Respondent should be condemned to pay to the Appellants $50 damages with costs in all Courts.

FOURNIER, J., concurred.

HENRY, J.:—

I concur in the judgment that has just been read. The Respondent's pleas have not been proved. He pleads that it was a nuisance of a public and private character. He certainly has failed to prove that it was a nuisance of a public character, and he does not set out how it would become a private nuisance to him more than to anyone else. Therefore, there is no justification for his removing it, further than there would be on the part of any other in the country. I think the law justified the parties having a wharf outside in putting that gangway on to the wharf. This party says, however, that he abated the nuisance, but it appears he only abated it by putting another in its place. If it was a nuisance, the erection put in place of it by his orders was, as far as the public were concerned, as great a nuisance as the one complained of. I think the plea is not proved in any way. His other plea has only reference to the claim that the property should be restored to its original position, and not at all to the damages. Such a plea as that, after the damages were incurred and the action commenced, could not be an answer. It does not affect the judgment at all, in my view. He is to make out, first, that it was a public nuisance, and secondly, that he had a justification in abating it. But the evidence does not prove he did abate the nuisance, because, as far as the

public and the navigable qualities of the bay are concerned, he did not abate the nuisance. It would be a queer way on a public highway to abate a nuisance if a party tore a building away and left another in its place. There is no justification whatever shown here, either by the pleas themselves, even if true, or by the evidence by which they were attempted to be sustained. I entirely agree that the action was a good action when commenced, that the subsequent plea did not affect it, that there were damages and injuries sustained, and that Plaintiff is entitled to recover for those damages. I think $50 very reasonable, under all the circumstances, and my opinion is that the judgment of the Court below should be reversed, and judgment given for $50 and all the costs.

Appeal allowed with costs in all the Courts and $50 *damages.*

Solicitors for Appellants: *A. & W. Robertson.*

Solicitors for Respondents: *Charles Thibault.*

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*June 10, 11.

GEORGE ARCHIBALD AMER AND LABAN AMER ..... } APPELLANTS;

AND

THE QUEEN ..... RESPONDENT.

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

Appeal—38 *Vic., Ch.* 11, *Sec.* 49—*Conviction when unanimous.*

In Michaelmas Term, 1877, certain questions of law reserved, which arose on the trial of the Appellants, were argued before the Court of Queen's Bench for *Ontario*, composed of *Harrison*, C. J., and *Wilson*, J., and on the 4th February, 1878, the said Court, composed of the same judges, delivered judgment affirming the conviction of the Appellants for manslaughter.

The Court of Queen's Bench for *Ontario*, when full, is composed of a Chief Justice and two Puisne Judges.

The Appellants thereupon appealed to the Supreme Court under 38 *Vic.*, ch. 11, sec. 49.

Held,—That the conviction of the Court of Queen's Bench, although affirmed but by two judges, was unanimous, and, therefore, not appealable.

APPEAL from a judgment of the Court of Queen's Bench for *Ontario*, affirming the conviction of the Court of Oyer and Terminer and Gaol delivery for the District of *Algoma*.

At a special Court of Oyer and Terminer and general Gaol delivery in and for the provisional judicial District of *Algoma*, held on the 2nd October A. D., 1877, *George Archibald Amer* and *Laban Amer*, were tried for the wilful murder of *William Bryan*, and *George Archibald Amer* was found guilty of manslaughter, and *Laban Amer* was found not guilty. They were also

*PRESENT.—Ritchie, Strong, Taschereau, Fournier and Henry, J.J.

tried for the murder of *Charles Bryan* and both found guilty. At the trial the learned Judge reserved certain questions of law for the consideration of the Court of Queen's Bench for *Ontario*, and thereupon the said questions of law were argued before the Court of Queen's Bench, *Harrison*, C. J., and *Wilson*, J., being the only judges then present. On the 4th February, 1878, the Court of Queen's Bench, the same judges being present, considered and adjudged that the conviction of the said *George Archibald Amer* and *Laban Amer* be and the same were thereby affirmed.

The said *George Archibald Amer* and *Laban Amer* appealed to the Supreme Court of *Canada* under sec. 49 of the Supreme Court Act.

The following statement of facts was agreed by counsel to be taken on the argument as part of the case:—

"The Court of Queen's Bench, when full, is composed of a Chief Justice and two Puisne Judges. Prior to the 13th November, 1877, the members of the said Court were the Honorable Chief Justice *Harrison* and the Honorable Justices *Morrison* and *Wilson*. Previous to the 3rd December, 1877, being the day upon which this case was argued in the Court of Queen's Bench, Mr. Justice *Morrison* was appointed Justice of the Court of Appeal for *Ontario*, by commission bearing date the 30th November, 1877, and had, previous to the said 3rd day of December, intimated his acceptance of the said office of Justice of the Court of Appeal, and had thereupon ceased to act as Judge of the Court of Queen's Bench. He did not, however, take the oath of office as Justice of the Court of Appeal until the 15th December, 1877. Mr. Justice *Armour's* commission as Judge, as aforesaid, also bears date the said 30th day of November, 1877, and previous to the said 3rd day of December, he had intimated his acceptance of the said office, but did

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not take the oath of office until the 4th day of December, 1877. His commission reached him on the 1st day of December, 1877.

"The judgment in this case in the Court of Queen's Bench was delivered on the 4th February, 1878. Mr. Justice *Armour* was in Court during the day upon which the said judgment was delivered, but not until subsequent to the delivery thereof. He took no part in such judgment."

Mr. *M. C. Cameron*, Q.C., for Appellant, and Mr. *Boyd*, Q.C., for Respondent.

RITCHIE, J.:—

The *Supreme and Exchequer Court Act* provides that any person convicted of treason, felony, or misdemeanor before any Superior Court, 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 convictions is unanimous. It is not denied in this case that the Court appealed from was duly constituted and had full jurisdiction to hear the appeal, and that the Judges sitting in the Court and hearing the appeal were unanimous, and did affirm the conviction, but it is contended that there being one other Judge of that Court who might have sat in the Court, but did not, the Court was not unanimous; that the unanimity required by the Statute was not the unanimity of the Judges who composed the Court at the time of hearing the appeal, and who decided the case; but that an appeal existed, unless all the Judges of the Court were unanimous.

But I think the Court of last resort and the Court of

Queen's Bench of the Province of *Quebec*, named in the Statute, does not mean the individual Judges who may be authorized to sit in those Courts, but the tribunals from which the appeals are to come, or the respective Courts themselves, without reference to the number of Judges, provided always the Court be duly constituted by the presence of a sufficient number of Judges to make a legal Court, whatever number that may be, and if the Court so legally constituted affirms the conviction, and the Judges forming that Court and hearing the appeal shall be of one mind, that is agree in opinion, or determination, in respect to the affirmance of the conviction, in other words, if the Court, is unanimous in affirming the conviction, no appeal shall be allowed; but if, on the contrary, the Judges differ in opinion, the Court not being unanimous, then, and then only, may the person convicted appeal.

The Court, in this case having been unanimous, I think there is no appeal to this Court, and we are without jurisdiction.

STRONG, J.:—

I concur. It is impossible for us to come to the conclusion that there was a want of unanimity; and so long as there was no want of unanimity, this Court possesses no jurisdiction under the Statute. For the reasons assigned by Mr. Justice *Ritchie*, the appeal should be quashed.

TASCHEREAU, J.:—

The question, though not devoid of interest, in so far as the prisoners are concerned, seems, to my mind, so clear that I hardly can believe it possible to find a precedent to justify the application for an appeal to this Court. It has been said that in a doubtful case leniency

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should apply, or rather that the benefit of the doubt should be given in favor of the prisoners, but this humane principle should not blind us so as to make us lose sight of another principle, which is that no Court should take cognizance of an appeal when its jurisdiction is so doubtful. If, to extend mercy to the prisoners, we are to assume a jurisdiction which we do not possess, we would commit an act of injustice towards the crown and the community. That we have no jurisdiction is, to my mind, very evident. The Statute says in very clear terms that the appeal shall only be granted when a dissentient opinion is given in favor of the prisoner. That dissentient opinion is not to be found in the present case. The two learned Judges who expressed their opinion in the Court below composed the Court, and were unanimous, and so the case should end there. It is true that the Court may be composed of three Judges, but two of them form a competent Court. One of those three can also sit alone, and as such he forms the Court, and, as such, his decision would be final in the present cause. As Mr. Justice *Ritchie* very happily observed yesterday at the argument—this right of appeal may be looked upon as only granted when it happens that a dissent to the judgment appears.

The prisoners should have applied for the privilege of having the full Bench. No Judge would have refused such a request, I am sure ; but, having elected to submit their case before two Judges, and these two Judges forming the Court then sitting, I think the prisoners are precluded from their right of appeal to the Supreme Court.

FOURNIER, J., concurred.

HENRY, J. :

Looking at the Statute giving us jurisdiction, I found

that we have no jurisdiction where a Court properly constituted was unanimous. I must say, however, that I think the organization itself is defective. It does appear rather anomalous that one Judge should have power to decide a case of this kind, for it might be that the second decision would be by the same Judge who tried the case. Whether an amendment might be made by a change in the constitution in *Ontario*, or by an amendment to this Act, it is not for me to say. Nevertheless, an inconvenience must result to the public interests when one Judge could sit on a case of this kind, representing the full Court, and thus prevent an appeal to this Court. Still, I can only decide on the law as it is, and, after full consideration, I am bound to agree with the decision of the of my learned brethern.

Appeal quashed.

Solicitors for Appellants: *Cameron, McMichael & Hoskin.*

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*Feb'y. 9.

June 4.

THOMAS J. WALLACE.....APPELLANT;

AND

JOHN SOUTHER & CO.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Promissory Notes—Joint Liability—Evidence, rejection of—Misdirection as to Interest.

Plaintiffs sued *W.* upon two promissory notes signed by one *T. E.* and *W.* The notes were dated at *Halifax* and made payable to Plaintiff's order in *Boston, U.S.* The notes were unstamped, but before action brought double stamps were affixed and no contract as to interest appeared on the face of them. *W.* pleaded, *inter alia,* that he had signed the notes upon an understanding and agreement that he should be liable thereon as surety only for *T. E.,* and that Plaintiffs, without his knowledge or consent, agreed to give and gave time to *T. E.,* and forbore to enforce payment when they might have been paid. At the trial *W.* sought to cross-examine one of the Plaintiffs on an affidavit made by the witness, and to which was annexed a letter to Plaintiffs from *T. E.* This evidence was rejected by the Judge, and a verdict was given for Plaintiffs with interest. A rule *nisi* to set aside verdict was discharged by the Supreme Court of *Nova Scotia,* but they referred the rate of interest to a Master of the Court.

Held,—That there was an improper rejection of evidence, and that the Jury should have been directed as to interest.

APPEAL from a judgment of the Supreme Court of *Nova Scotia* discharging a rule *nisi* for a new trial.

This was an action brought by Respondents against Appellant upon two joint and several promissory notes, dated, *Halifax,* the 15th Oct., 1873, made by one *Thomas Evans* and the Appellant, by which they promised to

*PRESENT:—Sir William Buell Richards, Knt., C. J., and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

pay to the order of the Respondents, at their office, at *Boston, U. S.*, the respective sums of $1,000 and $2,000 *U. S.* currency.

The pleadings and facts of the case sufficiently appear in the judgment of Mr. Justice *Henry*, hereinafter given.

The evidence rejected by the Judge at the trial was an affidavit made by *Chs. H. Souther*, to oppose an order for continuance, to which was annexed a letter signed by *Thomas Evans*, and about which the Appellant sought to cross-examine the said *Chs. H. Souther*, in support of the following plea :—

"The Defendant for an added plea in this cause, added by leave of a Judge, says for a plea on equitable grounds that he the said Defendant made the notes declared on in this action at the request of and for the sole accommodation of one *Thomas Evans*, as the surety only of said *Evans*, to secure a debt due to the Plaintiffs solely from the said *Evans*, and, save as aforesaid, there was not any value or consideration for the Defendant making the said notes or either of them, and the said notes were delivered to the Plaintiffs and accepted by them from the Defendant upon an understanding and agreement that the Defendant should be liable thereon as surety only for the said *Evans*, and the Plaintiffs, at the time the said promissory notes were made, had notice and knowledge of the same having been made by the said *Thomas J. Wallace* as such surety, as aforesaid, and that the Plaintiffs, without the knowledge or consent of Defendant, agreed to give and gave time for payment to the said *Evans* of said notes, respectively, and forebore to enforce payment of the same for a long time, and the Plaintiffs might and could, had they not given time, long since obtained payment from the said *Evans*, and by means of the premises the Defendant has been greatly prejudiced and damaged, and has been and is wholly

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discharged from all liability to pay the amount due upon the said notes, and each of them."

The case was tried before Mr. Justice *Wilkins* at *Halifax*, and a verdict given for the Respondents for $2,670 with interest.

A rule *nisi* was taken out under the Statute to set aside verdict, which was argued before the Court in Banc on the 8th January, 1877, and discharged on the 2nd May, 1877.

The Appellant in person :—

The papers which were declared on as promissory notes were only agreements. They were promises to pay *John Souther & Son*, but the action was brought by *John Souther & Co.* The notes were drawn in *Halifax* and were not stamped with any revenue stamps.

The learned Judge who tried the cause, among other misdirections, directed the jury that the papers declared on were promissory notes, requiring no stamps, gave them no directions as to the law by which they were to be governed in finding interest, if any, and told them that time given by one Plaintiff or partner to the principal would not discharge the surety, but that time should be given by all to have this effect. That they were not to go beyond the notes, or enquire into the consideration, and failed to give them such directions as the case demanded. Nor did he leave any question to the jury in closing, but gave them positive instructions to find a verdict against the Appellant. He should have told the jury that the notes, not having been made to the Plaintiffs but to *John Souther & Son*, they could not recover upon them, but did not do so.

Hillard on New Trials (1) ; *Roscoe* (2).

I complain also of the improper rejection of testimony offered by the Defendant, the Judge having

(1) Pp. 254 to 291, 386. (2) P. 138.

rejected an affidavit made in the cause by one of the Plaintiffs or Respondents with a letter of *Thomas Evans* attached, and also refused to admit an agreement made between *John Souther & Co.* and one *Charles Murdoch*, when offered by the Appellant, but afterwards admitted, when offered by Respondents, a paper, a duplicate of the rejected agreement, except a memorandum at the bottom of the first, not on the second offered agreement: *Roscoe* on Evidence (1); *Taylor* on Evidence (2); *Boileau* v. *Rutlin* (3); *Brickell* v. *Hulse* (4).

I also submit that the Appellant, being only surety for *Thomas Evans* on the notes and agreements, the rejection of the testimony offered by him prevented him from proving his discharge in consequence of the time given to *Evans*. If the evidence had been received the want of an allegation of consideration could have been supplied by amendment at the trial. *Evans's* offer to pay interest was a sufficient consideration. *Byles* on bills (5). In fact, the evidence does not establish a case for the Respondents. *Hilliard* on New Trials (6).

Mr. *Gormully*, for Respondents:—

The notes declared on were promissory notes and there is no sufficient evidence of suretyship between the Appellant and *Thomas Evans*. But, assuming the suretyship to be established, there is no evidence that time was given to the principal in such a manner as to discharge the surety.

Mere non-direction on the question of suretyship would be no ground for a new trial, unless the verdict were against the weight of evidence; but that point is not open to Appellant in this Court. *Great W. R. Co.* v. *Braid* (7).

(1) Pp. 196, 214, 129.
(2) Pp. 691, 723, 743 & 821.
(3) 7 A. & E. 454.
(4) 2 Exch. 675.
(5) P. 382, 11 Edition.
(6) Pp. 461, 124, 125, 129, 145, 138.
(7) 1 Moo. P. C. C. N. S. 101.

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Respondents are entitled to interest, and what was given here was the legal interest, and the rate of interest in *Boston*, in the absence of evidence to the contrary, must be taken to be the same as the rate in *Halifax*. See *Byles* on bills (1).

Now, as to the evidence rejected, the only evidence withdrawn from the jury was the affidavit and letter shown on pages 15 and 16 of the printed case. Such evidence was properly rejected. If admissible at all, it was never formally tendered, nor were the grounds of its admissibility distinctly pointed out to the Judge at the trial, consequently such improper rejection of evidence is no ground for a new trial.

Greene v. *Bateman* (2); *Bain* v. *Proprietors of the Whitehaven Railway Compay* (3).

Moreover, the evidence rejected, even if admitted, could have had no effect on the jury, and the verdict meets the justice of the case. A Court ought not to grant a new trial after a verdict for the Plaintiffs where the defence set up is unconscionable, and the verdict has been found according to the justice and honesty of the case. *Chitty Pr.* (4).

RITCHIE, J.:—

I think there must be a new trial in this case. There was evidence rejected at the trial that ought to have been received, and this rejection requires this Court to make absolute the rule for a new trial. The notes sued on were the joint and several notes of *Thomas Evans* and Defendant *Wallace*. One of the defences was, that Defendant *Wallace* signed these notes for the accommodation of, and as surety for, *Evans*; that they were

(1) 12 Ed. p. 405.
(2) L. R. 5 H. L. 591.
(3) 3 H. L. 1.
(4) 3 Vol. p. 835.

delivered to and accepted by Plaintiffs, on the agreement that *Wallace* was to be liable thereon as surety only for *Evans*, and that Plaintiffs, without the knowledge or consent of Defendant *Wallace*, gave time for payment to *Evans*, whereby Defendant was discharged.

The evidence Mr. Justice *Wilkins* rejected was an affidavit by *Charles H. Souther*, one of the Plaintiffs, to oppose order for continuance, to which was annexed a letter from *Thomas Evans*, addressed to *John Souther & Co.*, upon which Mr. *Wallace* sought to cross-examine the said *Charles H. Souther*, when he was on the stand supporting his own case, in order to get evidence in support of his plea that he was a surety, and that time had been given to *Evans*.

On the cross-examination, the Judge's notes say:

The witness, one of the Plaintiffs, looks at an affidavit. The signature to it is mine. Looks at letter annexed. This is signed by *Thomas Evans*. I read that letter myself. Mr. *Wallace* asks, did you not on this letter—(Objected. I refuse to allow that question.)

Defendant, having opened his case, made the same Plaintiff his witness, and the Judge's notes say:

Mr. *Wallace* proceeded to interrogate *Souther* on the point of time having been given to a party. Mr. *Wallace* offers in evidence the affidavit of the witness submitted to him on cross-examination, and respecting which he spoke on his examination. Mr. *Wallace* did not in any way refer to this in opening his case to the Jury. I say to him that I require him to point out to me in what respect the affidavit which he offers contains matters contradictory of any evidence given by the witness on his cross-examination. This he declines to do, and I, therefore, refuse to receive the affidavit. * * * *Wallace* offers, in evidence, the letter annexed to the witness's affidavit. I refuse to receive it. He asks did you act on that letter? I refuse to allow him to do so.

Now, this was clearly all wrong. One finds it somewhat difficult to understand how, after a witness, a party in the cause, on cross-examination, looks at an affidavit, the signature to which he admits to be his own, and identifies a letter annexed thereto as signed

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by the co-contractor of Defendant, to whom it is pleaded time was given, and states that he had read that letter himself, the Defendant could be denied the privilege of asking the witness what he he did on this letter, it being testified by the witness, that the account referred to in the letter was in connection with the original transaction, and an examination of the affidavit shows that it was made and used by Plaintiffs in this very cause, and the contents of the letter treating exclusively of the subject matter of this suit, expressing inability to pay promptly, and craving further indulgence. It is still more extraordinary that the Defendant was stopped and his question rejected before it was even finished.

But strange as this is, it is more unaccountable that Defendant, being driven as it were by this rejection to make Plaintiff his own witness, the Judge should reject the same affidavit when offered as part of Defendant's case. Surely the Defendant had a right to give in evidence an affidavit made and used by Plaintiff in the cause, having reference to the subject matter in dispute, whether it contradicted a previous statement of the party or not. Surely anything a party says or does in reference to the matter in controversy, his opponent has a right to prove, without being limited to whether it contradicts a previous statement or not; and, as to the letter annexed to the affidavit, it, having been read and used by Plaintiff and annexed to his affidavit, was, in like manner, receivable, and Defendant had a right to ask witness whether he acted on that letter. Without doubt the acts of a party to a suit are,equally with his declarations, evidence his opponent is entitled to use; and in this case, where the giving of time was solicited by the principal, if principal he was, the surety had a right to know whether that application was made and acted on by the creditor, the witness. This is the more

obvious when the Defendant proves that Plaintiff said he had a letter from *Evans* asking for time and he had given it.

Whether the whole evidence would have made out *the suretyship* and the giving of time or not, is not now the question. Most material evidence was rejected, bearing on the very point in issue, the want of which may have most effectually embarrassed Defendant in his defence, and for ought we know prevented him from establishing his case.

As to stamps, I say nothing, as it does not appear where the notes were made, whether in *Nova Scotia* or the *United States*.

Another point was in reference to the interest. The jury found the full amount of these notes and interest. The Appellant took exception to that, and contended that they could not allow interest, because no evidence was given as to what the rate of interest in *Boston* was, and that it should have been found specifically by the Jury. The Court, finding the difficulty there was, said, "Oh! we will refer it to the Master to compute the interest" (assuming the Master had the right to compute it), but gave no directions as to how that was to be done. But where, as here, interest was not made payable by the note itself, any interest given would be in the nature of damages ; I think it should be found by the Jury and not by the Master; and, I think, it was the duty of the learned Judge to direct the Jury by what rule that interest should be governed. Because cases are abundant that, where a note or agreement is payable in a particular place, the rate of interest is to be governed by the rate at the place where the note is payable. As in this case the notes were payable in *Boston*, and there was no evidence as to the rule by which the interest might be computed, nor any evidence of the legal rate of interest in *Boston*, neither

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the jury nor the master had any rule or rate for their guidance. This might have been avoided if the Plaintiff had given up the interest, but the other is a substantial objection, and I am of opinion, therefore, that the rule should be made absolute for a new trial.

STRONG, J., delivered an oral judgment in favour of allowing the appeal.

TASCHEREAU and FOURNIER, J. J., concurred.

HENRY, J.:—

This is an appeal from the Supreme Court of *Nova Scotia*. The Respondents seek to recover upon two promissory notes set out in their writ, as drawn by the Defendant, dated the 15th day of October, 1873, payable one for $1,000 in one month, the other for $2,000 in three months, "to the Plaintiffs at their office, *South Boston, U. S.*" The Plaintiffs allege that they were duly presented for payment at the said office *of Plaintiffs*. The pleas to the notes declared on are:—

1st. A denial of the making of them.

2nd. No consideration.

3rd. That they were not stamped as required by law.

4th. Setting out that they were given as part payment of machinery, for a dredge that was insufficient to perform certain work which it was agreed to be capable of performing; that the same was not worth more than the sum which had been already paid for it; that the Defendant was not aware of the insufficiency when he made the notes; and that, therefore, the Plaintiffs ought not to recover the amount of the notes or any part thereof.

5th. On equitable grounds, that Defendant signed only as surety for one *Thomas Evans* to secure a debt due by him, *Evans*; that there was no consideration for

the Defendant making the notes; that they were received by Plaintiffs on the agreement that Defendant should be answerable only as such surety; and that time was given by the Plaintiffs without the knowledge or consent of the Defendant to said *Evans*, by which his liability was discharged.

6th. That the notes were not duly presented.

The case was tried in 1876 and a verdict given for the Plaintiffs "for amount claimed $2,670 with interest."

A rule *nisi* having been refused, one was taken out under the Statute, the grounds argued before the Court at *Halifax*, and the rule discharged with costs. From that judgment the Defendant has appealed to this Court, and we are to decide whether that judgment should be confirmed or set aside and a new trial granted. A rule for judgment was granted as follows: "On argument of the rule *nisi* to set aside the verdict herein, it is hereby ordered that the said rule *nisi* be discharged with costs."

A number of grounds (eighteen) were taken in the rule *nisi*, but, according to the practice in *Nova Scotia*, they are all covered by the objections taken generally.

1st. That the verdict is against law and evidence.

2nd. For the improper rejection of evidence.

3rd. For the improper reception of evidence, and

4th. For misdirection.

The other objections contained in the rule need not be specifically referred to, as the four I have stated comprise them all.

The first step on the trial of the issues was to prove the making of *the notes declared on*, which are alleged to be notes payable *to the Plaintiffs*. Those given in evidence were made payable to "*John Souther & Son*," not *to the Plaintiffs*. They are not declared on as payable to the Plaintiffs, as co-partners by the name and firm of "*John Souther & Son*," but under the name and firm of

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John Souther & Co., nor is it in any way alleged that any firm of such a name as the former existed. And I am at a loss to ascertain how they, under the declaration, could have been received in evidence as the notes declared on. On proof of the Defendant's signature, as appears by the Judge's notes of the trial, they were "read," and then Defendant objected that they were not properly stamped. It does not appear that any objection on any ground was taken before the reading of the notes. The admission of them in evidence may therefore be considered regular; but the question still remains what do they prove? Certainly, not that the Defendant made two notes *to the Plaintiffs*, but to *John Souther & Son*. If, therefore, *John Souther & Son* are the payees, what right have *Charles H. Souther* and *George A. Souther*, by being members of the firm of "*John Souther & Co.*, to sue for or collect money when no promise is shown to have been made to them? No evidence is given to show who the "son" is; and he may possibly be another son of *John Souther* altogether. If, therefore, the Defendant has not concluded himself by a clear agreement on the trial not to raise the objection, or rather has agreed that "*John Souther & Son*," means "*John, Charles H.* and *George A. Souther*, I must unhesitatingly say that the Plaintiffs wholly failed to make out a case.

Evidence was given that the consideration of the notes passed from the firm of *John Souther & Co*, as a balance for machinery furnished by them. They might, if the Defendant were the original contractor or debtor, have recovered on the common counts; but the claim in this action is limited by the particulars to the notes, and the Plaintiffs must show a contract by them (the notes) to pay the Plaintiffs the amount of them either as members of the firm or otherwise. If by them, the notes, there is no contract to pay the amount of them *to the*

Plaintiffs, it matters not that the Defendant owed them an equal amount as a balance for goods sold and delivered or otherwise. The whole evidence upon this point by the Plaintiffs is, that the Defendant owed the Plaintiffs, and that for the debt he gave the notes payable to "*John Souther & Son.*" The claim is not for the balance previously due; and the case of the Plaintiffs stands on the promise contained in the notes. There is no evidence, in my opinion, to sustain the allegation that the notes were made payable to the Plaintiffs; and I do not see how they can recover on a promise not made to them. I have looked carefully through the notes of trial and the judgment given by the Court below, but I can see nothing by which the Defendant is concluded from raising the ground of want of the proof necessary to sustain the claim set out in the writ that the notes were made payable *to the Plaintiffs*. It is clear to me that the objection was taken and considered on the argument below of the objections in the rule *nisi;* and I am, therefore, to assume it was raised on the trial. The judgment refers to it as an objection "that there was no proof of partnership of the Plaintiffs," which shows that the objection was taken and disposed of in reference to the question of the right of *the firm* to recover on the notes. Being, therefore, of the opinion that the objection was open to the Defendant on the argument before us, he is entitled to the benefit of his defence on the plea denying the making of the notes declared on, and consequently, in respect to that issue, to a judgment in his favor. The case in 4 *Allen* R. p. 234, cited in support of the judgment, does not, in my opinion, affect the case. There, the surnames of all the Plaintiffs were given as the payees of the notes, and after the commencement of the suit the Defendant acknowledged his liability, and promised he would intruct his Attorney to give a confession. The objection was that the

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Christian names of the payees were not mentioned in the note, but the Court overruled the objection, because the Defendant had been "served with process at their suit," and said he had no defence. It is authoritatively laid down that in a bill or note the person to whom it is to be paid must be designated with certainty; and that uncertainty, in this particular, will destroy the validity of the instrument (1). So far as the evidence in this case goes, there is every uncertainty as to the payees of the notes in question. We might assume a good deal, but we cannot supply legally deficient evidence.

The objection to the rejection of evidence is another point demanding attention, and in considering it we must keep in mind the several issues.

Under the equitable plea, that Defendant was only a surety for *Evans* in the notes, he was justified in tendering evidence to show that the original indebtedness was not his, and he could not show that better than by a document signed by the Plaintiffs. The rejection of the document was therefore improper. Oral evidence of Defendant having been the original debtor had been received, and the document in question, showing the agreement with another party, was legitimate evidence in contradiction of that evidence and in support of this plea. I don't think it should have been considered "irrelevant" or its reception declined. It was a document signed by the Plaintiffs referring to what had been alleged as the consideration of the notes, and, under any circumstances, legitimate evidence. The affidavit of the witness, *Charles H. Souther*, and the letter referred to therein and annexed thereto was, on the same and other grounds, legitimate evidence, and was also, I think, improperly rejected. I know of no rule which would have required the Defendant to have

(1) Chitty on Bills 10th Ed. 106, and references in note 3.

referred to the affidavit in opening his case to the jury. Nor do I think it a good reason for rejecting it, that the Defendant declined to point out wherein it contained "matters contrary of any evidence given by the witness on his cross-examination." This affidavit, made by one of the parties to the suit, and adopting, as it did, a letter which was alleged as the beginning of a negotiation for further time by *Evans*, for whom Defendant alleged he was security, should have been received as a matter of right, and not of favor, or subject to the condition imposed. When that affidavit and letter were *proved*, the Defendant could not, of course, *then* tender them in evidence; but he had a perfect right to question the witness as to what he or the other Plaintiffs did on receipt of that letter. He was not allowed to do so. He may, therefore, have been thereby prevented from proving an important issue, that time had been given to *Evans* in a manner to have released the Defendant. We, of course, cannot say that would necessarily have been the result. It is enough, however, that legitimate evidence that might have affected the verdict was rejected. As it was, the evidence that a binding contract for time which alone would have discharged the Defendant under the plea in question, was deficient; but we cannot tell what the result might have been, had the evidence in question not been rejected. I think, therefore, the verdict should be set aside on that ground.

The notes were payable in *Boston*, and the legal rights and liabilities of the parties to them are governed by the *lex loci contractus*. An objection was taken that they were not properly stamped. If that was a requisite to their validity at the place of payment, the law requiring such should have been proved by the Defendant; and in the absence of that proof, the plea must, in that respect, fail. They are dated at *Halifax*, but that, in my view, is un-

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important. They were not notes at all till delivered in *Boston*, and besides, if even delivered in *Halifax*, but payable in *Boston*, they become subject to the laws at the place of payment.

It is adopted by the common law, as a general rule, in the interpretation of contracts, that they are to be deemed contracts of the place where they are made, unless they are positively to be performed or paid elsewhere (1).

The place of payment, according to every legal authority, settles, therefore, the point in this case, that the notes in question are to be deemed contracts of the place of payment, even if they had been fully executed and delivered in *Halifax*; but, as I before said, the delivery of them in *Boston* totally does away with any objection that might otherwise be raised. The whole contract was made there, and the formalities, proofs or authentications which are required by the *lex loci* are indispensable to their validity everywhere else. If, by the laws of the state of *Massachusetts*, the notes would have been void if not stamped, they would be held void here even before stamps were required in this country. Not good there, they would not be good anywhere. If, then, the notes could be recovered by the *lex loci contractus* without stamps—and we must so assume, in the absence of proof to the contrary—is stamping necessary before they can be sued upon in this country? And if so, how and when must the stamps be affixed? By section 11 of 31 *Vic.*, ch. 9, it is provided that:—

If any one in *Canada* makes, draws, accepts, indorses, signs, becomes party to or pays any promissory note, draft or bill of exchange *chargeable with duty under this Act*, before the duty (or double duty, as the case may be), has been paid by affixing thereto the proper stamp or stamps, he shall incur a penalty of one hundred dollars, and save only in the case of the payment of double duty, as hereinafter mentioned, such instrument shall be invalid and of no effect in law, or in equity, and the acceptance, or payment, or protest thereof, shall be of no effect.

(1) Story on Prom. Notes, 164.

The provisions of that section are confined to promissory notes, drafts or bills of exchange, "*chargeable with duty under this Act*," and we are thereby referred to section 1 of the same Act, by which stamp duties are imposed. The latter provides that:—

> Upon and in respect of every promissory note, draft or bill of exchange * * * made, drawn, or accepted in *Canada* * there shall be levied, collected and paid to her Majesty, the duties hereinafter mentioned, &c.

"Made," "drawn" and "accepted," are construed in their technical sense. The first applies to promissory notes and the other two to drafts, or bills of exchange. "Drawing," in reference to bills of exchange, has the same application as "making" to promissory notes, and includes, not only the writing and signing, but also the full execution by delivery. "Drawing," however, in reference to a promissory note, means nothing more than the writing without execution of it. I am, therefore, of opinion that the mere drawing and signing a promissory note in this country, delivered and payable in another, does not bring such a note within the terms of section 11, and, therefore, I think the notes in question may be recovered on although not stamped.

I need hardly refer to the objection of "misdirection," as my decision on other points is in favor of setting the verdict aside. The report of the Judge's charge is very general. He reports that he expressed a very decided opinion that the notes in view of the Stamp Acts, and the "proved facts in connection with them" were due and recoverable in point of law, and that to the Plaintiff's right to recover a verdict for the amount due on them no defence was made out under any of the pleas. From what I have said it will be seen that, as regards the objection on the ground of the want of stamps, I entirely agree with him. But

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from what I have said it will be as plainly seen that, I think, under the evidence the Plaintiffs did not make out a case, and that the learned Judge should have so charged.

One other point will I refer to. The verdict includes interest, and the question is, can it be sustained when so including it? The notes contain no reference to interest, and there is, therefore, no contract to pay it. No evidence was given that by the laws of *Massachusetts* the Plaintiffs could recover interest in such a case, nor what the rate of interest, if any, there was. It is clear to me, therefore, it cannot be recovered in this action under the evidence in it. The learned Judge who delivered the judgment of the Court below assumed that the learned Judge on the trial instructed the jury properly on this point, and he could "see no difficulty in a judgment being entered for the Plaintiffs for interest, within the scope of the claim in the declaration at the legal rate thereof at *Boston* at the time of the trial to be referred to a Master of the Supreme Court to ascertain." I feel bound to dissent from that decision. There is neither law nor established practice to sustain such a reference. For mere matters of computation, reference may be made to a Master; but the Defendant here had the right to have the law, as applicable to such a case, expounded by a Judge, and the opinion of the jury upon the point. Interest may be allowed or not, when not of the essence of the contract, and a jury is not bound by the law in *Nova Scotia* to give interest; and the rate of it may affect the judgment of a jury as to allowing it. To give that power to a Master might, in some cases, virtually leave the right of a party to recover a judgment, or not, dependent on the report of a Master, for, in a case where several claims existed on both sides, allowing or refusing interest on notes similar to those in question, might decide the verdict; or rather, leave the

final result not be settled wholly by the jury under the direction of a Judge as to law, but, possibly, the most important part of it left to the decision of a Master. Cases in *Nova Scotia* are, as in other places, supposed to be tried by law and established practice, and issues decided by Judges and jurors. I can find no authority for calling in the aid of a Master in such a case. Were the interest merely a matter of computation under our own law, and the jury added it generally, the amount, no doubt, could be ascertained by a Master; but there is no law that I can find by which one part of an issue shall be found by a jury, directed as to the law by a Judge, and the remainder by a Master. We are in this Court authorized and required to give the judgment we think should have been given by the Court below; and, if this were the only objection to the verdict, we might possibly be justified, under the evidence, in directing a judgment for the Plaintiffs for the amount of the notes without interest; but I do not consider it necessary to decide as to that, because, for the other reasons given, I am of opinion the verdict cannot stand. It, in my opinion, should be set aside, and a new trial granted, and the appeal allowed with costs.

Appeal allowed with costs.

Solicitor for Appellant: *Wallace Graham.*

Solicitors for Respondents: *Meagher & Chisholm.*

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*Jan. 21, 22.

*April 15.

WILLIAM JOHNSON TAYLOR.....APPELLANT;

AND

ADAM HENRY WALLBRIDGE.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Principal and Agent—Trustee and cestui que Trust—Laches.

In 1847, the Plaintiff, *W. J. T.*, before leaving *Canada*, conveyed certain lands, in which he had an interest as assignee of a contract to purchase, to his brother, *G. T.*, one of the Defendants.

In April, 1851, *G. T.*, in anticipation of a suit which was afterwards brought by one *C.* against *W. J. T.* in relation to the lands in question, without the knowledge of his brother, re-assigned the property to him, and having paid the balance of the purchase money, a deed of the lot issued at *G. T.'s* request to *W. J. T.*, as such assignee. In October following a power of attorney was sent to, and executed by, *W. J. T.*, who was then in *California*, in favor of *G. T.*, to enable him (*G. T.*) to "*sell* the land in question, and to *sell* or *lease* any other lands he owned in *Canada*."

In 1856, *G. T.* conveyed the property to *W.*, the Respondent, who had acted as solicitor for *W. J. T.*, and had full means of knowing *G. T.'s* position and powers, for an alleged consideration of $1000, and *W.* immediately reconveyed to *G. T.* one-half of the land for an alleged consideration of $200. In 1873, *W. J. T.* returned to *Canada*, and in January, 1874, filed a bill impeaching the transactions between his brother and *W.*, seeking to have them declared trustees for him.

Held,—(Reversing the judgment of the Court of Error and Appeal and affirming the decree of Vice-Chancellor *Proudfoot*, *Strong* J., dissenting,) that *W.J. T.* was the owner of the lands in question, that he had not been debarred by laches or acquiescence from succeeding in the present suit, and that the transactions between *G. T.* and *W.* should be set aside.

APPEAL to the Supreme Court of *Canada* from a judgment of the Court of Appeal for the Province of *Ontario*,

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

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affirming an order of the Court of Chancery of *Ontario*, dated 2nd February, 1876, in a cause in the said Court of Chancery between *William Johnson Taylor* (Appellant) Plaintiff, and *George Taylor*, *Adam Henry Wallbridge* (Respondent), and *George Simpson*, Defendants.

In this case Plaintiff's bill sets forth: that in 1851 he was seized in fee simple, or well entitled to the north half of lot No. 8, in the 2nd Concession of the Township of *Thurlow*, and being out of *Canada*, he executed a power of attorney to *George Taylor*, dated 11th October, 1851, authorizing him "to sell all" the said land, as also to act as his attorney "in the sale or leasing of any lands of which" he was the owner in the Province of *Canada*, known as *Canada West;* that in the year 1856 one *Joseph Canniff* exhibited his bill of complaint in the Court of Chancery against Plaintiff, which Plaintiff believed alleged that *Canniff* had some estate, &c, in the said lands, and registered under said bill *a lis pendens* against said lands, and *George Taylor*, as such attorney and agent of Plaintiff, defended against said bill by *Lewis Wallbridge* and *Adam Henry Wallbridge*, co-partners and practicing solicitors; that under the said power *George Taylor* pretended to convey by indenture of grant, dated 29th December, 1856, the said land to Defendant *Wallbridge*, for the expressed consideration of $1,000, and said *Wallbridge*, by indenture of even date, conveyed back to *George Taylor* one half of the same, viz: the north seventeen acres and the south thirty-three acres of the said north half of said lot, for the expressed consideration of $200.

That Plaintiff left *Upper Canada* before 1851, and remained out of *Canada* continuously until October, 1873, when, for the first time, he returned to *Canada;* that the said power of attorney was executed by him in *California* and sent to *George Taylor* to enable him to

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act as trustee and agent for Plaintiff in the management and sale of the lands and premises therein mentioned. That the conveyance to Defendant *Wallbridge*, and the conveyance back to *George Taylor*, were "made in pursuance of a colorable and collusive agreement and understanding between the Defendants, to defraud Plaintiff out of said lands and to divide the same between the Defendants, both of whom at the time held a fiduciary position towards the Plaintiff—the one as agent and the other as solicitor." That Defendants had, since the said pretended conveyances, bargained, sold and conveyed some portions of said lands to different parties, all which, so far as the abstract title of the said lot in the Registry Office showed (and Complainant had no knowledge of any other sales or conveyances thereof), Plaintiff was willing, and offered, to confirm the same. That Defendants had received and appropriated to their own use divers large sums of money, the proceeds of such sales, and neglected and refused to account to Plaintiff therefor and to pay same over to him.

That since Plaintiff's return to *Ontario*, *George Taylor*, as Plaintiff was informed and believed, executed, without any consideration whatever, an indenture of grant of part of said lands to *George Simpson* for his natural life, and Plaintiff alleged that the said *George Simpson*, before the execution of the said indenture, was well aware, or had actual notice of Plaintiff's rights and interests in said land; and Plaintiff submitted that said power of attorney did not warrant and empower Defendant, *George Taylor*, to grant, convey, and lease said lands to *Adam Henry Wallbridge* and *George Simpson*, and that the pretended consideration mentioned in the deed to *Adam Henry Wallbridge*, if paid at all, which Plaintiff denied, was grossly inadequate to the value of the said north half of the said lot; and Plaintiff prayed:—

1. That the Defendants might be declared Trustees for him of the said lands, premises and moneys.

2. That an account might be taken of the parcels or portions of the said lands and premises sold or conveyed, or leased, as aforesaid, and of the moneys which they received or ought to have received therefor.

3. That they might be ordered to convey and assure, by proper assurances with all necessary parties, the remaining or unsold portions of the said lands and premises to the Complainant.

4. That the Defendants might be ordered to account to Complainant for the moneys received by them, or either of them, or which should have been received by them, or either of them, for the said parcels or portions of said half lot so sold and conveyed, and for the rents, issues and profits which they received or ought to have received from the said lands and premises, with interest.

The Defendant *George Taylor*, in his answer, after setting forth that his mother purchased the said lands from King's College, and her connection with the said lands, states that she afterwards assigned her interest in said lands to him, in consideration of which he paid her the sum of $50, and that afterwards, in the year 1851, he assigned his interest in the said lands to the Plaintiff, setting forth the circumstances under which he alleges this was done.

He admits receiving the power of attorney.

He admits the suit by *Canniff* against Plaintiff, in whose name the title to said lands then stood, but alleges that he defended it, not as attorney and agent for Plaintiff, but on his own behalf, as the person beneficially entitled to said lands.

He alleges that the conveyances from himself to *Adam Henry Wallbridge*, and from *Adam Henry Wallbridge* to himself, were made immediately after the

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determination of that suit, in pursuance of an agreement previously entered into between his Solicitor, *Adam Henry Wallbridge*, and himself, the particulars of which he sets out.

He denies collusive agreement with Defendants to defraud Plaintiff of lands; admits that he has sold certain portions of the lands and received the purchase money; that about 15 years ago he did agree to give Defendant *Geo. Simpson*, his and Plaintiff's uncle, a life lease of about 15 acres of land in consideration of a nominal rent, and he then entered into possession, and that he, *George Taylor*, has since executed a life lease to him.

Has always believed that Plaintiff had no title and never had any to said lands, except under the deed from the King's College to him, which, he submits, gave Plaintiff no beneficial interest in lands, but merely made him a trustee of the legal estate for him, *George Taylor*, and he submits that the legal estate was properly conveyed by him, as Plaintiff's attorney, to Defendant *Adam Henry Wallbridge*, but if it should be held that the legal estate did not pass to *Adam Henry Wallbridge* by said conveyance, and the same still remains in Plaintiff, he submits that Plaintiff ought to be declared a trustee of the legal estate for him, and ordered to convey the same to him by a good and sufficient deed. *George Taylor* further submits that he is a purchaser for value, and contends that Plaintiff never paid anything, and would never have had any claim had he, *George Taylor*, not taken the deed from King's College in his name.

He further submits that in any event he is entitled to a lien on said lands for the purchase money so paid by him.

Adam Henry Wallbridge, by his answer, after setting forth the result of inquiries as to the land before the same came to *Jane Taylor*, says:

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That said *Jane Taylor*, on 3rd March, 1832, contracted in her own name with the Chancellor, President, and scholars of King's College, for the absolute purchase thereof in her own proper name.

That on the 26th Nov., 1839, *Jane Taylor* assigned the contract of purchase to Defendant, *George Taylor* ; on the 30th October, 1841, *George Taylor* assigned the same to Plaintiff ; on the 9th November, 1847, Plaintiff assigned same to *George Taylor* ; on 12th April, 1851, *George Taylor* assigned same to Plaintiff ; on or about the said month of April, 1841, a deed was issued by King's College in the name of Plaintiff, *William Taylor*.

That he, *Adam Henry Wallbridge*, furnished the money to pay the amount due the college, and the same was transmitted to *Toronto*, in the name of *George Taylor*, with instructions to have the deed made out in Plaintiff's name.

That before the time of the last mentioned transfer to Plaintiff, he had left *Canada* for the purpose of going to *California*, and he remained away from *Canada* until some time during last year.

Submits that Plaintiff could not have known, except by report or letter, that the land had been so transferred in his name, and he paid nothing to the college for the land.

Submits that the land, notwithstanding the title stood in the name of Plaintiff, was, in fact, the property of *George Taylor*, and that Plaintiff never, until within a short time, so far as he knows, or has been informed, set up any title thereto, or in any way claimed the same. on the contrary, Plaintiff, shortly after deed was made to him by the College, transmitted to *George Taylor* the power of attorney to enable Defendant, *George Taylor*, to dispose of the land.

Submits that land was the property of *George Taylor* and not of Plaintiff, but stood in Plaintiff's name, with-

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out the Plaintiff's knowledge until informed, &c., and that Plaintiff was trustee for *George Taylor*, or of himself, *Adam Henry Wallbridge*, who paid the money.

That he received a deed from *George Taylor*, executed under said power of attorney, for good and valuable consideration paid by him therefor, and he claims to be an innocent purchaser for value, and denies collusion or intention to defraud charged in bill.

That *George Taylor* and he have been in possession of land 20 years and upwards; and he claims the benefit of the statute of limitations. That Plaintiff has acquiesced in his title by lapse of time and otherwise, and he is estopped from denying the title given under the power of attorney.

That the title is a registered title, and the deed under the power of attorney is also registered, and he claims the benefit of the registry laws. That he has sold part of the land to one *John Hyslop* and *M. Thompson*, who are interested in the suit and necessary parties.

Submits, if any secret trust or understanding between Plaintiff and *George Taylor*, he is not chargeable therewith or thereby, as he received his deed under the authority given by Plaintiff and without notice of any trust.

The following exhibits were fyled in the suit:—

EXHIBIT "P."

Letter from *W. J. Taylor* to the Bursar of King's College, 28th November, 1842, as follows:

"*Belleville*, 28th November, 1842.

"SIR,—I have become the purchaser of north half of Lot No. 8, in the 2nd concession of *Thurlow*, from *Jane Taylor*, the original purchaser thereof from King's College. I am now able to pay £25, which I will do if I can secure such terms as will enable me ultimately to own the lot. I wish to know the longest time you can

give me for the payment of the balance, and whether the deed can come out in my name upon producing the assignment from *George Taylor* to me.

"Your obedient servant,

"WILLIAM JOHNSON TAYLOR,

"By his Agent, *L. Wallbridge.*"

"Please address *W. J. Taylor, Belleville.*"

"Are U. E. rights taken in payment? If so, I can pay down."

"W. J. TAYLOR."

Address: "*H. Boys*, Esq., Bursar King's College, *Toronto.*"

Receipt, dated 7th July, 1853, and signed by *G. Taylor* and *A. H. Wallbridge*, for £90 5s. on account of purchase money of half lot 8, which, he alleges, he agreed to sell him for £215, *Wallbridge* to bear half expense of the suit now going on respecting said half lot in Court of Chancery and Queen's Bench, the remaining five hundred dollars to be paid this fall. If suit in Chancery does not terminate successfully, then each party to sustain half the loss, and *Wallbridge* is not then to pay the $500.

EXHIBIT "R."

Receipt to *George Taylor*, as follows:—

"UNIVERSITY OFFICE,
"*Toronto*, April 14, 1851.

"Received from *George Taylor*, the sum of one hundred and forty-three pounds seven shillings and a penny currency, in payment of the following sum due to the University of *Toronto*, on the north half lot 8, second concession of *Thurlow*.

Balance of principal	£60	0	0
do. of interest	68	10	0
Costs	14	16	4
Postage			9
	£143	7	1

"ALAN CAMERON,
"*Bursar, University.*"

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EXHIBIT "S."

Receipt to *George Taylor*, as follows:

"UNIVERSITY OFFICE,
"*Toronto*, April 24th, 1851.

"Received from *George Taylor*, the sum of two pounds fifteen shillings currency, in payment of the following sum due to the University of *Toronto*, on north half lot eight, second concession of *Thurlow*.

Fee for Deed.....	£	15	0
Assignment of Registry.....	2	0	0
	£2	15	0

"ALAN CAMERON,
"*Bursar, University.*"

EXHIBIT "T."

Letter of receipt to *George Taylor*, as follows:

"UNIVERSITY OFFICE,
"*Toronto*, April 15th, 1851.

"SIR,—I enclose a receipt for your remittance by cheque on Commercial Bank of £143 7s 1d in full of purchase money, &c., of the north half lot No. 8, second concession of *Thurlow*. The deed will be made out and forwarded to *William Johnson Taylor* as soon as possible on receipt of fee of fifteen shillings for the deed, and £2 0 0 for registering four assignments.

"I am, sir, your obedient servant,
"ALAN CAMERON,"
"*Bursar.*"

John Taylor, father of *William* and *John*, was original lessee of land from the Crown. Lease expired in 1826.

John Taylor died, leaving a will by which he nominated his wife, *Jane Taylor*, his executrix, and his son *John* his executor. The will is dated 14th December, 1824.

John Taylor, the son, died, leaving *Jane Taylor*, his mother, surviving him. In March, 1832, *Jane Taylor*

paid the rent then in arrear. On the 3rd March, 1832, she, while executrix, contracted in her own name with the Chancellor, &c., of King's College to whom land had been transferred, for the absolute purchase thereof in her own name. On the 26th November, 1839, *Jane* assigned this contract of purchase to Defendant *George Taylor*. On 30th October, 1841, *George Taylor* assigned same to Plaintiff *William J. Taylor*. On the 9th November, 1847, *William* assigned same to *George Taylor*. On the 12th April, 1851, *George* assigned same to *William*. On the 24th April, 1851, King's College deeded same to *William Taylor*. On 11th October, 1851, *William* sent *George* a power of attorney in these words :

"Know all men by these presents, that I, *William Johnson Taylor*, at present of *Carson's Creek*, County of *Calaveras*, State of *California, United States of America*, but formerly a resident of *Kingston*, in that part of Her Britannic Majesty's Dominion, known as *Canada West*, hath made, constituted and appointed, and by these presents, doth make, constitute and appoint *George Taylor*, of *Belleville*, in that part of Her Britannic Majesty's Dominion, known as *Canada West*, my true and lawful Attorney for me, and in my name and behalf to sell all that certain tract or parcel of land, known as lot number eight, second concession of the Township of *Thurlow*, in the *Victoria* District and Province of *Canada*, aforesaid. As also to act as my Attorney in the sale or leasing of any lands of which I am the owner in the said Province of *Canada*, aforesaid. Hereby ratifying and confirming the act or acts of my said Attorney.

"In witness whereof, I have hereunto set my hand and seal at *Carson's Creek*, as aforesaid, this eleventh day of October, one thousand eight hundred any fifty-one.

"Signed and Sealed in presence of.

"(Signed) J. ALDHAM KYLE.

"(Signed) WM. J. TAYLOR."

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On 29th December, 1856, *William*, by his attorney, *George*, in consideration of £250 sells and conveys to *Adam Henry Wallbridge* the land in dispute—north ½ of lot 8. On the 29th December, 1856, *Adam Henry Wallbridge*, in consideration of £50, sells and conveys to *George Taylor*the north 17 acres and the south 33 acres of the north ½ of lot 8.

The following exhibits also were fyled in the suit:—

Answer of *William J. Taylor*, dated 22nd November, 1852, in chancery suit of *Canniff* v. *Taylor*, and sworn to by *George Taylor*.

Affidavit on production, made by *George Taylor* in same suit, dated 30th June, 1853.

Copy of decree in same suit, dated 13th June, 1856.

Deposition taken *vivâ voce* of *George Taylor* in suit of *Canniff* v. *Taylor*, 15th May, 1856, and also depositions of *J. W. D. Moodie* and *T. J. W. Myers* in same suit.

Judgment roll in ejectment in suit of *Doe* v. *Fairman*, on verdict for Plaintiff; *William Taylor* comes into Court; possession prayed for and granted.

The other material facts of the case and the evidence relating to the transfer of the lot in question by the King's College, are hereafter given at length in the judgment of the Chief Justice.

The case came on for examination of witnesses and hearing before Vice-Chancellor *Proudfoot* at *Belleville*, on the 10th day of November, 1874, and the Court gave a decree in favor of the Plaintiff.

The cause then came on before the Court of Chancery by way of re-hearing, and on the 2nd February, 1876, the Court made the following order:

"1. This Court doth order that the said decree be and the same hereby is reversed as against the said Defendant, *Adam Henry Wallbridge*, with costs of such

re-hearing to be paid by the Plainiff to the said Defendant forthwith after taxation thereof.

2. This Court doth further order that the Plaintiff 's bill of complaint be and the same is hereby dismissed out of this Court as against the Defendant *Adam Henry Wallbridge*, with costs to be paid by the said Plaintiff to the said Defendant forthwith after taxation thereof.

3. And this Court doth further order that the deposit in Court of forty dollars, paid in by the Defendant, be forthwith paid out to him.

4. And this Court doth further order that the Plantiff do forthwith repay to the said Defendant *Adam Henry Wallbridge*, any amount which the said Defendant may have paid to him on account of the costs of this suit, or otherwise under the said decree payable by the said Defendant to the Plaintiff.

On appeal to the Court of Appeal for *Ontario*, this order was affirmed with costs.

Mr. *Bethune*, Q. C., and Mr. *George D. Dickson*, for Appellant:—

The beneficial property was in *William Johnson Taylor* ; and Vice-Chancellor *Proudfoot*, who saw the Plaintiff, the Defendant *George Taylor*, and the Defendant *Wallbridge*, all of whom were examined before him as witnesses, and the evidence of all of whom is most material, was in a better position to form a judgment upon the facts than the majority of the Court of Appeal in *Ontario*, and the latter Court should not have disturbed the finding of the Court of first instance upon the facts.

The evidence shows that prior to the 28th November, 1842, the Plaintiff had purchased the land from the Defendant, *George Taylor*, and on the 28th November, 1842, applied to King's College to have his purchase recognized, and this was done.

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In 1847 the Plaintiff expected to go to *California*, and to enable the Defendant *George Taylor* to procure the deed from King's College, and to manage the property for Plaintiff, conveyed the property to him. After the execution of the conveyance, a Bill was filed in Chancery against the plaintiff by *Joseph Canniff*, setting up an agreement to sell the land to *Canniff*, and charging that the transfer by the Defendant *George Taylor* to the Plaintiff was in fraud of this agreement, and asking for specific performance of it. The Defendant *George Taylor* answered this Bill in the name of and as the agent of the Plaintiff; and, in the answer, states in substance that he applied for and got the conveyance as *agent* for the Plaintiff, and the transfer to the Plaintiff were *bonâ fide* and for consideration. The Defendant *George Taylor*, who is the Sheriff of the County of *Hastings*, has been ill for a number of years, and his memory has become impaired; but in 1856 was in perfect mental health, and was examined as a witness in the suit of *Canniff* v. *Taylor*. On the occasion of his examination in that suit he swore in the most positive terms that he had no interest in the suit if the Plaintiff was then alive, and that he assigned the land to the Plaintiff—that this was *bonâ fide*, and not to avoid payment of the claims of creditors.

It is alleged by Respondents that the conveyance to *Wallbridge* was executed in pursuance of the bargain contained in the receipt of the 7th July, 1853, signed by *A. H. Wallbridge*. But such a bargain was not within the scope of the agent's power. It was substantially a bargain, as carried out, to divide the property between the Defendant *Wallbridge* and the Defendant *George Taylor*; and the power of attorney set out in Plaintiff's bill was obtained from him under the pretext of being required to enable the Defendant *George Taylor* to manage the Plaintiff's property in *Canada*,

but in reality for the express purpose of enabling the Defendants *Wallbridge* and *Taylor* to divide the Plaintiff's land between them, and carry out the fraudulent scheme they had conceived.

The power of attorney was given by the Plaintiff to the Defendant *George Taylor* in 1851, and it was under this power of attorney that the land was conveyed to Defendant *Wallbridge*, who re-conveyed half of it to the Defendant *George Taylor*. At the time of the suit of *Canniff* v. *Taylor*, the Defendant *Wallbridge* was solicitor for the Plaintiff, and he cannot be a purchaser for value without notice, and to hold that Defendant *Taylor* was the beneficial owner, would be to enable them to profit by their own fraud.

There was no resulting trust here. This was not the case of a purchase by a stranger in the name of a trustee. This was a purchase by an agent in the name of his principal, and he cannot be heard against the principal to say that it was otherwise. In such a case the presumption of a resulting trust does not arise. The payment here was not proved to have been made with the money of *George Taylor*.

If the assignment was made by the Defendant *George Taylor*, intending to vest the property in the Plaintiff, then the purchase would be intended to have been completed for the benefit of the Plaintiff, and there would be no resulting trust. There is in the evidence no intimation made to the College that in any sense the purchase was intended to have been made for the benefit of *George Taylor*.

The Defendants cannot either defend under the statute of limitations, because they took possession in the Plaintiff's name in 1856, under the ejectment which *George Taylor* had obtained against *Canniff*.

No delay can be imputed to the Plaintiff until his return, and he filed his bill promptly thereafter.

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The learned counsel relied upon the following cases and authorities:

Greenwood v. *The Commercial Bank* (1); *Brown* v. *Smart* (2); *Marquis of Clanricarde* v. *Hennesy* (3); *Lewis* v. *Thomas* (4); *Sturges* v. *Morse* (5); *In re Butler's Estate* (6); *Blair* v. *Brownley* (7); *Brown* on Limitations (8); *Cole* v. *Lease* (9); *Dart* on Vendors (10).

Mr. *Fitzgerald*, Q. C., for Respondent :—

It must be admitted that at one time, viz., in 1847, the Appellant conveyed his whole estate and interest in the lands in question to *George Taylor*. The consideration of £150, named in the conveyance of the 29th November, 1847, is to be presumed to have been paid by *George*, and thenceforward *George* was and continued to be the beneficial owner of the property in dispute. There is no evidence that the Appellant provided any part of the purchase money paid to the College, nor was it shown that *George* paid it by way of a loan to him, and the consideration of 5s., named in the transfer from *George* to *William*, dated 12th April, 1851, was only nominal.

Upon reading all documents, it is clear that *George* was the owner, and that when *George*, without *William's* knowledge, got the deed issued in *William's* name, *William* became a bare trustee for *George* by the principle of resulting trust.

There must be evidence to rebut the presumption of law giving rise to the resulting trust; *Lewin* on Trusts (11). The evidence of *George Taylor* in the *Canniff* v. *Taylor* suit, relied on by the Appellant here, does not do so. The

(1) 14 Grant 40.
(2) 1 Grant's Er. & App. 148.
(3) 30 Beav. 175.
(4) 3 Hare 25.
(5) 24 Beav. 541; 3 DeG. & J. 1.
(6) 13 Equity Ir. p. 451.
(7) 5 Hare 542.
(8) 510.
(9) 28 Beav. 562.
(10) Vol. 1, p. 186, Vol. 2, p. 656.
(11) 6th ed., 150.

conveyance to *William* was a contrivance at the time which was honest to defeat *Canniff*, and *George's* statement in that evidence that he had no interest in that suit must be considered in the light of all the surrounding circumstances and the evidence in this case —and is, after all, only "evidence," and does not in any view amount to "estoppel." The meaning that must be attached to it is only that he had put himself in his brother's power as to this land by the conveyance of 12th April, 1851, and taking the University deed in his name, that his brother *William* had control of the property till he got some instrument giving that control back to him (*George*), and that he had done so under legal advice and was speaking of the conveyances according to the advice he had received as to their operation. It must be assumed on the evidence that *George* promptly communicated what he had done to *William* who had no previous knowledge thereof, and asked him for the power of attorney, and that *William* assented. The return of the power of attorney from *California* in October, 1851, having regard to the length of time then required for communicating with a person there, supports this view. Were it otherwise the Appellant could have shown it to be so. *Washburn* v. *Ferris* (1).

George Taylor, being then the beneficial owner of the land, it was only necessary that he should obtain from the Appellant the power of attorney of October, 1851, which he did obtain, to enable him to deal with it for his own use. That power of attorney is sufficient in point of form to support the conveyance to *Wallbridge* of 1856.

In 1856, *George Taylor*, as equitable and beneficial owner, and also as the duly constituted attorney of

(1) 16 Grant 76.

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William, in whom was the legal estate, was then competent to and did give a valid title to the said lands to *Wallbridge*, and *Wallbridge* did thereby acquire a valid title in fee simple to one half of the said lands, viz., 50 acres.

Even if *William* was at the time of the sale and conveyance to *Wallbridge* the owner of the said lands, yet by virtue of the said power of attorney he gave to *George Taylor* full power to sell and convey the said 50 acres to *Wallbridge* in fee simple in the manner in which he did sell and convey the same to said *Wallbridge*, and *William* is now estopped from denying *Wallbridge's* title to the said 50 acres, and if there were any doubt the court would now order a conveyance from *William*, the trustee of the legal estate.

The evidence, moreover, shows that *Wallbridge* was a purchaser *bonâ fide* for value, without notice of any defect in the title of *George*.

As to *Wallbridge* being incapacitated from buying, the rule seems to be that the onus is cast upon the solicitor to prove that he paid full value, and the evidence shows that he did pay full value, for he only bought one half.

In any event the laches and acquiescence of the Appellant disentitle him to any relief as against *Wallbridge*, and by analogy to the rule under 25 *Vic.*, c. 20, the absence of a Plaintiff from the country will not enable him in a Court of Equity to open up the transaction in question after so long a time, viz., 21 years after it took place, and 26 years after the Plaintiff left the country.

The Respondent relies also on the Statutes of Limitations as a complete bar to Plaintiff's claim.

After such a lapse of time the onus is upon the Appellant to establish his case beyond all reasonable doubt, and this he has plainly failed to do, and in con-

sidering a decision on an appeal, as in this case, the Higher Court will not interfere unless they are perfectly satisfied that the decision of the subordinate Court of Appeal is wrong.

Per Lord *Wensleydale*, *Mayor of Beverley* v *The Attorney-General* (1).

Mr. *Bethune*, Q. C., in reply :—

On 27th November, 1856, we have an order of the Court of Queen's Bench granting possession to the Appellant of the land in question, and any possession prior to that date cannot be invoked by Respondents.

The evidence, moreover, does not clearly prove that *George* did not pay the *University* with *William's* money, for we know that *George* had money the moment he exercised his power of selling *William's* lands. It is not a case where the evidence is clear and distinct as in *Washburn* v. *Ferris* (2). As to a resulting trust, see *Perry* on Trusts (3). There is only evidence of £20 consideration paid by *Wallbridge*. It is not a fair consideration, as he admits the property to be worth £215. The evidence in the suit of *Canniff* v. *Taylor* is conclusive, for the issue then was the same as at the present time ; was there any interest in *George* then ?

THE CHIEF JUSTICE, after stating the facts of the case, hereinbefore set out, proceeded as follows :

The Plaintiff relied on his documentary title, and Defendant claimed that the land was *George Taylor's*, held by *William* for him ; and, if not *George's*, then the sale and conveyance by *William*, by his Attorney *George*, vested title in him. *William* denied that *George* had any interest in the land, and contended that the power of attorney did not authorize *George* to sell and

(1) 6 H. L. 332. (2) 16 Grant 76.
(3) Vol. 1, sec. 162, p. 180.

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convey the land, and, if it did, that the sale was not *bonâ fide*, but colorable with a view to defraud him, or, if *bonâ fide*, that *George* could only sell for cash, and not on the terms and in the manner it was sold.

It is not disputed that, however the right to the property came to *Jane Taylor*, the mother, she, on the 3rd March, 1832, contracted with the authorities of King's College for its absolute purchase in her own name, and by virtue of which the deed was subsequently made to *William Taylor*, as assignee, by the college.

On the 29th Nov., 1839, *Jane Taylor* assigned her interest in the land to Defendant, *George Taylor*. The deed by which this was accomplished expresses to be in consideration of £100 paid by *George Taylor*, the receipt of which is acknowledged, and the instrument contains a covenant by *George Taylor*, "that he will pay all the remaining instalments that are due on the said land to the scholars or corporation of King's College (though the deed does not appear to have been executed by *George Taylor*), and *Jane Taylor* thereby requested that the deed for said land should be made out and issued in the name of *George Taylor*, upon his paying the remaining instalments due on said land.

On the 30th Oct., 1841, *George Taylor* assigned by a similar instrument alleging the same consideration of £100, his interest in the said land, and though containing a similar covenant by *William Taylor* as to paying instalments, it was not executed by *William Taylor*.

On the 29th November, 1847, by a similar deed, containing a like covenant on part of *George Taylor*, *William Taylor*, in consideration of £150 to him paid by *George Taylor*, transferred to him the said contract and lands. This deed is executed by both *William Taylor* and *George Taylor*.

On the 12th April, 1851, *George Taylor*, by an instrument under seal, in consideration of five shillings to him

paid by *William Taylor*, re-assigned and set over the said contract, and all benefit and advantage to be derived therefrom; to hold the same and the lands therein mentioned to him and his heirs, and requested that the deed for the same might issue to him. This document was witnessed by *L. Wallbridge* and the Defendant *W. H. Wallbridge*. And on the 24th April, 1851, the Chancellor, trustees and scholars of the University of *Toronto*, duly conveyed the said lands to the Plaintiff *William Taylor*.

This placed the legal title in the said lands, on the 24th April, 1851, in the Plaintiff, and this title remained unchanged until the 29th day of December, 1856, when a deed of that date was made and executed by *W. J. Taylor* by attorney *George Taylor* to *Adam Henry Wallbridge*, and which was registered 3rd January, 1857.

This deed purported to be made by and between *William Johnson Taylor*, of the City of *San Francisco*, in County of *Calaveras*, and State of *California*, but formerly of the Town of *Belleville* and County of *Hastings*, gentleman, of the first part; *Adam Henry Wallbridge*, of the Town of *Belleville* and County of *Hastings*, Esquire, of the second part; and witnesseth that the party of the first part for and in consideration of £250 of lawful money of *Canada*, to him in hand paid by the said party of the second part, had given, granted, bargained, sold, aliened, released, enfeoffed and conveyed all and singular that certain parcel or tract of land and premises, situate, lying and being in the Township of *Thurlow*, in the County of *Hastings*, being composed of the north half of Lot Number Eight, in the Second Concession of the Township of *Thurlow* and County of *Hastings*. To have and to hold in fee simple, with all appurtenances subject to original reservations. *Covenants for seizen, good right and title to convey, quiet possession, freedom from incumbrances and further assurance.*

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On the same 29th Dec., 1856, by a deed dated on that day and registered the said 3rd Jan., 1857, and purported to be made by and between *Adam Henry Wallbridge*, of the Town of *Belleville*, and County of *Hastings*, Esquire, of the first part; and *George Taylor*, of the Township of *Sidney*, and County aforesaid, Esquire, of the second part, it was witnessed that the said party of the first part, for and in consideration of the sum of fifty pounds of lawful money of *Canada*, to him by the said party of the second part in hand well and truly paid, had given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed unto the said *George Taylor*, his heirs and assigns, the north seventeen acres and the south thirty-three acres of the north half of lot number eight, in the second concession of the Township of *Thurlow*. Same covenants as in last deed.

The authority for making the deed of the 29th Dec., 1856, to *Adam Henry Wallbridge* is alleged to be under the power of attorney set out at length in the Plaintiff's bill, dated 11th Oct, 1851, whereby *William J. Taylor* constituted and appointed *George Taylor* his true and lawful attorney for him and in his name and behalf to sell all that certain tract or parcel of land known as lot No. 8, second concession of the Township of *Thurlow*, in the *Victoria* district and Province of *Canada*, as also to act as his attorney in the sale or leasing of any lands of which he was the owner in the said Province of *Canada*.

The legal title from the College being thus shown to have been in *William*, the first question we have to consider and determine is, was *William* under the deed from the College the beneficial as well as the legal owner, or was he only clothed with the legal estate for the benefit of *George*, the real owner? If *William* was a mere trustee, vested with the legal estate for *George*, the bene-

ficial owner, and the transfer of the property was made to Defendant *Wallbridge*, by and at the instance of *George*, under the power of attorney from *William*, it is obvious *William* could have no right to have such disposal of the property interfered with, whatever may have been the consideration for, or agreement or arrangement between *George* and *Wallbridge* under which such transfer was made, and consequently could have no ground for maintaining the present suit.

We must, therefore, enquire, first, who was the beneficial owner under the deed from the College? If *George*, the case ends. If *William*, then was the transfer under the power a good and valid conveyance of *William's* interest to *Wallbridge*? As the documentary title indicates no trust the burthen of establishing that the property was held in trust necessarily rests on the Defendants. At the outset I can safely say that I have never, that I can remember, been called on to consider a case where the evidence was so contradictory and unsatisfactory as in this case—the witnesses not only contradicting one another, but each, more or less, contradicting himself; and it is through this mass of conflicting statements that we have to grope our way to a conclusion.

After giving this case more than ordinary consideration, I am constrained to the conclusion that the weight of evidence establishes, with as much certainty as one could expect to feel in a case where the whole evidence is so unsatisfactory, that the property in question was transferred by *William* to *George* on the eve of a contemplated departure from *Canada* to enable *George*, as his agent, the better to look after his interests and obtain for him the title from the College. It is not disputed that he had left *George* as his agent in charge of all his other large real estate, which *George* says amounted to $20,000, and that, as *William* says, he

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handed his papers to *George* on leaving. On 30th June, 1853, *George* himself swears as to the papers connected with this property, as follows:

William left *Canada* in December, 1850, and then left with me (*George*) the contract for purchase of the deed and the assignment to me.

This was in the controversy when *George* was putting *William* forward as solely interested in the land.

And *William* says:—

I made a transfer of some property to *George* when I thought of going West; I had obtained an assignment at one time of the right my brother had in the land in dispute. I recollect the assignment from myself to *George*, which was made afterwards. I executed this to him as my agent.

This statement of *William's* appears to me to be as strongly confirmed as it very well could be by *George*, who on the 3rd March, '53, swore as follows:—

The assignment from *William Taylor* to me was without consideration, and made to me because he (*William*) was going to *California*.

And again, on the 15th May, '56, after testifying that he could not tell why *Wallbridge* advised him to assign to his brother, says:—

I had no reason, but that I had not paid my brother.

At another time he says:—

I think it was done so that I might be a witness.

I think the weight of evidence likewise establishes that the re-transfer was not for the purpose of vesting the legal title in *William*, with a beneficial or resulting trust in favor of *George*, to enable *George* to appear as a disinterested and competent witness, as suggested by *George*, when, in fact and in truth, he was the reverse, but was made because *William* was the benificial owner. This suggestion of *George*, that the transfer was made to enable him to be a witness is at variance with his answer: for in paragraph 2 he says he cannot now

say why he assigned to Plaintiff; and it is not confirmed by *Wallbridge*, who assigns an entirely different reason. I am unwilling to think, without the clearest evidence, that any respectable solicitor could have advised a transfer for such a purpose, with a view, in contemplation of such evidence being given and the land thereby recovered, that a claim should be subsequently set up of a beneficial interest in witness.

On principles of public policy, I should hesitate long before I should be willing to admit that a party, who claims a resulting trust on the ground that he made a transfer of the property with a view to enable himself to testify in relation to it as a disinterested and competent witness in a suit pending, or in contemplation, in which the title to such property was in issue, and in such suit put himself forward as such disinterested witness, and was accepted on testifying that he had no interest in the property, could be allowed to set up what, if his contention is correct and successful, can, I think, be looked on in no other light than a fraud on the Court. I am, by no means, as at present advised, prepared to say that a party who has so put himself forward as having no interest in the property ought to be permitted to invoke the aid of the Court so deceived, or any other Court, to assist him in obtaining the fruits of his deception, by declaring that he then was and still is the beneficial owner, and that the owner put forward by him as the absolute owner had no beneficial interest in the property whatever, but that the title merely stood in his name as trustee. To give judicial sanction by giving efficacy to such a proceeding seems to me repugnant to the due and proper administration of justice. Weak and impotent, indeed, it appears to me, would be the law if a man could deal thus treacherously with its tribunals, and then constrain the same tribunals to give him the benefit and

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advantage of such treachery; but it is unnecessary to discuss this question further, as I cannot think that, if both *Wallbridge* and *George* knew that this suit, if gained, would inure to the sole individual benefit of *George*, the transfer could have been advised by *Wallbridge*, or made by *George*, under the idea that he should, as he certainly did do, appear in Court, offer himself as a disinterested and competent witness, and qualify himself as such by swearing on the *voir dire* that he had no interest in the property. Nor am I able to bring myself to the conclusion that the transfer was made for the reason assigned by *Wallbridge*. He says the assignment was made to *William* at his suggestion in view of litigation. On this all important point in his case we would naturally expect as part of his case a very clear and circumstantial account of this transaction, and satisfactory reasons assigned for advising a client to place his property in the name of a person of whose very existence at the time there was no certainty. But in his direct examination we find no particulars whatever given, and it is only on his cross-examination we find the reasons brought out.

It is well to bear in mind that the assignment from *George* to *William* was on the 12th April, '51, and the deed from the College to *William* on the 24th April, '51, and that Mr. *Wallbridge* says the litigation took place after deed was obtained from the College, the first steps of which were taken by him, for he says:—

I first commenced an action against *Fairman* at the suit of the Plaintiff.

And then, on his cross-examination, he gives his reasons for advising the transfer. He says:—

I think the bargain (that is the bargain between himself and *George Taylor*) was made with *George Taylor* about a month or six weeks before the deed issued from the College; no litigation was going on; I supposed it could be got without litigation at that time.

I did not find out that we could not get the property without litigation until the month of May. Up to this time I thought we could get it without litigation.

And he then says:

It was in view of litigation with *Canniff* that I advised the transfer to he made to the Plaintiff. Although I supposed there would be no litigation, I had the transfer made with a view to litigation. It was the litigation with *Canniff* that I sought to avoid. * * * By taking the deed from the College, I thought *Canniff* might prosecute for taking a title in litigation. The litigation I meant that was to be avoided by taking the deed from the College to *William* was the *qui tam* action against *George Taylor*.

I do not regret being forced to say that I cannot accept this statement as affording a satisfactory or credible reason for suggesting the transfer. I think Mr. *Wallbridge's* memory must have failed him with respect to this. It is difficult for me to understand how any man, lay or legal, could be induced to believe, without corroborative evidence of an overwhelming character, that any sane lawyer could advise a client to put his property in the name of another with a view to litigation, when he thought that the property could be got without litigation, and when he supposed there would be no litigation, and put the title in the name of a person away in *California*, of whose whereabouts, or even of whose existence, there was at the time no certainty, and that, too, in the year 1851, when access to and communication with *California* was so different from what it is at this day; nor can I bring my mind to believe that without the knowledge or consent of *William*, a responsible man, having apparently large real estate in the country, though absent therefrom, any solicitor would suggest, or any honest man would act on the suggestion, that to enable the actual owner of land to escape a *qui tam* action, he would put the title in the name of an absent man, and so make him liable to the very prosecutions from which he desired his own client

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to escape, and subjecting him to consequences the real owner feared to meet, and that this same solicitor should, without any directions or authority from the party whose name had been so dealt with, institute and defend suits in his name, based on a title so acquired, and thereby expose this absent and innocent man, not only to a possible *qui tam* action, should he return to the country, but involve him in litigation as Plaintiff and Defendant, at law and in equity—thereby subjecting him and his estate to possible penalties and heavy costs. A proceeding so unusual, and, if I may be permitted to say so, to my mind so unjustifiable, I cannot accept as the reason why the transfer was made from *George* to *William*, when I find in the evidence reasons assigned and testified to at the very time the transactions took place, when all was fresh and with surrounding corroborations, which afford a solution so much more reasonable and satisfactory. On the contrary, then, I think the reason for the transfer was, as *George* himself at one time swears, because he had not paid his brother for the land. In other words, as I construe his statement, because the land rightfully belonged to his brother. This view, without compromising anybody, fully justifies the advice of Mr. *Lewis Wallbridge*, which, as *George* says, was this :

> I swore in that suit that my brother was the owner, at the advice of Mr. *Wallbridge;*

And I think the facts will justify the assumption that, in view of all the circumstances, a transfer was made to *William*, and so the legal title placed where the benificial interest was, and thereby *George* was in a position honestly and truthfully to testify that he had no personal interest in the matter, and so was not interested in the result of the suit. That this was so, is somewhat corroborated by the fact that neither of the Defendants called Mr. *Lewis Wallbridge*, who must have

known exactly what the transaction was, for *George* says :

The answer in the *Canniff* suit was made at the advice of Mr. *Lewis Wallbridge*;

And strongly, by the direct evidence of *George*, who, speaking of the litigation in 1851, says :

The facts at the time were much fresher in my memory then than they are now. I was also examined as a witness before the Court at *Toronto*. The evidence I then gave was true, to the best of my belief. I swore, in that suit, that my brother was the owner, by the advice of Mr. *Wallbridge*. I swore, in that suit, if my brother was living, I had no interest; if dead, I would be interested as his heir-at-law;

And more strongly by the sworn statements of *George*, made so far back as 1852 and 1856, when the facts, he says, were—and we well know must have been—so much fresher in his memory.

On the 22nd November, 1852, he went before the Court in the suit of *Canniff* v. *Taylor* as the avowed agent of *William Taylor*, and so expressed to be on the face of the answer, and as such agent defended the suit and caused to be put in *William's* answer these words (to the truth of which he swore), viz. :

Defendant (*William*) by his agent, applied for and obtained the deed of said land from the College and *paid* the balance of principal and interest due the College thereon, as he humbly submits and insists he had a perfect right to do.

It is true, on 29th June, 1874—22 years after—in paragraph 3 of his answer in this suit, he is made to swear :

I defended the *Canniff* suit, not as agent and attorney for Plaintiff, but on my own behalf, as the person beneficially interested in the lands.

And this statement of *William's* interest is put forward, not only in the face of the answer in the *Canniff* suit, but of his sworn deposition made on the 15th May, 1856, in which he says:

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I say, if my brother is dead, I have an interest in the suit; if he is not dead, I have no interest. At present, I am not aware he is dead.

And again:

After the last assignment was made to *William*, I made the payment on the said half lot No. 8 to the College (£148), and obtained the deed for the Defendant (*William*), and in the Defendant's (*William's*) name.

I think I am bound to give credence to these sworn statements, made in 1852 and 1856, in preference to those made in 1874 and later.

There are other circumstances in the case which tend, with considerable force, to confirm the view that *William* was the owner, in addition to the fact stated by *George* that *William* had made several payments to the College, which statement would seem to be accurate, from the fact that the balance paid on 14th April, 1851, on account of principal and interest (£128 10s.), together with what the mother would seem to have paid, would not cover the amount of the purchase-money and interest; and it is not pretended that *George* or *Wallbridge* (if they paid anything) paid more than the amount mentioned in the receipts. The circumstances to which I refer are connected with the power of attorney and deed made under it. The power of attorney appears to me wholly at variance with Mr. *Wallbridge's* contention. His connection with the land he states thus:

George Taylor told me he had a pre-emption for the purchase of certain lands from the *College*. He wanted me to furnish the money and to take a half interest in the land.

And as to the power of attorney, he says:

George had a power of attorney from *William*. He got it at my suggestion. I advised him to do this to get my share of the land.

To accomplish this, *George* would require simply an authority from *William* to convey the dry legal estate.

This power neither recognizes any interest of *George*

in the land, nor does it give any direct authority to convey such legal estate; on the contrary, it authorizes *George* to do under it what, if Mr. *Wallbridge* is correct, it was never contemplated he should do, viz., "to sell" this land. But it is not confined to this land; it gives *George* a general power to act as his attorney in the sale or leasing of any lands of which he (*William*) was owner in the Province of *Canada*.

Thus, whilst the inconsistency of the writing with the statement of Mr. *Wallbridge* is established on the one hand, its consistency with the property being *William's* is made apparent on the other.

Looking at the deed to *Wallbridge*, executed under this power, we find the view that the land was the property of *William*, I think, still further strengthened. If the property was really *George's* and had been put in *William's* name, and behind his back, for the sole purpose of accommodating *George* and saving him from possible ulterior consequences, and authority had been obtained to use *William's* name merely to vest in Mr. *Wallbridge* his share, why did Mr. *Wallbridge* insert, or permit to be inserted, in the deed, made only for the purpose of divesting a trustee of a bare legal estate, and vesting it in his *cestui que* trust, or his assignee, covenants on the part of *William* for seizin, good right and title to convey, quiet possession, freedom from incumbrances, and for further assurances. Surely, all this indicates that the power of attorney was intended to accomplish more than Mr. *Wallbridge* would lead us to suppose, and the doings of *George* under it show plainly that he did not so consider it, for he appears to have sold and conveyed under its authority other lands with the full knowledge of *Wallbridge*, who says:

I knew that *George* was selling lots on the hill under power of attorney obtained from *William*. *George* received the monies. I saw the monies paid to him,

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and corroborates with much force the contention of *William*, who, in his bill, alleges that the power of attorney was by him executed while in *California* and sent to the Defendant, *George Taylor*, to enable him to act as trustee and agent for him, the Plaintiff, in the management and sale of the said lands and premises therein mentioned; and who, in his evidence, on 10th November, 1874, says:

> I sent him the power of attorney because he asked me for it. When I gave him the power of attorney, I don't know that I thought he would sell it. I thought it being a wood lot he might want it to enable him to take care of it.

And which is by no means inconsistent with the statement of *George* that:

> The reason he (Plaintiff) sent me the power of attorney was because he was in debt. I wrote him, I think, for the power of attorney.

And the conveyance under it, not being such an instrument as a bare naked trustee, and one made so without his knowledge or consent, ought to be called on to execute; but on the contrary, the power of attorney and the deed under it being just such instruments as a purchaser for value would naturally look for from a vendor selling on his own account in his own right, is it not a legitimate inference that the title was as the documents thus indicate? I may here say, with reference to this power of attorney, I cannot agree with an observation of one of the learned Judges in the Court below that the transactions of April, 1851, though effected in the absence and without the knowledge of the Plaintiff, "were promptly communicated to him."

I cannot discover one tittle of evidence that there was, with the power of attorney, transmitted any particulars whatever. *George* does not say he wrote the particulars, and *Wallbridge* says he never wrote to him, and the power itself, for the reasons I have assigned, affords, to my mind, strong evidence that such was not the case,

or, if they had been, a power consistent with the transaction would have been transmitted for execution by *William*.

The same learned Judge assumes that the power of attorney was drawn in, and sent from, *Cailfornia;* he says the instrument contains internal evidence of having been prepared abroad. Our attention has not been called to any such evidence, and the evidence in this case is directly the reverse. Mr. *Wallbridge* makes it apparent that this power of attorney was drawn in *Canada*, for he says:

> And the power of attoney *was sent* to be executed at my suggestion.

And again he says:

> I never wrote to Mr. *Taylor;* I was instrumental in having power of attorney *sent to him.*

And *William* says:

> I sent $1,000 to him (*George*) in 1851, when he sent the power of attorney.

And he (*William*) says:

> I don't know where the power of attorney was drawn.

Which he must have known, if *George* had not sent it to him to be executed, and if he had had it prepared in *California*. I, therefore, much prefer adopting the conclusion I have suggested, as being perfectly reasonable and natural and involving no imputation of impropriety on any person, supported, as I think it is, by evidence direct and indirect, rather than the suggestions of either *George* or Mr. *Wallbridge*, which are, to my mind, the very reverse. I have dwelt at this very great length on this branch of the case, because I think it the turning point.

Assuming, then, that *William* was the beneficial as well as the legal owner, was there a valid and binding sale and transfer by *William* to *Wallbridge?*

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It has been much pressed on Mr. *Wallbridge's* behalf that the balance due the College was paid by him. It is quite impossible to say with any degree of reasonable certainty who actually advanced the money to pay the balance due the College. *William* did not do it personally, though, if *George's* statement is true, *William* had made two or three payments to the College. *George*, *William* says, (and it is not disputed) was the sole manager of his property in this country ; and it is not disputed that he sold property of *William's* to a very large amount, and it is obvious that large sums from this source, belonging to *William*, must have been from time to time in his hands, an account of which, though written for, *William* could never obtain ; in addition to which, *William* appears to have remitted *George* $1,000 from *California* with the power of attorney, but there is no evidence that he appropriated any of these funds to pay this balance, unless, indeed, such an inference could be drawn from the statement in the answer in the *Canniff* suit, which *George* swore was true :

> That this Defendant (*William*) by his agent, applied for and obtained the deed of the said land, and paid the balance of principal and interest due to the College, as he humbly submits he had a perfect right to do.

If *William*, by his agent, did pay, and that agent had funds belonging to *William* in his hands, the presumption would not be very violent, that the payment was made from such funds. Both *George* and *Wallbridge*, with equal positiveness in some statements, and equal doubtfulness in others, claim to have paid it. But, it seems to me impossible to discover from their contradictory and conflicting statements, whose money went to the College. It is useless to go through or comment on all these different inconsistent statements as to the payment of the money. As everything connected with this payment, apart from the papers, rests on the evid-

ence of *George* and *Wallbridge*, it is only necessary, to show how very unreliable this evidence is (no doubt from failure of memory), to read from *Wallbridge's* testimony. He says:

I paid it to *George Taylor*. I made no entry of it. I knew that *Taylor* swore he paid the money. I think I paid *George Taylor* on account of this land. I can't remember what I paid. I think I paid him £215—the consideration money in the deed. I think Mr. *Taylor* got my brother *Lewis* to send the money to the College. It may have been my money; my impression is it was, but it is so long ago that I can't remember distinctly.

But by whomsoever advanced, the direct testimony of *George* and the written documents show it was transmitted to the College by *George*, for and on account of *William*, for the purpose of obtaining for him the deed, and that the College so understood it is plain, for the Bursar, in his letter to *George* enclosing the receipt for the money, says:

The deed will be made out and forwarded to *William Johnson Taylor* as soon as possible.

If, then, the property really belonged to *William*, I am at a loss to understand how it can be successfully contended that the sale or arrangement, whatever it was, between *George* and *Wallbridge*, and the transfer, under the power of attorney in evidence, to give it effect, can be held to bind *William* or divest him of his interest in the property.

The entire transaction was between *George* and *Wallbridge*, not in reference to *William's* property, but in reference to property they both assumed to belong to *George*, and in which, as they put their whole case, *William* had no beneficial interest. On what principle can such an attempted sale of, or bargain for, *George's* supposed interest or property be now turned into or sustained as a sale of *William's* property? *Wallbridge* purchased, and *George* sold half of his (*George's*) interest in the land. Neither *George* nor

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Wallbridge pretends to say that *George* sold, or proposed to sell, or that *Wallbridge* bought, or proposed to buy, any interest of *William's*. Both repudiated then, and repudiate now, that *William* had any right or interest to dispose of, but acted throughout, and have conducted their defence to this action, on the assumption that *William* had no beneficial interest in the property.

In his answer, *Wallbridge* claims to be an innocent purchaser for value, but, if his evidence is true, it was not of *William's*, but of *George's*, interest; but if these transactions between *George* and *Wallbridge* had had reference to *William's* interest, it seems to me impossible the transactions could stand. I think *George* and *Wallbridge* cannot be separated; the evidence shows, beyond all doubt, that *George* was acting throughout, not only under the advice, but, it may almost be said, under the direction of *Wallbridge* and his brother and partner, and that they were cognizant of all matters connected with the land, and not only advised but controlled their doings in relation thereto, more than *George* himself. It would be a useless waste of time to go through the evidence, in detail, of *George* and *Wallbridge*, and point out the extraordinary and manifold variances and inconsistencies, either as to the time when this alleged sale took place, the terms of the sale, or the alleged consideration. Some idea may be formed by briefly referring to a few irreconcilable statements. *Wallbridge* alleges the sale, or agreement for sale, was before the assignment from *George* to *William*. *William* says it was after litigation commenced, which was after the deed from the College. The written paper which contains, *William* says, the agreement, and is signed by both *George* and *Wallbridge*, and is in *Wallbridge's* handwriting, is dated 7th July, 1853, more than 2 years after the deed from the College, which is dated 24th April, 1851. *Wallbridge* says there

was no writing in relation to it—that the whole was verbal between him and *George*. The agreement in his own handwriting, and signed by him, is as follows:

7TH JULY, 1853.

Received, from *Adam H. Wallbridge*, the sum of £90 5s. 0d. on account of purchase of one half lot, No. 8, in the second concession of the Township of *Thurlow* and County of *Hastings*, which I have agreed to sell to him for two hundred and fifteen pounds, said *Wallbridge* to bear one half of the expense of the suit now going on respecting said half lot in the Court of Chancery and Queen's Bench, the remaining five hundred dollars to be paid this Fall. If the suit in Chancery does not terminate successfully, then each party to sustain half the loss, and said *Wallbridge* is not then to pay five hundred dollars.

(Signed), G. TAYLOR.
(Signed), ADAM H. WALLBRIDGE.

Wallbridge says the consideration was what he paid the College, and that he made no entry of what he paid. *George* says:

My agreement with *Wallbridge* had not been made before the proceedings were commenced. It was after the proceedings had commenced, and I had got disheartened about the costs that I made the arrangement with *Wallbridge*.

And after the written agreement is brought to light, which is dated 7th July, 1853, and shows an entirely different transaction from any one of those put forward by *George* or *Wallbridge*, he says:

I think the bargain was made before the deed was obtained from the College, and long before this document seems to be signed. I have no recollection whether this contains the bargain between us. I have no recollection that he was to pay me $500 the next Fall. It is in *A. H Wallbridge's* handwriting. I don't know whether I received the money mentioned in the document.

Though he had before stated "I think the agreement or contract with Defendant was in writing;" that he had a copy at home, and had it the previous night; that it was then at home, and that the agreement related to this land.

And when produced, he says:

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The paper writing now produced and shown me is the written agreement with Defendant, *Wallbridge*, and myself. It is signed by Mr. *Wallbridge* and myself.

Wallbridge says:

I think the bargain was made with *George Taylor* about a month or six weeks before the deed issued from the College. No litigation was going on. I made the bargain with *George Taylor* before money was sent to College. My bargain with *George Taylor* was, that I was to pay the College and indemnify him against all costs of suit that might be brought against him respecting the land, and I was to get half the land. * * I do not think there was any memorandum in writing. The litigation took place after the deed was obtained from the College.

At another time, he says:

I paid a balance of a note to *Filliter* to make up the amount of difference between the money I paid the College and the money going to *Taylor*. In making up the account I took the amount of the College money and the amount *Taylor* had paid on chancery suit, and paid the balance on the *Filliter* claim. I never searched my Bank account to see how I paid the money to *Taylor*.

Again, he says:

I paid the money that went to the College. I paid it to *George Taylor*. I made no entry of it. I think I paid *George Taylor* money on account of this land. I can't remember what I paid. I think I paid him £215, the consideration money in the deed.

George says:

Mr. *Wallbridge* paid me no money for the half he got. I conveyed the whole lot to him, and he conveyed back the half to me. This was done at *Wallbridge's* advice. I do not think the money to pay the College was furnished by Defendant (*Wallbridge.*) My remembrance is that I furnished it myself.

And on 15th May, 1856, he swears:

The amount I paid to the College was about £145.

The written paper shows the payment to have been on the 7th July, 1853, and for £90 5s. 0d., instead of £143 7s. 1d., the amount paid the College. Both say nothing remained to be paid. The paper says $500 was still to be paid; and, if *Wallbridge's* account is correct,

he paid the money in 1851; made no entry of it; had no writing to evidence his payment or his agreement in reference to this land, and, therefore, must have continued in that position till 29th December, 1856.

Then, as to this *bonâ fide* purchase for value, it is difficult to understand how any prudent business man of ordinary capacity could make so large a purchase, and on such unusual terms, and pay so much money on account of it, and make no entry of any such payment; take no written memo. of the agreement, or the terms of a transaction of so exceptional a character, and which the law required to be in writing to be binding and effective, and which could not be completed for an indefinite period, and so continue for years without any binding agreement, receipt, voucher or inditia of title, or payment of any kind, or even any entry in his own books; nor is it easy to be understood how Defendants, in the position these parties were—their minds so much at variance as to the particulars of this transaction—should appear before the Court without having examined their books and cash and bank accounts, and exhausted all other means of information calculated to sustain their contention. If they had such means of information, and did not choose to resort to them; or, if they had no such entries and no such accounts, no documents, no books to refer to, they cannot complain, if a transaction conducted so out of the usual and ordinary course of business, and left to rest on evidence so unsatisfactory, is not accepted.

But taking *Wallbridge's* contention in a way the most favorable to him, he has no case. The power of attorney gave no authority to *George* to make any one of the various arrangements spoken of by *George* and *Wallbridge*, and certainly gave no authority to give effect to an arrangement entered into, as *Wallbridge* persists in saying, not only before the title came to

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William from the College, but before *George* assigned to *William*, and, therefore, long before *George* had any authority from *William* to interfere with or dispose of any interest he may have had therein, and certainly the power gave no authority to *George* to convey the whole land to *Wallbridge*, or authority to *Wallbridge* to re-convey half to *George*.

But if the sale was in other respects unobjectionable, the transaction, it seems to me, could not stand. An attorney or trustee for sale is entirely disabled from purchasing the trust property. If *George*, and *Wallbridge* as attorney under him, were acting for *William* in securing the title, in recovering possession and effecting a sale of this property for *William*, they could not sell the property on *William's* behalf to themselves. The rule is now universal, that however fair the transaction, the *cestui que trust* is at liberty to set aside the transaction and take back the property. The law simply will not allow a man to be at the same time a seller and a buyer; therefore, any one intrusted with the sale of another's property, who directly or indirectly becomes the purchaser, commits, *ipso facto*, so far a fraud in the eye of the law that the owner may, at his election, avoid such sale.

In *McPherson* v. *Watts* (1), Lord *Cairns*, Ch., says:

It is here that the pointed observations by Lord *St. Leonards*, in this House, in the case of *Lewis* v. *Hillman* (2), become so very material. They were not observations laying down any new rule of law, for the same principles had already been applied in numerous cases, but what Lord *St. Leonards* said in that case, was this: Take the case of a sale of any kind, which is so fair, so reasonable as to price, so entirely free from anything else that is obnoxious, as to be capable of being supported, yet, if there has entered into that sale this ingredient, that the client has not been made aware that the real purchaser is his law agent—if the purchase has been made in the name of some other person for that law agent—that is a sale which cannot be supported. My Lords, so say I here. Assume, if

(1) L. R. 3 App. Cas. 263. (2) 3 H. L. 607—630.

you please, that in every respect as to price, and as to all other things connected with the sale, this was a sale which might have been supported had the *McPherson* family been told that *Watt* was the purchaser; in my opinion, it cannot be supported from the circumstance that that fact was not disclosed to them.

The defence of the Statute of Limitations is raised by the Defendant's answer.

Chief Justice *Haggarty* says it was conceded by the Respondent, the Defendant, on the argument, that the Statute of Limitations had no application to this case as a bar or otherwise, and I understood it was so admitted on the argument before this Court, but as some doubts have been expressed on this point, it is necessary for me to show why I think the Plaintiff's claim is not so barred.

George says:

I dispossessed *Canniff*, and I went into possession; I cannot tell when.

The means by which he dispossessed *Canniff* was the suit against *Fairman* (*Canniff's* tenant), consequently it must have been after the date of that judgment—27th November, 1856—that he went into possession.

Wallbridge says the land was in possession of *Osborne* (*Canniff's* tenant) when the deed was obtained from the College.

George is examined the 15th May, 1856, and says:

I brought an ejectment against Plaintiff, *Canniff*, in my brother's name, by the advice of *Wallbridge*. The action of ejectment was brought in 1853; that was staid by injunction. *Canniff* is still in possession.

The deed from *W. J. Taylor* by his attorney, *George*, to *A. H. Wallbridge*, is dated the 29th December, 1856, and the bill was filed in this cause on the 25th April, 1874. I cannot conceive how he can claim a possessory interest in this land before the date of the deed to him, and before he had any possession, actual or constructive, and as the judgment in ejectment against

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Fairman, who held under *Canniff* hostile to all parties, was signed on the 27th November, 1856, and this was the first litigation brought in the name of *William Taylor*, as *A. H. Wallbridge* says by him, to get the possession, and under which possession was obtained. how then can he claim a title by possession before the possession was acquired? From all this, it is abundantly clear that neither *Wallbridge* nor *George* had 20 years possession; so this defence fails.

But it has been urged that the Plaintiff has acquiesced in the sale, and by lapse of time is now estopped from disputing the validity of the sale under the power of attorney. As there never was any sale of *William's* interest in this property, it is somewhat difficult to understand how the doctrine of acquiescence is to be applied to a case of this kind; but suppose it applicable, I am by no means prepared to dispute that, while in cases of expressed trust by act of the parties no time will be a bar, acquiescence for a long time in an improper sale may disable a person from coming into a Court of Equity to set it aside. I am, nevertheless, at a loss to conceive how it can be claimed there was any such acquiescence in this case. Lapse of time can only commence to run from the discovery of the circumstances—until such discovery, or until such reasonable notice of what has happened has been given to the party injured, as to make it his duty, if he intends to seek redress, to make enquiry and to ascertain the circumstances of the case. No man can be supposed to acquiesce in that of which he was in entire ignorance. What are the circumstances under which we are asked to find an acquiescence in this case? The property being the property of *William*, then absent from the country, was, with other large property, placed by him in the charge of *George*, and *George* employed a solici-

tor to assist him in the management and litigation connected with the property. *William* appears, from time to time, to have striven to obtain a knowledge of the state of his property and the doings of his agent, by writing for money and information which he was certainly entitled to, but which he appears to have sought in vain, for it is not pretended that the one or the other was ever sent him. In this state of ignorance as to his affairs, he appears to have returned in October, 1873, and then finds, that while absent, the deed had been obtained in his name, actions at law and equity had been brought in his name, and as the result of such litigations, possession of the property had been obtained in his name; but instead of all this being done for his benefit, he finds that his agent and his attorney in such litigations repudiate his right and his title, and setting up a right in his agent, had under color of a sale, not of his (*William's*) interest, but of an alleged interest of *George*, his agent, divided the property between themselves, by *George* conveying the whole to *Wallbridge*, under an authority from *William* to *George* to sell his (*William's*) property, and *Wallbridge* re-conveying half back to *George*.

This would appear to be the first intimation that the principal had of any act or deed by his agent or attorney inconsistent with his interest or their duty. On the 25th April, six months after discovering the position of his property, he files this bill. Can it be said there has been laches, delay, or acquiescence; on the contrary, I think there has been the greatest promptitude after the facts appear to have come to his knowledge upon which the supposed acquiescence is founded.

But it has been argued that as the deeds from him to *Wallbridge*, and from *Wallbridge* to *George*, were on record, he could have discovered the transactions. This, to me, is simply a monstrous pro-

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position, as applied to an absent person who leaves an accredited agent behind him to look after his property in his absence, which agent employs an attorney to assist him and represent his principal in Court and out, both of whom he had a perfect right to expect were guarding his interest, and not invading his rights, and both of whom well knew that in his absence any examination of the records by him was simply impossible. To hold that the improper acts of agents or attornies, under the authority confided to them, are to be considered as acquiesced in, because their principal does not cause, during his absence, a constant supervision to be kept over them, would be to enunciate a principle I have never yet heard propounded, and which, I humbly think, would entirely weaken, if not overturn, those principles by which the relation of principal and agent and attorney and client are governed.

Though very unwilling to differ from the majority of the Court of Appeal of *Ontario*, for which Court, I need not say, I have the very highest respect, I cannot avoid the conclusion that the decree of Vice-Chancellor *Proudfoot* was right, and that his decision ought not to have been reversed.

I, therefore, think the appeal must be allowed, the judgment of the Court of Appeal of *Ontario* reversed, and the decree of Vice-Chancellor *Proudfoot*, dated 6th March, 1875, affirmed, with the costs of this appeal, and the costs of the re-hearing, and in the Court of Appeal of *Ontario*.

STRONG, J.:—

The Appellant, by his bill, impeaches a transaction which took place in the year 1851, the bill having been filed in 1874. This lapse of time, though by itself, under

the circumstances of the case, it may have no conclusive effect as constituting either a statutory or equitable bar, ought, at least, to induce the Court to make every fair and reasonable presumption in favour of the validity of a transaction sought to be avoided after such gross delay, and to require strict proof from the Appellant in support of his case. That the Respondent has been prejudiced in his defence by the delay which has occurred is apparent from the fact that the mind and memory of his principal witness, *George Taylor*, has, in this long interval, become so impaired that his recollection of the circumstances attending the original bargain between himself and the Respondent is imperfect and indistinct.

The extraordinary perversion of this property, which was originally a leasehold interest, from the destination of it prescribed by the will of *John Taylor*, who devised it to be divided amongst his wife, his nephew, and such of his children as should reside on the farm—a disposition with which the dealings of his widow and executrix, *Jane Taylor*, in surrendering the lease and entering into a contract of purchase, were entirely inconsistent—calls for no explanation in this suit, for, as the learned Chancellor has observed in his judgment on the rehearing, it was not for the interest of any of the parties litigant to call in question this dealing with the land by *Jane Taylor*, the executrix, since they all claim under her contract of purchase with King's College.

The evidence shows sufficiently that the transfer of the 30th October, 1841, by *George Taylor* to the Appellant, was for value. That the consideration for this sale was $50, both *George Taylor* and the Appellant agree. They differ as to the fact of payment. The Appellant says he paid his brother this sum. *George Taylor* denies this, and in his evidence, both in this

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cause and in the former suit of *Canniff* v. *Taylor*, he swears his brother never did pay him. I think the fair inference from this evidence is in favour of the conclusion, which was arrived at by the majority of the Court of Appeals, that no money was ever paid by the Appellant.

The assignment of the 29th November, 1847, made by the Appellant to *George*, purports on its face to have been an absolute transfer of *William Johnston Taylor's* interest. There is no evidence to show that it was made in trust, or to enable *George* to deal with the property as *William's* agent, except that of the Appellant himself, whose oath in this respect is again contradicted by that of *George*. It is true that no valuable consideration was paid ; but, if I am right in assuming that the proof establishes that no part of the price of the previous assignment to him had been paid by *William*, this makes no difference. I deny the proposition that a voluntary assignment, such as this, by itself, warrants the implication of a resulting trust (1) ; the inference, on the contrary, strengthened here by the fact that the transaction was between persons in the relation of brothers, is that a gift was intended. But, even if there would be *primâ facie* a resulting trust, the implication of such a trust might always be rebutted by the surrounding circumstances.

Then, what have we here? A re-assignment of an executory contract of sale under which no money had been paid by the purchaser, and that, too, a sale of a property of which the price contracted to be paid appears to have been the full value. Under such circumstances, the fair presumption at this distance of time, when we find a re-assignment by the vendee to the vendor, is that a rescission of the contract was in-

(1) *Young* v. *Peachy*, 2 Atkins 254 ; *Lloyd* v. *Spillett*, 2 Atkins 148.

tended to be effected in an informal manner. All the assignments here are informal, and none of them state the true consideration upon their face. In the case of an ordinary contract of sale, when we find the vendee, six years after the contract, re-assigning to the vendor, no part of the purchase-money having been paid, and the vendor swearing that an absolute assignment was intended, I should think it was out of the question that the transaction itself raised a trust by implication. Then, this leaves it entirely a question upon the evidence, and, I think, the weight of testimony is greatly in favor of *George Taylor's* account of the matter. All the probabilities point to an intention merely to undo the transfer of 1841, so as to revest the interest in the land, under the contract with the College, in the unpaid vendor. It is upon this part of the case, the effect of the assignment of 1847, that, as it appears to me, the only difficulty arises, and I, at first, took a different view of the result of the evidence. Subsequent reconsideration has, however, led me to take the view I have just enunciated, which is, I think, demonstrated to be the correct conclusion in the admirable exposition of, and reasoning upon, the facts contained in the judgment of Mr. Justice *Patterson*.

Then, if the interest in the land was absolutely vested in *George* by the assignment of 1847, I feel no difficulty about the proper result to be attributed to the subsequent transaction, either upon the facts, or as regards the law applicable to those facts. The evidence throws much more light on the facts connected with the assignment of the 12th April, 1851, by *George* to the Appellant, than on the other part of the case. At this date *William* was in *California*, whither he had gone in 1849. No communication was had with him relating to this transfer, and it cannot, therefore, be said for a moment to have had as its basis any con-

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tract or agreement between the brothers. It was entirely voluntary on the part of *George*, and was made, as stated by Mr. *Wallbridge*, at his suggestion, for reasons which he gives. He says :

> By taking the deed from the College, I thought *Canniff* might prosecute for taking a title in litigation. The litigation I meant that was to be avoided by taking the deed from the College to *William*, was the *qui tam* action against *George Taylor*.

At the date of these transactions, in 1851, the penal clauses of the Statute of Maintenance (1) were in full force, and many *qui tam* actions for penalties incurred by dealing with lands in litigation, or the titles of which were in dispute, had been upheld, some under circumstances of peculiar hardship, considerations which soon afterwards led to a legislative enactment repealing those clauses. Much alarm and anxiety in dealing with land in any way in litigation or dispute, although under circumstances to which the Statute could not apply, was, as will be remembered by those engaged in the practice of the law at that time, created by the decisions I have referred to. That the Statute would not have had application, as it clearly would not, since the title to be acquired from the College could not have been a pretenced title within the Statute, makes no difference. The apprehension, though ill-founded, was not at that time altogether unreasonable, and there is nothing incredible, but very much the contrary, in Mr. *Wallbridge's* statement that it constituted the reason for taking the conveyance in the name of the Appellant, *William Taylor*, who, in *California*, would have been beyond the reach of an informer's action for penalties, even if such an action could have been maintained. The object being to take the conveyance in the name of *William*, the assignment was indispensable to attain that end, since

(1) 32 Henry 8, c. 9.

the College officers would not have made the purchase deed to him without a transfer in the established form prescribed and alone recognized by them. The assignment preceded the conveyance by twelve days only, this last instrument being executed on the 24th April, 1851. The money was advanced by *Wallbridge* to *George Taylor*, and paid by the latter to the College.

A power of attorney must have been soon afterwards forwarded to *California*, for it was executed by *William Taylor*, at *Carson's Creek*, in *California*, on the 11th October, 1851. Putting the power of attorney altogether out of the question, the transaction, always assuming that *George* acquired an absolute interest under the assignment of 1847, would have clearly been that of a purchaser paying his own purchase-money and taking the conveyance in the name of a stranger—a transaction which, on the most elementary principles of equity, would have caused a trust to result by implication of law in favour of the real purchaser. The assignment was made merely to satisfy the formalism of the officers of the public body, the College ; and the College, in all respects, so far as the law applicable to it is concerned, stood precisely on the same footing as if an ordinary purchaser from a private vendor had paid the purchase-money, and then appointed the conveyance of the land to be made to a third person, without any communication with that third person. As I have said, the legal effect of such a transaction depends on elementary principles which no one will dispute. Then, could the power of attorney in any way detract from the rights of *George Taylor*, if he became, as I maintain he did, by the operation of the resulting trust which arose, the *cestui que* trust of this land, and the true beneficial and equitable owner of the estate. So far from having any such effect, the power of

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attorney materially strengthens the position assumed by the Court of Appeal in this respect. It gave the real owner of the estate power to deal with the bare legal estate which was outstanding in a trustee, and was nothing more than a clumsy mode of attaining the same end which would have been reached by a more artificial process of conveyancing, if *George Taylor*, whom I hold to have been the real purchaser, had taken a conveyance in his brother's name, with a power of appointment in fee limited to himself. I regard the three instruments, the assignment of 12th April, 1851, the purchase deed, and the power of attorney as all parts of the same transaction, the object of which was to vest the legal estate (for the reason given by Mr. *Wallbridge*) in the Appellant for the behoof of *George Taylor*, with a power of free disposition over it reserved in favor of the latter. It was, no doubt, inartificially done, but the science of conveyancing, tested by English models, had not, at that time, attained much perfection in the country districts of *Upper Canada*; and, at all events, we are to judge these impeached transactions by their legal effect and good faith rather than by their symmetry.

I have not noticed the effect of the evidence of *George Taylor*, in the suit of *Canniff* v. *Taylor*. It might have constituted an additional reason for taking the conveyance to *William* that it would, as it was thought, make *George* a good witness in that suit. Certainly, *George Taylor* then swore he had no interest in the land, which was, literally taken, untrue, if I am right in the view which I have taken of the character and effect of the various assignments; but, I think, we find a very sufficient explanation of this in the evidence given by *George Taylor* in this suit after he had entered into an amic-

able compromise with his brother. He says: "I swore to this, because I had made this transfer to him, the Plaintiff." In other words, he says he swore to this statement in ignorance, which, in a layman, might be pardonable, of that provision of the Statute of Frauds which exempts resulting trusts from its operation, and of those judicial decisions of English Equity Courts which have decided that when a man buys and pays his own money and takes a conveyance in the name of another —a stranger—a trust shall result for him who pays. This is all the utmost ingenuity can make of *George Tayor's* evidence, if we accept his explanation, given on his last examination as a witness in this cause, and it seems so reasonable, that I cannot bring myself to reject it; and to bind *Wallbridge* by evidence given behind his back, when he had no right of cross-examination, and was not in any way a party in the cause.

Another point remains to be noticed. It has been put forward as an argument that the deed had, according to the Respondent's own testimony, been taken in the Appellant's name to cloke what was apprehended to be an illegal transaction, and for that reason no trust arises by operation of law. To refute this argument the case of *Childers* v. *Childers* (1) was cited for the Respondent. *Childers* v. *Childers*, so far as I can discover, has no bearing on this objection; but in a case of *Davies* v. *Otty* (2) this precise point arose. There it was held that a conveyance which was made by a party in apprehension of a prosecution for felony, with a view to defeat the forfeiture and escheat of an estate in lands which would have followed a conviction, to a trustee on a secret parol trust to reconvey, should the fact turn out to be that no felony had been committed, did not become absolute and freed from the trust merely

(1) 1 DeG. & J. 482.

(2) 33 Beav. 540; see also *Haigh* v. *Kaye*, L. R. 7 Chy. 469.

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because the settlor had made the conveyance under the influence of a fear which proved to be chimerical, with an intent to defeat the rights of the Crown in the event of his conviction. Here, equally, there was no foundation for the apprehension under which *George Taylor* was advised and induced to take the deed in his brother's name, and consequently there is nothing to obviate his setting up the trust which arises from the payment of the purchase money. Upon these grounds, I am of opinion, that the proper decree was that made by the Court of Chancery on the re-hearing, and affirmed by the Court of Appeal, dismissing the bill with costs.

Had I taken a different view of the facts in regard to what I consider the turning point of this case, the character of the assignment of 1847, I should, notwithstanding, have come to the same conclusion. This appeal, which, in the view of it which I have already stated, depends principally on a single question of fact, would, if the assignment of 1847 is regarded as having been made in trust for the Appellant, and the re-assignment and the conveyance are to be taken as vesting the estate in the Appellant as the true beneficial owner, have turned on questions of law as applied to the transactions between *George Taylor*, as the agent and trustee for the Appellant, and the Respondent. There could, I think, be no doubt but that the power of attorney enabled *George* to sell, and also to perfect a sale by a conveyance in the name of his brother, and that the authority to sell was not confined to a sale in one lot, but authorized a sale in separate parcels. This being so, I should have thought the sale to Mr. *Wallbridge* of one-half the lot in April, 1851, for a price which there is not a word of evidence to show was inadequate—the fact, indeed, so far as there is any proof, being the other way—entirely unimpeachable. For the evidence does not support, what is assumed as a fact in the judgment

of one of the learned Judges in the Court below, namely, that at the time of the purchase or agreement to purchase by Mr. *Wallbridge* he was the attorney or partner of the attorney, for the Appellant. The only evidence on the point is that of Mr. *Wallbridge*, the Respondent, who says he did not enter into partnership with his brother until Feb. 1, 1853. Therefore, in April, 1851, he was as free to buy as any stranger. It is true that the receipt which constitutes the earliest written evidence of the sale is dated in July, 1853, and that the conveyance to the Respondent was not executed until the 29th December, 1856. *Primâ facie*, no doubt, the contract of sale ought to be referred to the date of the memorandum, but it is only evidence of the agreement, not the agreement itself, and it is quite competent for parties, in order to show that a sale was made at a time when no professional or fiduciary relationship existed, and in order to refute a charge of equitable fraud, to prove by parol testimony that the true contract preceded the date of the written evidence in which it was afterwards recorded. We have, then, a sale to Mr. *Wallbridge* of one-half of this land in April, 1851, at a time when he was under no disability to purchase, as standing in the relationship of solicitor to the vendor. What is there in this evidence which should avoid such a sale? Nothing, except the circumstance that, when the conveyance came to be executed five years after the date of the sale, it was made to include, not only the half of the land which *Wallbridge* had purchased, but also the remaining half which he was to re-convey, and did re-convey, to the vendor's agent and attorney in the matter of the sale. Now, had the original agreement been fettered with this condition, I grant that it ought, if the objection to the sale had been raised in due time, to have constituted a ground for setting it aside. But there is nothing to show that

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it was any part of the agreement, and the memorandum of July does not recognize any such arrangement. If, therefore, it is now to have the effect retrospectively of avoiding the fair, honest and unimpeachable bargain of April, 1851, or of July, 1853, if that is the date which should be assigned to the contract, it can only be on the principle that the Respondent, having concurred with the agent, *George Taylor*, in offending against the rules of equity in carrying out an unimpeachable sale by a conveyance which had the effect of a breach of trust as regards other lands, is to have his own purchase annulled by way of penalty for his concurrence in such a breach of trust in respect of the other lands. The answer to such a position is contained in a simple reference to the rule that a Court of Equity never acts punitively, except in the matter of costs. If the original purchase by Mr. *Wallbridge* was free from the taint of any improper dealing with the lands for the benefit of the trustee, the relief against him, in respect of his concurrence in the breach of trust, was limited to the lands re-conveyed to *George Taylor*.

I have not dwelt much on the legal consequences of the fact that the true date at which to test this transaction is April, 1851, when the original bargain was made, and neither that of the written memorandum nor of the conveyance, because I consider the principle, that a valid contract having been entered into between parties who are, as it is phrased, at arm's length, is not subjected to the rules regulating contracts between solicitor and client, if that relationship should happen to spring up in the interval between the contract and the conveyance, to rest on rules of equity too clear and sound to need demonstration. The other principle, that to show a contract free from equitable fraud, it is allowable to prove that it was concluded at a date anterior to the written instrument by which it is

evidenced, is also, I think, so clear on authority that it would be superfluous to quote cases to establish it.

But there is another consideration which seems entirely to have escaped the observation of one of the learned Judges in the Court below, who lays stress on Mr. *Wallbridge* being the Appellant's Attorney when he purchased. It seems to have been assumed that the incapacity of the solicitor to purchase is absolute. This is clearly not the law. All that the law requires in the case of such purchases—unlike the case of a purchase by a trustee for sale for his own behoof—is that the attorney purchasing shall have withheld from his client, the vendor, no information in his possession which may have influenced him in making the contract, and that he must prove he gave full value (1). There is no suggestion that Mr. *Wallbridge* possessed any information affecting the value of the land which he ought to have communicated; and, as to inadequacy, the only evidence as to value, that of Mr. *Wallbridge* himself, is strong to show that not only was the price as much as the land was worth, but that his purchase has been far from a profitable one. So that, even if we fix the time of the sale at the date of the written memorandum, in July, 1853, when the Respondent had entered into partnership with his brother, the Appellant's solicitor, in the litigation with *Canniff*, I fail to see that, tested by those sound rules which Courts of Equity have laid down for the regulation of transactions between solicitor and client, there would be any ground for impeaching this purchase.

Lastly, I should, if the case depended on that alone, feel that I ought to agree with the learned Vice-Chancellor *Blake* in holding lapse of time (irrespective, of course, of the Statute of Limitations, which can have no

(1) *Cane* v. *Lord Allen*, 2 Dow. 289.

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application) a sufficient bar to the Appellant's suit. The Appellant might have known, at any time after the 3rd January, 1857, when the two deeds by which the legal estate was vested in *Wall-bridge* and *George Taylor*, respectively, were registered, how his attorney had dealt with these lands. It is not, therefore, like the case of a concealed transaction. Where the means of knowledge exist, Courts of Equity, in cases of laches, attribute the same effect to lapse of time as when actual knowledge is proved. Numerous decisions of the Equity tribunals in *Upper Canada*—and it is the law of that portion of the Dominion we are now administering—show that much greater strictness has been applied there, particularly since 1849, when the Court of Chancery was re-organized, as regards laches in cases relating to real property, than that which prevails in *England*, and for the good reason that the constantly increasing value of lands would make the indulgence which is extended in *England* impolitic and inequitable in this Province. I am of opinion that the Appellant's omission, not only to pursue his rights, but even to make any specific enquiry as regards these lands for 18 years, ought alone to be fatal to his claims, even if they were in other respects well founded. And more especially ought this to be the result when, as in the present case, the Defendant has been prejudiced by the loss of evidence.

As a Court of Equity, in considering the effect of lapse of time as an equitable bar, always acts in analogy to the positive rules of law in reference to the effect of time under the Statute of Limitations, I also agree with the learned Vice Chancellor that the Statute of *Canada*, 25 Vic., Cap. 20, passed in 1862, having repealed the provision in the Statutes of Limitations making absence from the Province a disability, the absence of the Appellant

in *California* constitutes by itself no excuse for his laches.

I am of opinion that the order of the Court of Appeal should be affirmed, and this appeal dismissed with costs.

HENRY, J. :—

The Appellant in this case seeks to set aside,as fraudulent, colorable and collusive, a conveyance made by the Defendant, *George Taylor*, as his attorney or agent, to the Respondent (*Wallbridge*) of certain parcels of land situate at or near *Belleville*, *Ontario*, and also a deed made by the Respondent, *Wallbridge*, to *George Taylor*, by which he re-conveyed to the latter, at the same date of the conveyance from *George Taylor* to him, one-half of the land conveyed by *George* to him.

Judgment by default was entered against *Simpson*, one of the Defendants; and *George Taylor* and the Appellant made a settlement, since the suit, in regard to the parcel of land held by him under the conveyance from *Wallbridge*. We have, therefore, only to deal with that part of the case which lies between the Appellant and the Respondent, *Wallbridge*. The latter, in his answer, claims that, although the title of the lands in question was in *William*, *George* had, at the time he conveyed to him, the beneficial interest, and that he, *Wallbridge*, having furnished the money to pay the amount due to the College to *George*, had also a beneficial interest in the land conveyed to *William* by the said College, and that, therefore, *William* was the trustee of *George* or himself.

If such were the case, admitted by *William*, the title still remained in him, but only as such trustee, and, therefore, the conveyance to *Wallbridge* under the

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power of attorney would not be inequitable. We must, therefore, see whether that was the undoubted position of *William*. There is no evidence that he ever admitted that he was the trustee of *George*. There is nothing, I think, in the circumstances to sustain the position that he could be called the trustee of *Wallbridge*. The evidence that he, *Wallbridge*, ever paid any of the consideration for the deed from the College to *William* is contradictory. *Wallbridge* himself does not positively say he paid any of it, but on cross-examination leaves it too contradictory and doubtful to have any effect or weight. He says:

I paid the money that went to the College. I paid it to *George Taylor*. I made no entry of it. I knew that *George Taylor* swore that he paid the money. I think I paid *George Taylor* money on account of this land. I can't remember what I paid. I *think* I paid him £215, the consideration money in the deed. I *think* Mr. *Taylor* got my brother *Lewis* to send the money to the College. It may have been my money. My impression is that it was; but it is so long ago that I cannot remember distinctly.

The fair presumption is, that under the circumstances, as so related by *Wallbridge*, if he advanced any money at all, it was to *George*, and not on *William's* credit; but it would be hard to conclude for a moment that, even by his own showing, there is any evidence to declare *William* his trustee; and *George's* evidence goes rather to negative the fact of any money being advanced by *Wallbridge* to pay the balance due on the land to the College. George says:

I paid the money. I forget how I raised the money. It strikes me I got the money from Mr. *Grass* to pay the College. I have no distinct remembrance. I think, if Defendant *Wallbridge* gave me the money, he charged me with it. * *

He says again, on his cross-examination by Mr. *Wallbridge:*

I do not think the money to pay the College was furnished by the Defendant *Wallbridge*. My remembrance is, that I furnished it myself.

That part of the Respondent's (*Wallbridge*) answer, being unsupported by any reliable evidence, must be ruled out. The defence, on the other ground, is, that *William*, when the deed was made to him by the College, became the trustee of *George*, through the payment by the latter of the sum of £145, the balance due of the purchase-money—by which the beneficial interest became vested in *George*, although the title went to *William*.

To determine that point, we must first see how the parties, *George* and *William*, then stood in relation to the land and to each other. To do this, I will start from the agreement made by *Jane Taylor*, the mother of *William* and *George*, to purchase from the College. That document bears date the 3rd of March, 1832. The consideration £100, of which £10 were paid at the time, and the remainder was to be paid by annual instalments of £10 each, with interest, from the 25th March in that year. *Jane* does not appear to have made any payment beyond the first £10, but she, on the 26th November, 1839, assigned her interest in that agreement to *George Taylor* for the actual consideration of $50.

Under that assignment, the first act of *George* appears to have been a sale by him to *William* of his interest therein. The instrument made by the former to the latter is dated the 30th day of October, 1841, and the consideration agreed upon was $50. The Respondent *Wallbridge* contends that the consideration for the latter assignment was not paid, and, therefore, there is a resulting trust in favor of *George*, but, as will be seen, neither the law nor the evidence sustains that contention. First, as to the evidence, *George* says:

> After I held it (the agreement) some years, through the influence of my mother, I agreed to let Plaintiff have it, which I did. He agreed to pay me what I had paid, but he never did pay me.

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In his answer to interrogatories in chief, in the suit of *Canniff* against *William*, he makes, in substance, the same statements. Here there was a clear intention to part with all his interest—not a mere conveyance without a consideration or use stated or declared. If it were true that *William* did not pay *George*, the latter might have had an equitable lien upon the land for the $50 *William* had agreed to pay him, if it were a purchase of land; but here it was merely an assignment of a a right to become the owner of it by paying the balance of the purchase money, and no equitable lien could arise. If, however, *George* assigned to *William* under an agreement that *William* was to be merely his agent to complete the purchase, he might, in case of the latter taking a conveyance to himself, have had an equitable demand on *William*, as being his trustee, to convey the land to him. There could, however, be no resulting trust in *William* merely from the failure on his part to pay *George* the $50. A resulting trust arises only where land *is conveyed* without any consideration alleged or paid, or, strictly speaking, where no use is declared, and where, by the evidence, it appears such was the intention of the parties to the conveyance. If A bargains to sell land to B for a certain sum, and that A gives a deed to B, I am not aware of any law by which A can claim a resulting trust in B, if the latter fails to pay the consideration money. Equity might decree a lien in A for the consideration money and any necessary further relief against B for the recovery of the consideration money, but here the remedy ends. The beneficial interest would remain in B, subject to A's equitable lien arising from the non-payment of the consideration money.

William, however, says in his evidence:

I had obtained an assignment at one time of the right my brother had in the land in dispute. * * * I paid *George* $50 at the time I made the purchase, and got the assignment from him.

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The evidence is therefore so conflicting that, if the case depended on a determination of that disputed point, I would not feel justified in founding any judgment upon it in favor of the Respondent, who, in such a case, is bound to furnish evidence clear from reasonable doubt, which is not the case here. But in his *vivâ voce* examination in 1856, *George* makes this significant statement respecting his second transfer to *William* a few days previous:

> I cannot tell why Mr. *Wallbridge* advised me to assign to my brother. He advised me to do so and I followed his advice. *I had no reason but that I had not paid my brother for the land.* * * * * * My brother never paid me anything for it.

From the whole of *George's* statements together I should feel inclined to conclude that, as he had been *William's* agent in the sale of his lands, he got the $50 in some shape, if not from *William* direct, for otherwise he would not have considered himself bound to make the last assignment for the reason he gave, that he "had not paid" his brother "for the land."

I consider, then, that *William*, under the assignment from *George*, became legally and equitably his assignee of the right to complete the purchase from the College. *William* retained that right until, being about to leave the country, he, on the 29th of November, 1847, assigned to *George*. About a year after *George's* assignment to him, *William* himself, and by his attorney, Mr. *Lewis Wallbridge* (on the 28th November, 1842), wrote to the bursar of the College in respect to the land; informed him that he had become the assignee; that he was then able to pay £25, and wished to learn the longest terms of payment; and whether he could get a deed on producing the assignment from *George*. No answer to this application was shown; but we can reasonably conclude that some satisfactory arrangement was made, for *George*, in his deposition before mentioned says:

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My brother had made two or three payments to the College.

The dates of these payments are not given; but they must have been made before *William* went to *California*. They appear to have been made to the knowledge of *George*, and he, during six years, treats *William* as having the beneficial interest; how, then, can he, or any one claiming under him, pretend for a moment there was any such agreement or understanding between him and *William* as would raise a resulting trust in the latter. *William's* position was fully admitted by the College, with the, at least, implied assent of *George;* and how could he claim any beneficial interest afterwards in the land? *William* held the right in question for over six years, and, being about to leave the country, made an assignment, as he alleges without contradiction, of the right in question to *George*, as his agent, without any consideration whatever. As to this position there can be no doubt, for both he and *George* unequivocally so state. *George* says, in his examination in *Canniff* v. *Taylor*:

The assignment from *William Taylor* to me was without consideration, and made to me because *William* was going to *California*.

George must, under this evidence, be considered the trustee of *William;* and I can, therefore, understand why it was that Mr. *Wallbridge* advised in 1856 a re-assignment to *William*, and the taking of the deed in his name from the College. Holding the trust for *William*, it would have been a fraud for *George* to have taken the conveyance to himself, and a title under the conveyance consequently defective. *William* and his mother together must have paid seventy or eighty pounds on account of the purchase-money; and no Court of Equity would have permitted *George* to hold the title to the land against his principal in such circumstances. He admits his agency from *William*, and it is shown by the latter and him that he sold thousands

of dollars worth of *William's* lands. Mr. *Wallbridge*, knowing the facts and relationship of *George* to *William* in regard to his lands, might very properly feel that a title through *George*, under such circumstances, would be insecure.

Independently, therefore, of the positive statements of *William* and *George*, the other circumstances afford strong *primâ facie* evidence that the conveyance by *George* was as agent or trustee of *William*. *George*, having so acquired the right in question in 1847, held it till the 12th of April, 1851, when he re-assigned to *William*, as he says, *because he had never paid the latter anything for it.* He must have considered the beneficial interest was in *William*, and having made the transfer to *William*, he is estopped from denying that beneficial interest.

On the 24th of the same month *George* paid the balance of the purchase money, interest and costs, amounting to about £145, and obtained a deed from the College to *William*.

It is contended for the Respondent, *Wallbridge*, that under the circumstances *William* became the trustee of *George* of the beneficial interest in the whole lot, and that he, *Wallbridge*, having received a conveyance from *George* of it, and having retained one-half of it, his title to it is good against *William*, and, if not, that the conveyance to him from *William* by *George* as his attorney or agent transferred *William's* title to him, both at law and in equity. In the first place, then, did the payment of the *balance of the purchase money* by *George* and the conveyance to *William* in consequence thereof create an executory trust in *William* and give *George* the beneficial interest?

The power was expressed to be to *sell* the land in question. Did that power necessarily give the power to *convey?* A parol power to *sell* would certainly not include a power to convey, and does the fact of the

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power being under seal make any difference? When special power is given to perform any prescribed duty or service, it necessarily implies a power to do all subordinate things that are necessary to the performance of that duty or service, and the principal would be bound to the same extent as if all that the agent did were specially stated in the power. After an exhaustive search I can find neither a case nor an authority that a power to sell, even under seal, gives one to convey. Authorizing one to sell or enter into a contract for a sale requires the reposing of much less confidence in an agent than the power to convey and receive the consideration money. No authority was cited in support of the proposition, although one of the grounds taken on the part of the Appellant. I do not, however, base my judgment on that objection; but if it were not rendered unnecessary by other considerations, I would feel bound, as at present advised, to decide against the power to convey. All the authorities concur in the proposition that an agent, constituted so for a particular purpose, and with a limited and circumscribed authority, cannot bind the principal by any act in which he *exceeds his authority* (1).

It is a well settled rule that all written powers, such as letters of attorney, or letters of instruction, shall receive a strict interpretation, and the authority is never extended beyond that which is given in terms, or is absolutely necessary for carrying the authority so given into effect (2).

The power to convey is in no way subordinate to the power to sell or to contract for a sale. The latter power can be exercised by entering into a contract binding on the principal, and may, therefore, *be fully*

(1) Paley on agency by Lloyd, p. 204. See *Fenn* v. *Harrison*, 3 T. R. 757, and 4 T. R. 117.

(2) Paley on agency 192.

executed. The rights and obligations of the principal may thereby be totally changed, so that specific performance would be decreed. Personal property, passing by sale and delivery by an agent, binds the principal, who, by his delivery to the agent, gives him an implied authority to deliver to the purchaser. With real estate it is quite different; and authority to sell is not held to be an authority to make a feofment under the common law; and, by a parity of reasoning, the power to sell would not include one to convey. *Payley* (1) says:

> The agent or solicitor of the vendor cannot, without special authority, receive and give a discharge for the purchase money, and the usual indorsed receipt is in equity no conclusive evidence of payment.

Sugden on vendors (2) says:

> A purchaser cannot safely pay the purchase money to the vendor's attorney without the seller's authority, although he is intrusted with the conveyance and is ready to deliver it up.

From a full consideration of all the authorities, my judgment is irresistibly drawn to the conclusion that *George* had not, under the letter of attorney from *William*, anything more than a power to contract for a sale; and in the construction of written documents it would be wrong and dangerous to speculate as to "the belief of the Plaintiff," that "the power given included all that was necessary to pass the title to a purchaser," as suggested by one of the learned judges. If he had not the power to convey, it necessarily follows that his deed to *Wallbridge* would convey no interest. The general rule, that when an attorney or agent does any act beyond the scope of his power, it is void as between the appointee and the principal, which has always prevailed, and which is elementary in the doctrine of

(1) 1 vol., p. 501.

(2) 8th Am. ed., p. 217; See also *Wilkinson* v. *Candlish*, 5 Ex. 91; *Kent* v. *Thomas*, 1 H. & N. 473; *Lucas* v. *Wilkinson*, 1 H. & N. 420.

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powers, is applicable to this case. The appointee is not bound to deal with the attorney or agent; but if he do, he is bound to inspect the power when in writing, and he is held to understand its legal effect, and must at his peril see that the attorney or agent do not transgress the prescribed boundary.

The subsisting authority in this case, and the only one, was the power of attorney; and as the execution of the deed to *Wallbridge* was by procuration, he was bound to look at and be governed by the authority given to the agent, and ignorance of its restrictive character is no legal or equitable excuse.

The next point to consider is that of the alleged constructive trust in *William*, under the deed to him.

To establish such a trust, parol evidence is admitted, and, also, to rebut the implication of it. It may be shown by evidence of the agreement of the parties, at the time of the purchase and payment; or it may be the result of proved facts from which a beneficial interest may be decreed in the party purchasing and paying for land, and who takes the conveyance to another. There is no doubt that "where a man *buys* land in the name of another, and pays the consideration money, the land will be generally held by the grantee in trust for the person who pays the consideration money" (1); and, if *George*, when paying the balance of the consideration money, comes within that principle, he would, undoubtedly, have the beneficial interest.

The authorities all provide for cases where the purchase was made and the consideration paid by the purchaser, either in whole or some specified proportion of it; but I can find no case of a beneficial interest having been declared in favor of one who did not him-

(1) 7 B. & C. 285. See Bayley, J., in *Attwood* v. *Cumings*, and Holroyd, J., p. 284.

(1) Story Eq. Jur. S. 1201.

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self *purchase*, but who only paid a part of the consideration money years after the purchase was made. The purchase in this case was made by *Jane Taylor*, nineteen years before the payment by *George* and the deed to *William*; and the latter had the right to complete the purchase ten years before that time. The first constituent of the rule is, therefore, wholly wanting, and I know of no law or principle by which one man can step in between two contracting parties, and, by an unauthorized payment of a balance of purchase-money, oust the purchaser. By paying only *a balance* he admits the legal position of the purchaser; and doing so, cannot be permitted to deny it, so as to obtain a beneficial interest, and thereby deprive the purchaser of his previous rights. Equity at once opens its eyes to such a transaction, and may properly inquire how a party so acting can expect to turn the purchaser from his rights, under the agreement, into a mere trustee for his beneficial interest. It has been said *William* and his mother only paid a small part of the purchase-money. Between them, as I have shown, they must have paid seventy or eighty pounds; but it matters not how much they paid, the principle is the same; and we are not required here to estimate the proportion. Suppose but fifty out of two hundred pounds remained due, would there be any other principle applicable? Under the agreement for the bargain and sale, the College became a trustee for, and was seized to the use of, *William*. The bargain vested the use to be executed on payment of the balance of the purchase-money. How, then, could *George* step in and divest *William* of his right under the agreement as before stated. There is no question of "lien" in this case. The question of a grantor's "lien" does not arise; and, besides, if *George* had an equitable "lien" *Wallbridge* could not set it up; at all events, it is not set up in this suit.

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The claim here is not for a partial trust to the extent of the money paid by *George*, but for the whole beneficial interest. Had *William* no interest in the land under the payments he could claim credit for, and which *George* got the benefit of?

It is quite certain, if land be purchased by two, or by one for two, and each pays a part of the consideration money, but the conveyance is made to one, there is a constructive trust for the other to the extent of the proportion paid by him. To this, however, there is applicable a further rule which is, says *Brown* on Statute of Frauds (1),

> That though there may be a trust of a part only of the estate by implication of law, it must be of an aliquot part of the whole interest in the property. The whole consideration for the whole estate, or for the moiety, or third or some definite part of the whole, must be paid—the contribution or payment of a sum of money generally for the estate, when such payment does not constitute the whole consideration, does not raise a trust by operation of law for him who pays it; and the reason of the distinction obviously is, that neither the entire interest in the whole estate, nor in any given part of it, could result from such a payment to the party who makes it, without injustice to the grantee, by whom the residue of the consideration is contributed.

And for his doctrine he cites numerous *United States* decisions. He adds:

> Upon the same view it is held, that if the proportion paid towards the consideration, by the party claiming the benefit of the trust, cannot be ascertained, whether because its valuation is, from the nature of the payment, uncertain, or because the sum paid is left uncertain upon the evidence, no trust results by operation of law.

It must be admitted, however, that the amount paid by *George* is certain enough, but the proportion to the whole is not shown by the evidence, and the relative interest in the whole is, therefore, equally uncertain as in the other case, which would leave it, I think, subject to the same objection. It is unnecessary to say

(1) P. 81.

whether the doctrine first quoted should be considered authority or not, for, if the evidence fails to show the amounts paid by each, the authorities concur in saying that no trust exists.

The payment, I conceive, must have formed part of the original transaction. *Washburn* on real estate (1) says:

> But where the husband paid part of the purchase money for land conveyed to the wife, but such payment was subject to the purchase and formed no part of the original transaction, no trust resulted in his favor.

Again:

> If one pays only part of the purchase money and another another part, but the definite proportion cannot be fixed, no trust will result.

Again:

> So where A bought land and paid for it and had the deed made to B, upon his agreement to repay the money at a future time, no trust was raised in favor of A. The intention of the parties to the transaction was, that B and not A should be the beneficial owner.

And again:

> But where one of two joint purchasers upon credit pays the whole debt, it does not raise a resulting trust in his favor. In carrying out the doctrine above stated, it has been held that the payment which raises a resulting trust, must be part of the transaction and relate to the time when the purchase was made. Any subsequent application or advance of the funds of another than the purchaser towards paying the purchase money will not raise a resulting trust.

He truly exhibits the principles acted upon generally in the *United States*, where transfers by deeds of bargain and sale are similar to those in this country, and I find no English authority but sustains the general statement of the law by him. In *Blodgett* v. *Hildreth* (2), it was held that it was unnecessary to show that the purchase money was actually paid at the time the conveyance was made, but that "it would be sufficient to show

(1) Pp. 474, 475, 476, 477. (2) 103 Mass. R. 487.

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that it was paid *in pursuance of the contract by which the purchase was made.*" *Brown* on Statute of frauds (1) says:

> A resulting trust attaches only when the payment is made *at the time of the purchase,* and a subsequent advance will not have that effect.

The payment, then, by *George*, in my opinion, raised no trust in his favor, but if we take his own statements for a guide, it will be unnecessary to think long as to the legal effect of them. In his answer, under oath, in the cause of *Canniff* against *William*, as the agent of the latter in 1852, (the year after the deed to *William*,) he (*George*) says:

> This Defendant (*William*) by his agent (*George*) applied for and obtained the deed of the said land from the said College and paid the balance of principal and interest due to the College thereon, as he humbly submits and insists he had a right to do.

These statements, having been made so soon after the date of the deed, and several years before *George* took any steps to obtain any title to the land for himself, are entitled to every favorable consideration when contrasted with his subsequent ones, made when it became necessary to sustain his alleged fraudulent transfer to *Wallbridge*. If he made the payment as agent of, or in the interest of, *William*, as his friend, he could safely say the latter had done so, and his statement above quoted to that effect is true, and his subsequent statement that he (*George*) paid the money is not in conflict therewith; and it will be observed that in all the subsequent references by *George*, in his examinations in *Canniff* v. *Taylor*, and in this suit, he does not in the slighest degree contradict the statements I have quoted from the answer he put in *as William's agent, in* 1852. I feel bound, therefore, to conclude that the statement, in the answer, that he paid

(1) P. 83.

the money as *William's* agent, is substantially true. He received the conveyance, by his own sworn statement, without consideration from *William*, for whom he subsequently acted as agent in his absence. The latter sent him $1,000 from *California ;* and he sold thousands of dollars' worth of *William's* property ; and he does not allege that he did not repay himself for any money advanced by him, if he really did advance it. If he did subsequently repay himself, he would be estopped from seeking to enforce the trust, if it ever existed. He could not play fast and loose; and having once received payment, his equitable interest was at an end, and he could not revive it, even by a tender back of the money. Situated as he was, he was bound, I think, to show he had not done so before seeking to establish a trust in *William.*

Two points yet remain. The first is, can *Wallbridge* be held to be a purchaser without notice. His title being through the deed executed by *George* under the power, I do not see how it can be contended that he had not sufficient notice. He was the attorney in the ejectment suit against *Canniff's* tenant (*Fairman*) brought for *William* in 1851 immediately after his deed from the College, and so continued until the issue of the *habere* by him in December, 1856, under which the possession of the land was recovered for *William.* In about a month afterwards the conveyance of the whole lot is made to him. His knowledge of *William's* affairs and of *George's* dealings with them commenced as far back as 1851. *George* advised with him respecting the deed from the College. He says himself he had at one time in his possession the agreement of *Jane Taylor* to purchase and all the assignments of it. He was not, it is true, the attorney of *William* in *Canniff's* suit; but when he was such attorney in the ejectment suit, which was staid by an injunction in the former, and

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his right to proceed depended on the success of the equity suit, and the consequent dissolution of the injunction, it is too much to suppose, that in view of all the peculiar circumstances in evidence, he, *Wallbridge*, was unaware of the answer put in by *George* and of the statement therein, that *the defendant by his agent* had paid the balance of the purchase-money. *George* says it was he, *Wallbridge*, that retained Mr. *Mowat* in *Canniff's* suit; and he, as attorney of *William*, should have seen and approved of the answer. I can come to no other conclusion from what I have stated, and from a good deal more which need not be stated, that *Wallbridge* knew well all the circumstances, and, therefore, cannot be held an innocent purchaser for a valuable consideration without notice. Besides, the evidence that he ever paid anything for the land is too uncertain and contradictory—his own statements conflict, as do those of *George*, and they contradict each other, and the receipt contradicts both. He swears he paid *George* £215 in one part of his examination, and then comes down to a doubtful thought that he paid him something. *George* swears he neither paid him the £90 5s. mentioned in the receipt, or any part of the consideration money of his deed. He, *Wallbridge*, says he paid it all before the deed to *William*. The receipt *two years afterwards* is but for £90 5s. If he paid it all about the time of, or before, the deed to *William*, how did it become necessary to pay £90 5s. *two years afterwards*? The receipt, before mentioned, contains a provision for the payment of $500 of a balance the next fall; but if the suit in Chancery did not terminate successfully, each party was to bear half the loss, and the $500, in that event, were not to be paid. The suit in question did "terminate successfully," but still no one pretends the $500 or any part of them were paid, and *George*

swears they were not paid, nor the £90 5s. either. This receipt and agreement clearly show that no money was paid at the time of the deed to *William*, and the evidence otherwise shows that no money was paid afterwards.

There are, too, further fatal objections. *Wallbridge* at the time of the conveyance to him was the adviser of *George*, acting as the agent of *William*, and thereby with full knowledge occupied a fiduciary relation to *William*, and, such as, in my opinion, should prevent his purchasing in the way he did. He advised the whole affair and knew, or was bound to have known, that under the terms of the power *George* had only authority to sell for cash, or at all events for a sum certain, and not to make the payment contingent upon the success of a suit. Besides, if he bought the half only, his taking a deed of the whole under an agreement to convey back immediately to *George* the other half, and thereby make his deed the conduit pipe of a transfer of *William's* title to his agent, *George*, would, independently of anything else, be sufficient to avoid the conveyance to him. It was, under any circumstances, a legal fraud, if nothing further, and one which equity is bound to condemn and frustrate. The bill only asks for a reconveyance of what remained unconveyed by *Wallbridge*; and the questions raised require, as in the words of Lord *Redesdale* in *Hevenden* v. *Annesley* (1) to decide—

> Whether it would be good conscience to interfere in his (Appellant's) favor to take from the Respondent that which would be a defence at law.

I consider we are bound not so to interfere, and if the objection that was raised as to the staleness of his claim, amounting to laches, is not permitted to obtain, our judgment should, I think, be for the

(1) 2 Sch. & Lef. 607.

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Appellant. The evidence shows that the Respondent's title under the deed was obtained in 1856. The Appellant's bill was filed the 25th April, 1874. The Appellant's claim has not been barred by the Statute of Limitations. By section 31 of chapter 88 of the *Consolidated Statutes of Upper Canada*, the limitation of suits in equity, in respect of lands, is made the same as in law.

Section 32 provides that,

> When any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que* trust, &c., to bring a suit against the trustee or any one claiming through him to recover such land or rent, shall be deemed to have first accrued * * * at and not before the time at which such land or rent shall have been conveyed, &c.

Section 33 provides that,

> In every case of concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent, of which he or the person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might have been, first known or discovered.

Section 34 contains a proviso exempting from the operation of section 33 cases of *bonâ fide* purchasers for valuable consideration.

Section 35 exempts from the operation of the act the rule and jurisdiction of courts of Equity, "in refusing relief on the grounds of acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this act."

How then does this legislation affect the rights of the Appellant?

In the first place his claim is not barred by the statute for a good reason. In the first place twenty years had not elapsed from the date of Respondent's conveyance before action, and taking the conveyance estops *Wallbridge* from saying the Appellant was not then in pos-

session; and, secondly, there was a concealed fraud unknown to the Appellant until his return. The conveyance is not to a *bonâ fide* purchaser for valuable consideration, and, therefore, section 33 fully applies.

Archbold v. *Scully* is a case of appeal in 1861 to the House of Lords (1), in which, under the Statute, the Plaintiff's legal remedy was barred several years before action, and the defence of the Statute and acquiescence and laches was set up. In delivering judgment Lord *Wensleydale* says:

> So far as laches is a defence, I take it that, where there is a Statute of Limitations, the objection of simple laches does not apply until the time allowed by the Statute. But acquiescence is a different thing. It means more than laches * * * But the fact of simply neglecting to enforce a claim for the period during which the law permits him to delay, without losing his right, I cannot conceive to be an equitable bar. In this case I cannot say that anything has been done or permitted which falls under the definition of acquiescence.

Lord *Chelmsford*, in the same case, says:

> Have any laches or acquiescence, then, been established to disentitle the Appellant to the relief which he prays? Acquiescence in the sense of mere passive assent cannot be regarded as anything more than laches or delay, as Lord *Cranworth* said in the *Rockdale Company* v. *King* (2): "Mere acquiesence, if by acquiescence is to be understood only the abstaining from legal proceedings, is unimportant. Where one party invades the rights of another, that other does not, in general, deprive himself of the right of seeking redress merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the Statute of Limitations. In this case, however, there has been no substantial alteration in the condition of the Respondent, and there is nothing in the conduct of the Appellant beyond his having suffered so many years to elapse after the right accrued before its assertion. This, in my opinion, is not sufficient to disentitle him to the assistance of a Court of Equity to obtain the relief which he seeks."

The Appellant, in his petition, claims only a re-conveyance of the land remaining unsold, and in regard to

(1) 9 H. L. 360. (2) 2 Sim. & Stu. 89.

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that part, there being "no substantial alteration in the condition of the Respondent," and nothing whatever in the conduct of the Appellant in the shape of delay to seek the assistance of the Court as soon as he returned and become aware of the transaction which he seeks to avoid, I cannot discover anything like acquiescence, or the slightest evidence of even mere laches or delay. I think, therefore, the Court is bound "by good conscience to interfere in his favor;" that the appeal should be allowed and judgment given in favor of the Appellant, with costs.

Appeal allowed with costs.

Solicitor for Appellant: *George Dean Dickson.*

Solicitors for Respondent: *Fitzgerald & Arnoldi.*

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*Jan'y 30.

*April 15.

THE TRUSTEES OF SCHOOL SECTION No. 16, SOUTH DISTRICT OF PICTOU COUNTY..... APPELLANTS;

AND

JAMES CAMERON *et al*..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Rev. Stats. N. S. (4th Series) Ch. 23, Sec. 30—Trespass by Individual Corporators—Plea—Corporation may sue its Members.

J. C. and *J. A. C.*, while Trustees of School Section No. 16, South District of *Pictou* County, and *N. C.* as their servant, entered upon the school plot belonging to their section, removed the school house from its foundation and destroyed a portion of the stone wall. Subsequently, the Trustees of said School Section brought an action of trespass *quare clausum fregit* and *de bonis asportatis*

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

against the said *J. C.*, *J. A. C.*, and *N. C.* for injury done to the school house, the property of the section. The Defendants pleaded *inter alia* justification of the acts complained of, asserting that the acts were legally performed by them in their capacity of Trustees. Sub. sec. 4 of sec. 30, ch. 23, Rev. Stats., N. S., (4th series) declares that the sites for school houses shall be defined by the Trustees, subject to the sanction of three nearest Commissioners, residing out of the section. In this case the sanction of the three nearest Commissioners was not obtained.

Held,—On appeal, that under ch. 23 Rev. St., N. S., (4 series), *J. C.*, *J. A. C.*, and *N. C.* were not authorized to remove the school house from its site in the manner mentioned. That Defendants having subsequently abused their right to enter upon the lands of the corporation by an overt act of spoliation, the Plaintiffs, who are a corporate body and are identical with the corporation which existed at the time of the trespass, can maintain trespass against the Defendants for the injury done to the corporate property. That when an action is brought in the name of a corporation without due authority, it is not sufficient for the Defendants to plead that the Plaintiffs did not legally constitute the corporation, but in such a case Defendants ought to apply to the summary jurisdiction of the Court to stay proceedings.

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, making absolute a rule for a new trial.

This was an action brought by the Plaintiffs as Trustees of School Section No. 16, in the South District of *Pictou*, against the Defendants for breaking and entering their close as such trustees, and destroying the foundation walls of the school house of that section thereon erected, and removing and carrying away the same from its lawful site and converting the same to their own use.

The declaration was in the ordinary form in cases of trespass *quare clausum fregit* and *de bonis asportatis* under the *Nova Scotia* law and system of pleading, and the pleas are eight in number.

The Defendants, by their pleas, denied that they committed the trespass as alleged; the Plaintiff's property

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in the land and in the goods; and by their seventh plea asserted a title to the freehold of the said land, and a right of property in the said goods in the Defendants, *James Cameron* and *John A. Cameron*, as being the Trustees (with one *Duncan Macdonald*, who is not a party in the action) of School Section No. 16, South District of *Pictou*, duly elected and appointed under the Statute in that behalf, and the Defendants *James Cameron* and *John A. Cameron* justified the acts complained of by asserting that the said acts were performed by them in their said capacity of Trustees, they having lawful power so to do, and the Defendant *Nathan Cameron* as the servant of the said other Defendants.

By the eighth plea, the Defendants denied the character of the Plaintiffs at the time the trespasses were committed or action brought and their property in the lands and goods, and that the said *James Cameron*, *John A. Cameron* and *Duncan Macdonald* were at the time, &c., Trustees of the said School Section No. 16, duly elected and appointed under the Statute, a body corporate for the purpose mentioned in the Statute, &c.

The evidence showed that the Defendants *James Cameron* and *John A. Cameron*, together with the said *Duncan Macdonald*, had, at the annual school meeting for the said section, held in 1873, been appointed trustees for that section for the ensuing year; that they assumed the duties of that office; that a teacher was engaged by them, and an effort made to open the school. That in December, 1873, and during the currency of their term of office, the Defendants *James Cameron* and *John A. Cameron*, at an informal meeting, and without the concurrence of *Duncan Macdonald*, determined to remove the school house of said section to another site. That a site for the school house of that section had been chosen according to law, and the school house built, and that while *James Cameron* and

John A. Cameron were Trustees the school house was actually removed by them, and a portion of the stone wall was destroyed. That in June, 1874, the Commissioners of Schools for *South Pictou* dismissed the said Trustees, and appointed the Plaintiffs in their stead.

The mode of substituting Trustees and the powers and duties of the Trustees are prescribed by the following sections of chap. 23 of the *Revised Statutes of Nova Scotia* (4th series), secs. 20, 28, 30, 31, 32, 33, 34, which are referred to at length in the judgments of this Court.

The case was tried before Mr. Justice *Macdonald* with a jury, at *Halifax*, on the 25th October, 1875.

At the trial, he recommended a non-suit, and Plaintiffs' counsel having refused to become non-suited, the learned Judge told the jury that it was their clear duty to find a verdict in favor of the Defendants. Notwithstanding the charge, a verdict was rendered for the Plaintiffs, with $150 damages, and the Defendant then moved to set aside the same, on the grounds set forth in the *rule nisi*, and the Court below made the rule absolute.

Mr. *Cockburn*, Q. C., for Appellants:

The Plaintiffs, being legally appointed, represent the section for which, as a corporate body, they act. Their possession is not an individual possession, but the possession of the people whom, in their corporate capacity, they represent; the possession of their predecessors was also only a representative and not an individual possession, and, therefore, in their corporate representative capacity, the Plaintiffs, after their appointment, can maintain trespass for any wrong done to the corporate property by any individual, whether at the time of the wrong done such individual happened to be a member

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of the corporation or not. *Courvell* v. *Woodard* (1); *Brice* on Ultra Vires (2); *Waterman* on Trespass (3).

A corporation may sue its members. See *Field* on Corporations (4).

The act complained of was not done by the Defendants as a corporate act representing the section, but done by them as individuals.

As to the second point, that the Trustees at the time of action, were not the legally appointed trustees of the section, I submit this cannot be raised by the plea fyled in this case. The Board of Commissioners, being a court of competent jurisdiction, their acts, appointments or decrees cannot be impunged except by appeal to the Council of Public Instruction.

Mr. *A. F. McIntyre* for Respondents:

The first point to be determined is whether the acts complained of were done by the Respondents in their corporate capacity of Trustees, or as individuals.

It is a fact that the removal of the school house was decided by a majority of the trustees at a meeting held by them in December, 1873. Under the *Revised Statutes Nova Scotia*, 4th series, c. 1 last sub.-sec. of sec. 7, where a joint authority is given, a majority can act, and by c. 32, sec. 31, power is given to the Trustees to change the site of the school house when they deem it desirable. The approval of their decision by the three nearest Commissioners is only necessary when the site is first chosen. These were, no doubt, the sections the Trustees had in view when they arrived at their determination. There was no necessity for them to keep a record of their proceedings; in such cases it is sufficient to prove the resolution to have been passed by a majority of the Board.

(1) 5 Howard 665.
(2) P. 485.
(3) Vol. 2, p. 231.
(4) Secs. 180 & 361.

In *re Bonnelli's Telegraph Co.* (1); *Darcy* v. *Tamar Ry. Co.* (2).

There is nothing in the *Nova Scotia* Act which requires that a notice in writing should be sent before a meeting is held, as in the *Ontario* Act.

In any case the Defendants *James Cameron* and *John A. Cameron*, being members of a public corporation, incorporated for public purposes, and having public duties to perform, an action of this sort will not lie against them at the suit of the corporation for acts done in their corporate capacity without proof of *mala fides* : *Harman* v. *Taffenden, et al* (3).

The Respondent submits also that the present appeal should be dismissed, because at the time of the alleged trespasses, the Defendants *James Cameron* and *John A. Cameron*, together with the said *Duncan Macdonald*, were the duly elected and acting Trustees of Section No 16, South District of *Pictou* County, and were, as such Trustees, by law vested with the freehold in the lands and the property, in the goods in the pleadings mentioned, and in possession of the same.

THE CHIEF JUSTICE :

By sec. 7, c. 32, *Revised Statutes, N. S.*, 4th series, sec. 7, the Governor in Council is empowered to appoint Commissioners for each District, who shall form a Board of School Commissioners.

By sec. 22 each school section shall have a Board of three Trustees, and no section shall have more than one Board.

By section 28, the Trustees of any section shall be a body corporate for the prosecution and defence of all actions relating to the school or its affairs, and other

(1) L. R. 12 Eq. 246. (2) L. R. 2 Ex. 162.
(3) 1 East 555.

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necessary purposes, under the title of "Trustees of School Section No. ———, in the District (or Districts) of ———," and they shall have power, when authorized by the school meeting, to borrow money for the purchase or improvement of grounds for school purposes, or for the purchase or building of school houses.

By sec. 29, Trustees are authorized to effect insurances on school houses, and sec. 30 declares the duties of the Trustees as follows. *Inter alia* sub-sec. 2:

To take possession of and hold as a corporation all the school property of the section, or which may be purchased for or given to it for the use or support of Common or Academic Schools.

Sub. sec. 4:

To determine the sites of school houses, subject to the sanction of the three nearest Commissioners residing out of the section, and in case the three nearest Commissioners do not agree as to the site of a school house, the matter shall be referred to the Board of Commissioners for the District or County in which the school is situate, and their decision shall be final.

The Trustees of School Section No. 16 were possessed of the property on which this school house stood under a deed from *William Thompson* to *James Macdonald*, *Donald Macdonald* and *Peter Ross*, Trustees of School Section No. 16, dated 29th Oct., 1866, whereby *Thompson*, in consideration of $16, bargained and sold to said Trustees and their successors in office the lot in question, to have and to hold the same as school property to said Trustees and their successors in office. At the time of the acts complained of, Defendants *James Cameron* and *John A. Cameron*, and one *Duncan Macdonald*, were the Trustees of School District Sec. 16. *Macdonald* says he had nothing to do with the removal of the school house; that *James Cameron* and *John A. Cameron* came to see him about it after night; said they were going to remove the school house, and asked if he had any objection; he said he had; that it could not

be in a better place; that he saw the Commissioners remove the school house in Dec., 1873.

Peter G. Campbell says:

It was removed the length of itself and 3 or 4 feet more from its old foundation. It was less or more damaged; the stone wall was torn down.

Duncan Cameron says:

I said to *James Cameron* (the morning they commenced to remove the building) surely you are not going to remove the building; he said yes. He said, they had consulted the Board before and they would not heed him. He said they did not consult the Board about removing it; then, I said, you should have consulted the section; he said, we are the section; he said they were about removing it to another site about a mile and a quarter off, and not approved of by the Board.

James Macdonald says:

I saw *James* and *John A. Cameron* in the act of removing the house; *Nathan Cameron* was present with others. The stone foundation was torn down in removing it. It was removed towards the road. I think part of it was on the road. It was left temporarily on the runners. * * * Afterwards, I had a conversation with *James Cameron*. He said he did not consult the Commissioners as he did so previously without good result. * * * The house was thrown off the level so that one corner of the window was an inch open when the other was closed.

William Thomas says:

When the school house was taken off the foundation the windows were twisted. The one end higher than the other. * * * The weather boards and a few shingles were hurt.

Nathan Cameron was the only Defendant examined. He was called for the defence. He says:

They asked me to go and assist them in removing the school house in Dec., 1873. I assisted them. We were to remove it a mile and a quarter away, or less. The Defendants told me that their object was to remove the school house to the church.

There is evidence as to the deposition of the Trustees and the appointment of others in their stead after the removal; but, in the view I take of this case, all such

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evidence is immaterial and ought not in any way to affect the disposition of this case.

On the trial, Mr. *James* moved for a non-suit on the ground that "a corporation cannot sue itself; no title or possesion proved in the plantiffs; title and possession proved to have been in the Defendants, Trustees, at the time of the alleged injury." The learned Judge recommended a non-suit, and, on Plaintiffs' counsel refusing to become non-suited, the Judge instructed the jury that Defendants, having denied Plaintiffs' possession, it was incumbent on Plaintiffs to prove possession, actual or constructive; that evidence showed Defendants, *James Cameron* and *John A. Cameron* and *Donald Macdonald*, were Trustees at the time and were in the legal possession, the law vesting both the title and possession in them as such Trustees; * * * expressed great doubt as to the dismissal, in which case he said, by this strange action, two of them would be now Plaintiffs, as Trustees against themselves, as individuals, but that it was not necessary to trouble the jury with that question, as their legal possession at the time of the alleged trespass was sufficient defence in this action for acts done, while in such legal possession, by them and Defendant who justified under them. That, if they were guilty of a breach of trust, as such Trustees, as he thought they were, the section had a remedy for such wrong, but certainly not in this form, or style of action. That as the case turned upon a question of law, the facts upon which the legal question depended being admitted on all sides, he had nothing to submit to them, and that it was their clear duty to find a verdict in favor of the Defendants.

Notwithstanding this charge the jury found in favor of the Plaintiffs, and a rule was made absolute by the Supreme Court of *Nova Scotia* to set aside this verdict, and a new trial was granted.

No question was raised as to this being a perverse verdict, and it was not set aside upon that ground, but the judgment appears to proceed on the ground that the Defendants *James Cameron* and *John A. Cameron* were Trustees at the time of the removal, and were at the time in the lawful and exclusive possession as Trustees of School Section No. 16, which, the judgment states,

> strikes at the very foundation of this suit, and is of itself a fatal objection to it, as it is clear that trespass cannot be maintained against the Defendants for the removal of the school house while they were in the lawful possession of it as Trustees.

While admitting the Defendants may have acted indiscreetly, the judgment goes on to say :

> But it must be borne in mind that they were public officers, and if they acted in good faith, though wrong, they cannot be treated as trespassers and held personally responsible for what they did.

I venture humbly to submit that this is all wrong; that the Defendants in their pleadings, their counsel on the trial, as well as the learned Judge and full Court, have entirely misapprehended this case in dealing with it as if the title and possession of this school property was in the Trustees for the time being personally and as individuals, and not as in a corporate or *quasi* corporate body, and in treating this action as if brought by the Trustees, or those claiming to be Trustees, in their own name as individuals, as if the fee was in the individual Trustees, and as if the action was for a wrong done to the personal title or possession of the individual Trustees, instead of treating the title and possession as being in a corporate or *quasi* corporate body, and the action as brought by such corporation for a wrong done to the title and possession of the corporation.

Under the express terms of the Statute the Trustees of schools are to " take possession of and hold as a corporation all the school property of the section," and the Trustees of any section are declared to be a body cor-

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porate under the title of "Trustees of School Section No. —— in the District (or Districts) of ———" for the prosecution and defence of all actions relating to the school, or its affairs, and other necessary purposes.

The Trustees, therefore, are created a corporation or artificial body, by virtue of which they hold the land like every other corporation.

The title being in the corporation, not in the members of the corporation, the Trustees may change, but the corporation continues, and the title and possession continues in the corporation.

The members, though constituent parts, are not in a legal sense the corporate body, but as it has been expressed, "they are only the elements which form the one artificial body," but entirely distinct from the artificial body endowed with corporate powers; so that the rule that a person cannot be both Plaintiff and Defendant in the same suit, which seems to have embarrassed the counsel and the Court below, has no application to corporations. We have every day's experience of members suing corporations and of corporations suing members, and it is too well established to be now disputed that "suits may be brought for all the variety of causes and in all the various forms, and in the same manner as though the parties thereto were natural persons."

The acts of the Trustees, no doubt, are the acts of the corporation, but only when within the scope of the authority conferred on them by the law establishing the corporation. Their acts are only the acts of the corporation, so far as they have such authority to act by virtue of the powers conferred on them.

The Legislature has only granted to School Trustees in *Nova Scotia* special and limited powers for limited purposes, and one limitation is that they shall not fix or determine, and, a *fortiori*, not change, the site of a school house without the sanction of the Commissioners.

If the Trustees wrongfully deal with the property confided to their care in a manner, not only not sanctioned by law, but contrary to law, as distinguished from mere error, mistake and misapprehension, or simple negligence, they cease to act as Trustees. Their act in such a case is not a corporate act. They become wrong-doers, and cannot justify as Trustees, and, as such, are liable to be sued by the corporation as any other trespasser or wrong-doer having no legal justification for his acts.

If the acts of these Defendants, then, are clearly *ultra vires*, their liability for such acts must be determined by the ordinary principles of law. "In all cases of tort," Mr. *Brice* says, "as an actual wrong-doer is always liable to the injured party, a corporate official necessarily is under personal responsibility."

I quite agree that, so far as the determination of this case is concerned, it matters not who the individual Trustees now are, or were at the commencement of this suit. If Trustees for the time being, having the right to manage the school affairs and to bring and defend suits in the corporate name, have any reason to complain that the corporate name is being improperly used in the bringing of an action, I can see no reason why the same course would not be open to them that a private individual would have, if his name was used without his consent, viz: by applying to the Court to stay and set aside the proceedings. Be this as it may, all we have now to do is, not to enquire what individual Trustees set the law in motion, but to treat the suit as properly brought in the name of the corporation, and adjudicate on the rights of the corporation; in other words, simply to enquire whether the close of the Plaintiffs has been illegally broken and entered, and the property of the corporation, the school house, has been unlawfully injured and removed, and,

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if so, to ascertain whether the Defendants were guilty of such unlawful acts. Reduced to this point, the result is self evident. These three Defendants, without authority of law, undertook to remove this school house from its site, and did so in a most wilful manner, for it cannot be pretended that they were in ignorance of the law, or the duties and powers of Trustees, but they did it, in fact, in direct defiance of the law. They knew no site could be fixed and determined on without the sanction of the Commissioners, and this they would not even seek to obtain, because, from a previous application, they had evidently discovered that the Commissioners would not sanction their proposed interference. Thus, these Defendants, without such sanction, without taking any action under sub. sec. 4, and without the acquiescence of the third Trustee, in fact, in opposition to him, proceed to remove the school house, drawing it from its foundation and otherwise injuring the foundations and buildings. These three Defendants, then, were violating the law and acting outside of and beyond any power or authority given to Trustees of Schools over school property, and so abused the authority given them by law and became trespassers, and so rendered themselves liable to be sued as such by the corporate body on whose property they so trespassed, which body corporate are the Plaintiffs of record in this suit. The Plaintiffs, then, having suffered wrong at the hands of the Defendants, and the Defendants having wholly failed by plea or proof to justify their conduct, I think the charge of the learned Judge was wrong, and the judgment of the Court below confirming that ruling equally wrong, and that this appeal should be allowed with costs in all the courts.

STRONG, J.:—

There seems to have been a strange misconception of

both the facts and law as regards the first point which is dealt with in the judgment of the Court below, that relating to the Plaintiffs' title to sue. The Plaintiffs are a corporation aggregate incorporated under ch. 32 of the *Revised Statutes of Nova Scotia* (4th series), having necessarily perpetual succession, and not the individual corporators who, at the time the action was brought, happened to compose the corporation. The Plaintiffs sue by their corporate title as "The Trustees of School Section No. 16, South District of *Pictou* County," and the names of the individual Trustees are not once mentioned in the record. It is, therefore, only calculated to confuse the case, and to introduce irrelevant matter into its decision to speak of the Trustees individually as the Plaintiffs, and to enter into an enquiry as to the legality of the dismissal of the former Trustees and the election of those who at present claim to fill the corporate offices.

The corporation which now sues for trespass to the corporate body is identical with the corporation which was seized of that property at the time the wrong complained of was done. The eighth plea does not contain allegations showing that the corporation has ceased to exist, in which case it might have constituted a good defence, but it merely sets up that the persons now claiming to constitute the corporation, in the plea itself miscalled the Plaintiffs, had not been duly elected or appointed to fill the offices of Trustees, and that the old Trustees are still in office.

As the action is brought by the corporation, this is manifestly no defence. If the action was brought without due authority in the name of the corporation, that is not a matter which could properly be raised as a defence on the record, though it might, under proper conditions, have constituted ground for an application to the summary jurisdiction of the Court to stay proceed-

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ings. The 8th plea, which raises this objection is, therefore, irrelevant and bad in substance, and tenders an immaterial issue. It follows that, as a new trial will never be granted for the purpose of re-trying an immaterial issue, one in respect of which a verdict for the Defendant might be followed by a repleader or judgment *non obstante*, there was clearly no ground for a new trial as regards the issue on the 8th plea.

As to the issues on the six original pleas, amounting respectively to pleas of not guilty, and a traverse of Plaintiffs' property and possession in the *locus in quo*, pleaded to each of the three counts of the summons, the evidence was entirely sufficient to warrant a verdict on all these for the Plaintiffs.

There remains the issue on the 7th plea, which is in substance a justification by the Defendants, *James Cameron* and *John A. Cameron*, as corporators at the time of the acts complained of, and by *Nathan Cameron*, the remaining Defendant, as their servant. The evidence shows that the Defendants entered upon the school plot and removed the school house from its foundation, and destroyed part of a stone wall which formed the foundation. This was an act clearly beyond their legal powers. The powers and duties of the Trustees are prescribed by chapter 32 of the *Revised Statutes of Nova Scotia* (4th series), secs. 30 to 34, inclusive, and nothing can there be found authorizing them to remove the school house from its site in the manner mentioned by the witnesses for the Defendants themselves, as well as by those who gave evidence for the Plaintiffs.

Upon the uncontradicted testimony it appears that the school house was actually removed from its foundation and a portion of the stone wall was destroyed, and although no question as to these facts was specifically left, by the learned Judge who tried the cause, to the jury, yet it would, of course, be idle to send the case

back for a new trial in order that a jury might find upon these undisputed facts. Then, the legal consequence of the Defendants acts is that, although they were members of the corporation at the time of the wrongs complained of, and had, for all legal purposes and in the due execution of their duty, a right to enter upon the lands of the corporation, and although their entry, followed by no abuse of authority, must be presumed to be legal and for the purpose of performing their corporate duties, yet, when the entry was followed by a subsequent abuse of authority, they became trespassers *ab initio*, their wrongful act relating back so as to make the original entry unlawful. This is very old law, for in one of the resolutions of the *Six Carpenters' case* (1), it is laid down that when a party enters under authority of law and is guilty of subsequent abuse, he becomes a tresspasser *ab initio*, though it is otherwise where the entry is by authority of the party.

The entry of the Defendants upon the lands of the corporation, therefore, constituted the trespass for which the Plaintiffs are entitled to recover, and the pulling down the wall and the removal of the school house are the acts of abuse which made the original entry unlawful, and were, also, matters of aggravation to be considered in estimating the amount of damages.

The issue on the 7th plea, which justifies the acts of the Defendants as those which "they had lawful power and authority to do," was, therefore, rightly found for the Plaintiffs, inasmuch as the Defendants showed no justification in law.

The whole case may be summed up in two propositions. The first is that upon which the case of the Appellants is rested in their factum, and which I adopt almost in the words in which it is there propounded. The Plaintiffs are a corporate body and are identical

(1) 8 Rep. 290.

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with the corporation which existed at the time of the trespass, and although the members of the corporation may have been changed, the possession is, and has always been, not that of the individual corporators, but the possession of the corporation. The Plaintiffs (the corporation) can, therefore, maintain trespass for any wrong done to the corporate property by any individual, whether at the time of the wrong done that individual happened to be a member of the corporation or not. The other proposition, that a wrong was committed by the Defendants at a time when they were members of the corporation, is established by the principle of law already adverted to, that an entry by an individual corporator followed by an overt act of spoliation, makes him a trespasser by relation.

The case of *Harman* v. *Taffenden* (1), cited by the Respondents, has no application here; it was not a case of trespass on the lands of the corporation. The rule of law which I apply does not in any way depend on proof of the intention of the party, either in entering or in committing the subsequent wrongful act. The principle is, that where a party, having an authority derived from the law to make an entry upon lands, commits an unlawful act upon the lands, there arises a presumption of law, one which cannot be rebutted, that he entered with unlawful intent, and that his entry was, therefore, a trespass.

In my judgment, the decision of the Court below must be reversed, and there must be substituted for the rule absolute, a rule discharging the rule *nisi* with costs, and the Appellants must have the costs of this appeal.

FOURNIER, J. :—

L'action en cette cause est pour voie de fait commise

(1) 1 East 555.

par les Défendeurs sur la propriété de l'Appelante, en déplaçant la maison d'école de la section No. 16.

Lorsque ce déplacement a été fait, deux des Défendeurs faisaient eux-mêmes partie du corps des syndics et formaient, lorsque la présente action a été intentée, la majorité de la Corporation qui les poursuit en cette cause.

Les Défendeurs ont répondu à cette action par plusieurs moyens de défense qui peuvent en dernière analyse se réduire aux deux suivants : 1o. Illégalité de la destitution des Intimés comme syndics de la dite Corporation, et conséquemment nullité de la nomination de leurs remplaçants ; 2o. justification des faits qui leur sont imputés comme voie de faits.

Par le ch. 32 des Statuts Refondus de la *N. Ecosse*, (4ème série) réglant l'instruction publique dans cette Province, les syndics de toute section scolaire sont érigés en Corporation sous le titre de "Trustees of School Sec. No..... in the District of ..... (or Districts of).

La 30me sec. définit leur pouvoir ainsi qu'il suit :

30. The duties of the Trustees shall be as follows :

(1). To meet as soon after the annual election or appointment of Trustees, or a Trustee, as practicable, and appoint one of themselves, or some other person, to be Secretary to the Board of Trustees, and to provide him with a suitable blank-book, and instruct him to keep therein and carefully preserve a correct record of all doings of the board.

(2.) To take possession of and hold as a Corporation all the school property of the section, or which may be purchased for, or given to it for the use or support of common or academic schools.....

(4.) To determine the sites of school houses subject to the sanction of the three nearest Commissioners residing out of the section ; and in case the three nearest Commissioners, residing out of the section, do not agree as to the site of a school house, the matter should be referred to the Board of Commissioners for the District or County.

Par leur premier moyen de défense, les Intimés démis,

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illégalement d'après les faits établis sur preuve, veulent faire décider en cette cause la question de savoir qui d'eux, ou de leurs remplaçants, sont les syndics légalement en office. Cette question ne pouvait pas être soulevée d'une manière indirecte comme on a essayé de le faire. Elle devait faire le sujet d'une procédure spéciale. Pour prendre avantage de ce moyen de défense, les Intimés auraient dû se borner à se plaindre que les syndics qui prétendent agir en cette cause au nom de la Corporation ne sont pas légalement revêtus de cette qualité, en accompagnant cette allégation d'une demande de surseoir aux procédés jusqu'à ce que, sur *quo warranto*, cette question eût été décidée. Au lieu de cela, ils ont jugé à propos de plaider au mérite. C'est une règle certaine en matière de plaidoyers, aussi applicable aux Corporations qu'aux individus, que le Défendeur qui plaide au mérite reconnaît la capacité de poursuivre chez son adversaire. Les Intimés doivent en conséquence être considérés comme ayant abandonné ce chef de leur défense et reconnu le droit d'action.

C'est à leur plaidoyer de justification qu'ils doivent maintenant s'entenir. Ils prétendent se justifier en alléguant que c'est en exécution d'une décision prise par eux comme syndics, de changer le site de la maison d'école en question, qu'ils ont agi.

Il n'est pas douteux d'après la preuve que les Défendeurs ont quelque peu déplacé la maison d'école en question; et que dans cette opération le mur des fondations a été endommagé, ainsi que les fenêtres et une partie de la couverture. Ces faits, à moins que les Intimés ne prouvent qu'ils étaient légalement autorisés à agir comme ils l'ont fait, sont certainement suffisants pour constituer une voie de fait donnant lieu à des dommages et intérêts. Mais ils prétendent de plus établir leur justification en alléguant qu'ils étaient, en

leur qualité de syndics, propriétaires et en possession légale de la maison d'école et du lot sur lequel elle est construite, et que par conséquent l'action pour voie de fait ne peut exister contre eux.

Les Intimés, en émettant cette prétention, se trompent sur l'étendue et le caractère du pouvoir que la loi leur attribue sur les maisons d'école. Ils n'en sont que les administrateurs et non pas les propriétaires. Ce ne sont pas les syndics en fonctions qui, aux yeux de la loi, sont les propriétaires et en possession de la maison d'école, mais la Corporation dont ils ne sont que les agents ou représentants. Le parag. 2 de la sec. 31, est clair sur ce point, et indique, comme l'un des devoirs des syndics, la prise de possession *comme corporation* des propriétés scolaires appartenant à la section. "To take possession of, and hold as a Corporation, all the school property of the section....."

Ainsi, ils ne sont ni propriétaires ni en possession individuellement comme syndics, mais c'est la Corporation elle-même qui en est propriétaire et en possessions sous le titre que la loi lui a donné. Ils ne peuvent pas se confondre avec la Corporation qui est un être tout à fait distinct des personalités qui la composent. Pour se justifier il leur faudrait non-seulement établir qu'ils agissaient en vertu d'une autorisation de celle-ci, mais aussi faire voir que la loi leur donnait sur la maison d'école une autorité qu'elle leur avait déléguée Pour cela, il aurait fallu prouver qu'une décision prise par les Intimés, comme corporation, avait reçu, conformément au paragraphe 4 de la sec. 30, la sanction des Commissaires les plus proches. Cette preuve n'a pas été faite. En agissant contrairement à la disposition de cette section, il est évident que les Intimés ont outrepassé leurs pouvoirs et commis une voie de fait pour laquelle ils sont responsables.

De plus, il est visible par l'irrégularité des procédés et

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l'empressement manifesté par les Intimés, que ceux-ci prenaient un intérêt plus qu'ordinaire dans le changement du site de l'école de la section. C'est le soir, tard, sans convocation régulière d'assemblée, qu'ils font demander à leur collègue, *Duncan Mac Donald*, s'il concourt dans leurs vues au sujet du transfert de la maison d'école. Sur sa réponse négative, les deux autres défendeurs persistent dans leur détermination. Il n'en est fait aucune entrée dans les régistres, ainsi que l'exige le parag. 1 de la sec. 30. Le lendemain, avec le concours d'un certain nombre d'intéressés, ils se mettent à l'œuvre pour transporter la maison. Cette précipitation et ces irrégularités dans les procédés font voir que les Intimés agissaient comme individus et non comme autorisés par la Corporation. Cette conduite démontre aussi qu'ils avaient dans cette affaire, comme c'est assez souvent le cas dans ces questions, un intérêt qui les faisait agir plutôt comme partisans que comme syndics. C'est précisément pour prévenir ces inconvénients que le parag. 4 a déclaré que dans des affaires de cette nature les syndics ne pourront pas agir sans l'approbation des commissaires les plus proches. Sous ces circonstances, je ne puis faire autrement que d'en venir à la conclusion que les Intimés ont agi individuellement et non comme syndics, ni comme autorisés par la Corporation ; que d'ailleurs eussent-ils ainsi agi en vertu d'une décision prise régulièrement par eux comme Corporation, leur qualité de syndics n'aurait pu les protéger contre les conséquences de leur action, puisque la Corporation dont ils sont membres ne pouvait pas leur communiquer un pouvoir, qu'elle n'a pas. Ce pouvoir, comme on l'a vu par le parag. 4 de la sec. 30 ne peut être exercé sans l'approbation des trois Commissaires les plus proches, résidant en dehors de la section.

Pour ces raisons je concours dans le jugement qui va être prononcé par cette Cour.

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TASCHEREAU, J.:

This is an action of trespass *quare clausum fregit et de bonis asportatis.* The Plaintiffs declare against the Defendants for breaking and entering their close, destroying the foundation walls of a school house thereon erected belonging to them, and removing and carrying away the same from its site. There is some confusion in this case, or, at least, in some parts of it, arising from the fact that the Defendants seem to have forgotten who the Plaintiffs are. By one of their pleas, they deny that the school house in question was the property and in the possession of the Plaintiffs; but, by another plea, they allege that this school house was the property and in the possession of the Trustees of School Section No. 16, South District of *Pictou.* Now, who are the Plaintiffs? No one else than these Trustees in their corporate name and capacity. The Defendants, then, as distinctly as possible, have admitted the Plaintiffs' ownership and possession of this school house, and upon this fact we have consequently nothing to determine. They want us to consider as Plaintiffs certain individuals with whom they contest the position of Trustees. They say to them "We are the Trustees, not you." This is an issue which cannot be determined in this cause, for the very simple reason that these individuals are not the Plaintiffs. The suit is brought by a corporation, and who are the members of that corporation we have nothing to do with here.

The only legal issue raised by the Defendants is, that they were the Trustees of the school when they removed this school house, and that, in doing so, they were acting as such Trustees; that, it is, in fact, the corporation itself which did the acts complained of, and that they are not personally responsible. The Defendants have, in my opinion,

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clearly proved that they were, at the time that the school house was removed, the Trustees of the school with one *Duncan Macdonald*, but they have entirely failed to prove that it was removed by the corporate body known as such Trustees, and not by them in their individual capacity. There is no evidence of any resolution authorizing this removal, no evidence even of a lawful meeting of the Trustees. One evening, about 10 o'clock, two of the Defendants went to *Macdonald*, their third colleague, and told him that they were going to remove the school house, asking him if he had any objections to it. *Macdonald* objected, but, next morning, they set to work. That is the only evidence adduced to prove that their act was the act of the corporation. Is that the way in which a corporate body can act? Can the individual members of a corporation, even though they form a majority thereof, without notice to any one, thus start and go and demolish a house, and bind the corporation by their acts? I do not think so. In a matter of contract, perhaps, a corporation aggregate, acting as such, may bind itself directly and without constituting an agent, but the only mode in which it can do a manual act is by an agent or servant (1). It may by a vote authorize its servant or agent to do an act, and, if this act is a trespass, will bear the consequences thereof (2). Certainly, that agent or servant may be taken amongst its members. But here, this is not the point raised. The Defendants do not pretend that they, individually, have been authorized by the corporation of the Trustees of School Section, number sixteen, South District of *Pictou*, to remove this school house, and that they cannot be sued by the said Trustees, because it is the said Trustees themselves who ordered this removal. But they say, "we were ourselves the trustees, and it is

(1) Angell & Ames on corporations, 186, 229, 279; Waterman on Trespass 927, Vol. 2, par. 927.

(2) Addison on Torts, Par. 977.

as such Trustees and as a corporate body that we did the acts complained of." Now, the law is that the members of a corporation aggregate cannot separately and individually give their consent in such a manner as to oblige themselves as a collective body, for in such a case, it is not the body that acts (1). It is only at a lawful meeting of the corporate body that the corporation can act or do anything. Was it at a lawful meeting of the Trustees of School Section 16, that this school house was removed? Certainly not. If a corporate body could itself commit a trespass in the manner that the act complained of here was done, it might as well be said that it can commit an assault and battery. Yet I do not think that it can be pretended that a corporation can commit an assault otherwise than by its agent or servant (2).

Again, according to the Defendants' contention, if the corporation removed this house, not they, it would follow that if, whilst they were doing so, they had been arrested, the corporation, not they, would have been arrested. Yet, who ever heard of a corporation aggregate being put under arrest? A corporation is a legal person, but, as it has been said, a deaf and dumb person. I might add that it has no hands with which it can remove a house.

Upon these principles, which rule all corporate bodies, I hold that the removal of the school house in question was the personal act of the Defendants; that, as individuals, they never had the possession of it; that it is and was the property and in the possession of the Plaintiffs, and that their acts were a trespass on the Plaintiffs' property.

If the Defendants had pleaded and proved that they

(1) Angell & Ames on corporations, 232.

(2) *Reg.* v. *Pocock*, 17 Q. B. 34.; Grant on Corporations, pp. 1, 2, 3; *Stevens* v. *Midland Counties Railway*, 10 Ex. 352.

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had been duly authorized by the corporation to do this act, and that, in doing it, they were the agents or servants of the corporation, I would be of opinion that the corporation, as the Plaintiffs here, would not have had the right to invoke its want of authority or power to order the act complained of. It could not say to the Defendants: "We authorized you to remove this house, but we had no authority to do so; we ordered you to do it, but we sue you for having done it." But, as I have said it before, that is not the issue raised.

The judgment complained of by the Plaintiffs is, in my opinion, erroneous, and the appeal therefore must be allowed. Rule to be discharged.

GWYNNE, J. :—

By sec. 28 of ch. 32 of the *Revised Statutes* of *Nova Scotia*, the Trustees of school sections are declared to be a body corporate for the prosecution and defence of all actions relating to the school, or its affairs, and other necessary purposes, under the title of "Trustees of School Section No. —— in the District of———," and by sub-sec. 2 of sec. 30, they are empowered to take possession of, and *to hold as a corporation*, all the school property of the section which may be purchased for or given to it for the use or support of common or academic schools, and by sub-sec. 4 of sec. 30 they are empowered to determine the sites of school houses, subject to the sanction of the three nearest Commissioners residing out of the section, and in case these Commissioners should not agree as to the site of a school house, it was enacted that the matter should be referred to the Board of Commissioners for the District or County in which the school house is situate, whose decision should be final.

The above Plaintiffs, in their corporate name and

character, have brought this action *qu. cl. fr.* against three persons, Defendants, and in their declaration complain that the Defendants broke and entered the Plaintiffs' close (describing it) known as the school house lot of Section No. 16, South District of *Pictou* County, and tore down and destroyed the foundation walls of the school house of the said section thereon erected, and removed, tore down and carried away the buildings, wood and logs of the Plaintiffs, and converted the same to their own use, and also that the Defendants removed and carried away the school house of the said section from its lawful site, and converted the same to their own use, and also broke and entered the close of the Plaintiffs (above described), and dug and cut up the soil thereof, and tore down the walls and building, and removed and injured the houses and buildings thereon, whereby the Plaintiffs were deprived of the use of the same, and were prevented from keeping a school therein, and the members of the said school were deprived of the advantage of having a school kept in the said section by reason of the said wrongful acts of the Defendants, and their children were thereby deprived of schooling for a long time.

It cannot be doubted that, if the Defendants, or any of them, committed, or caused to be committed, all or any of the acts complained of, without legal justification, they would be liable to the Plaintiffs in this action, suing as they do in their corporate capacity; and it would be quite immaterial who may have been, or be, the particular individuals comprising the corporation, who are the Plaintiffs, except in so far as the Defendants' plea of justification should occasion any enquiry upon that point. Now, to this declaration the Defendants have pleaded eight pleas, which may be reduced to three, namely: 1st. That the Defendants did not do any of the acts complained of; 2nd. That the close, soil,

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school house, foundation walls and buildings were not, nor was any of them the Plaintiffs' property, as alleged; and 3rd. (which is the Defendants plea of justification set out on the 7th plea), that at the time of the alleged trespass, and until and at the time of action brought, the Defendants *James Cameron* and *John A. Cameron*, and *Duncan Macdonald*, were the Trustees of said School Section No. 16, duly elected and appointed under the Statute in that behalf, and the said land was the freehold of the said *James Cameron*, *John A. Cameron* and *Duncan Macdonald*, as such Trustees, and the said school house and walls, buildings, wood and logs were the property of the said *James Cameron*, *John A. Cameron* and *Duncan Macdonald*, as such Trustees, under the Statute in that behalf, and because it was deemed desirable to change the site of the said school house, and to purchase and accept another site for the said school house, and the said *James Cameron*, *John A. Cameron* and *Duncan Macdonald*, deeming it advisable as aforesaid, and having purchased and accepted another site for said school house, and having lawful and proper authority in that behalf, proceeded to change the site of the said school house, and thereupon the said *James Cameron* and *John A. Cameron*, as such Trustees as aforesaid, in their own right, and the Defendant, *Nathan Cameron*, as their servant, and by their command, entered upon the said close, and, with teams necessary for that purpose, moved the said school house from the place it then occupied towards the site purchased and accepted as aforesaid, doing no more than was necessary for that purpose, and because the said school house was set fire to and burned by some person or persons unknown, accidentally or unlawfully, but without the knowledge of the Defendants, it was not removed to the said site so purchased and accepted as aforesaid, but the Defen-

dants were thereby prevented from so doing, which are the alleged trespasses.

The 8th plea it is unnecessary to set out, for the issue thereby sought to be raised is wholly immaterial to the matters really in issue in this action. The Defendants by that plea, treating the Plaintiffs, who are a corporation suing in their corporate name, as if they were individual persons, deny that such individuals, there being none named as Plaintiffs upon the Record, were ever duly appointed Trustees of the school section, or were such trustees at the time of the alleged trespasses, but that the Defendants *James Cameron* and *John A. Cameron* and one *Duncan Macdonald* were a body corporate for the purposes mentioned in the Statute, and entitled to sue under the title of Trustees of School Section No. 16, &c., &c, and that the said land was the freehold of them, the said *James Cameron*, *John A. Cameron* and *Duncan Macdonald*, as such Trustees.

This plea, as it appears to me, is framed upon a total misconception of the operation of the Statute and of the position, rights, and responsibilities of the particular individuals, who, for the time being, may fill the character of Trustees of the school section. By the Statute the school property is plainly vested, *not* in the *persons* who, for the time being, may be Trustees, as pleaded in this plea, but in the corporation. It is wholly erroneous to describe the property and to plead it as being the soil and freehold of the respective individuals for the time being filling the office of Trustees. Those *persons* have no estate whatever in the school property; it is vested in the corporation, whose agents the persons are. Now, that the agents of a corporation may commit a tort upon the corporate property, for which an action will lie at the suit of the corporation, there can be no doubt; a corporation known as the mayor, aldermen and commonalty of a city may sue persons

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filling respectively the offices of mayor and aldermen of the city for trespass, wrong and injury done to, or for the conversion of, the corporate property. Doubtless, these agents, having, for the time being, control of the corporation, may prevent an action being brought in the corporate name against themselves, but, that action being brought and the Defendants having pleaded to issue, all that we have to do is to determine the issues raised upon the Record before us in bar of the action, which issues must be determined irrespective of any question as to who may or may not have been competent to give instructions for the use of the corporate name for the maintenance of the action.

Now the issues joined, in substance, are, as I have said: 1st. Upon the question whether or not the Defendants, or any of them, did any of the acts complained of? As to the allegation in the declaration "that the Defendants removed and carried away the said school house from its lawful site, and converted the same to their own use," that might have been treated by the Defendants, and would have been treated, as matter of aggravation only, in view of the other matters charged, if the Defendants had not themselves, by their third plea, treated that charge as an independent substantive cause of action (1). It is unnecessary to enquire whether the contention of the Defendants upon this issue is or not correct, namely, that in this connection the word "site" must be construed to mean the whole lot upon a part of which the school house was erected, and not merely that part of the lot within the four walls, which were of stone, built into the ground, and which constituted the foundation of the school house, for the other acts charged, if proved and not justified, are abundantly sufficient to support the verdict rendered in favor of the Plaintiffs. Now,

(1) *Roberts* v. *Taylor*, 1 C. B. 117; *Lane* v. *Dixon*, 3 C. B. 776.

upon the evidence, it is clear, beyond all question, that the Defendants took the school house down from its foundation and removed it for more than the length of itself from off that foundation, and that, in so doing, they broke and tore down the stone walls constituting such foundation, and that the windows were twisted out of place, and that the weather-board and some of the shingles upon the roof of the school house were damaged, and that the building was left in a condition unfit for occupation there as a school house. That these acts constitute an actionable wrong for which damages may be recovered in this action, unless they can be justified, admits of no question.

Then, 2nd, the Defendants have pleaded in bar that the close, soil, school house, walls and buildings were not nor was any of them the property of the Plaintiffs. This plea seems to have been pleaded upon the misconception that some individuals behind the corporation putting it in motion were Plaintiffs, and not the corporation itself, for the Statute clearly vests the school property in the corporation, and that is, in effect, what the declaration alleges and the plea denies. This plea, therefore, must be found in favor of the Plaintiffs. The only question which remains is : Have the Defendants, by their 7th plea, established a justification ? Now, the land is not the freehold of *James Cameron, John A. Cameron* and *Duncan Macdonald*, as in this plea pleaded, even though they may have then been the persons filling the office of Trustees, the freehold is in the corporation—Plaintiffs. Moreover, assuming the last named individuals to have been the persons filling the office of Trustees, it appears by the evidence that it is not true, as alleged in the plea, that they had purchased another site for the school house, or that they had lawful power and authority to proceed to change the site of the school house, as they admit by their plea that they did pro-

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ceed to change it; the plea, in short, confesses the commission of all the trespasses charged in the declaration, professing to avoid them as lawful acts done by them in the discharge of the powers attached to their office; but it is clear that they had no such justification as that set up, for the 4th sub-sec. of sec. 30 of the Act required the sanction of three of the nearest commissioners residing out of the section, or. if they did not agree, then the sanction of the Board of Commissioners, whose decision should be final, before the acts which Defendants admit they committed could lawfully be done, and we find by the evidence that the Defendants *James Cameron* and *John A. Cameron*, knowing that the necessary authority had before been refused, despairing of obtaining it, did not again apply for it, but wrongfully, upon their own sole motion, did the acts complained of. It would be singular, as it appears to me, if upon a record raising these issues, all of which must be admitted to have been clearly established in favor of the corporation, a court of law should be disposed so far to countenance injustice as to render any assistance to the Defendants in their endeavor to defeat the corporation from recovering in this action for the wrong and injury done to their property, upon a suggestion that two of the Defendants and another person were, in truth, the only persons competent to set the corporation in motion by an action brought in its name.

The result is that the verdict recovered by the Plaintiffs must be allowed to stand, and that the appeal, which is against a rule which set it aside and granted a new trial, should be allowed with costs, and that the rule itself in the court below, granting the new trial, must be ordered to be discharged with costs.

Appeal allowed with costs.

Solicitor for Appellants: *S. H. Holmes.*

Solicitor for Respondents: *D. C. Fraser.*

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DISTRESS—*Exemption from—Replevin.*] *W.* let an unfurnished house to one Mrs. *M.* to be used as a boarding-house. Mrs. *M.* applied to *F. & Son* for furniture, which they refused to supply unless *W.* would guarantee that it would not be distrained for rent. *W.* thereupon signed the following mem., which was delivered to *F. & Son* by Mrs. *M.*: "The bearer, Mrs. *M.*, being about to purchase some furniture from *Wm. F. & Son*, and my rent being guaranteed, I hereby agree not to take the furniture so to be furnished by *Wm. F. & Son* for any rent that may become due." *F. & Son* then delivered the furniture to Mrs. *M.*, the said furniture to be paid for by monthly payments, and "to remain the property of *F. & Son* till paid for in full." *W.* levied upon the furniture, *F. & Son* replevied and obtained a verdict which the Court below refused to set aside. *Held*,—That the mem. signed by *W.* constituted a binding contract or arrangement with *F. & Son* not to distrain, and that the judgment of the Court below should be affirmed. Wallace *v.* Fraser - - - - 522

ELECTION—*Election Appeal—Admissibility of Respondent's evidence (P.Q.)—Multiplicity of charges—Bribery and undue influence—Agency—Drinking on Nomination and Polling Days.*] The petition was in the usual form, charging bribery and corruption on behalf of respondent and of his agents; and treating by respondent's agents on the nomination and polling days. In the bill of particulars, the petitioners formulated ninety-eight different charges, but, in appeal, they only insisted upon seventeen charges, seven of which attached personally to the defendant, and ten to his agents. The respondent was examined on his own behalf, and there were, in all, 280 witnesses heard. The judgment of the Superior Court of the District of *Montreal*, dismissing the petition on all the charges, was unanimously affirmed, except as to the charge of bribery and undue influence by one *Robert*, hereafter more particularly referred to; and it was *Held*,—1st. That the evidence of a candidate on his own behalf, in the Province of *Quebec*, is admissible. 2nd. That when a multiplicity of charges of corrupt practices are brought against a candidate, or his agents, each charge should be treated as a separate charge, and, if proved by one witness only and rebutted by another, the united weight of their testimony, without accompanying or collateral circumstances to aid the Court in its appreciation of the contradictory statements, cannot overcome the effect of the evidence in rebuttal, and that, in such a case, the candidate is entitled to the presumption of innocence to turn the scale in his favor. 3rd. That drinking on the nomination or polling day is not a corrupt practice sufficient to avoid an election, unless the drink is given by an agent on account of the voter having voted or being about to vote. (39 *Vic.*, ch. 9, sec. 94 D., compared with 17 & 18 *Vic.*, ch. 102, ss. 4, 23 & 36 Imp.) 4th. That a candidate, charged by his opponent with having no influence, is not guilty of a corrupt practice, if, in a public speech, in reply to the attack, he states "that he had had influence to procure more appointments for the electors of the county than any member."

The evidence on the *Robert* charge was to the following effect: *Robert*, long before the election was thought of, together with members of his family (the *Paré* family), exhibited a strong desire to obtain an employment for his brother-in- law, one *Edward Honoré Ouellette*. *Robert*, being a political supporter, a client and a personal friend of Mr. *Laflamme*, asked him on different occasions if he could procure his brother-in-law (*Ouellette*) a place. The first time he spoke to him with reference to it was about a year previous to the election; but he did not say anything to him on that occasion about his father-in-law (*Paré*). *Robert's* evidence on this part of the case then goes on as follows: "Q. On what occasion did you speak to him (Mr. *Laflamme*) about it? A. It was when the question of an election arose that I spoke to him about it. Q. Last fall? A. Yes. Q. What was the date at which you spoke to him regarding the *Paré* family? A. I cannot positively say, but it was four or five weeks before there was question of the election. It was then spoken of in the county and out of the county. Q. That was during the election? A. Yes. Q. At all events, it was at the time the election was spoken of? A. Yes. Q. What did you say to him regarding your brother-in-law and your father-in-law? A. I went to see Mr. *Laflamme* on different occasions, when I had some accounts to give him to collect, and I said to him: 'It would greatly please the *Paré* family if you could procure a place for my brother-in-law.' Q. Did you say to Mr. *Laflamme* in what way it would please the *Paré* family? A. I said this to him: 'It might, perhaps, prevent them from voting at the coming election.' Q. When you told Mr. *Laflamme* that the *Paré* family could be useful to him by not voting, what did Mr. *Laflamme* say? A. He simply told me 'that he would think of me, and that if a