REPORTS

— OF THE —

SUPREME COURT

— OF —

CANADA.

REPORTER

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1889.

JUDGES

OF THE

SUPREME COURT OF CANADA.

DURING THE PERIOD OF THESE REPORTS.

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

" " SAMUEL HENRY STRONG J.

" " TÉLESPHORE FOURNIER J.

" " WILLIAM ALEXANDER HENRY J.*

" " HENRI ELZÉAR TASCHEREAU J.

" " JOHN WELLINGTON GWYNNE J.

" " CHRISTOPHER SALMON PATTERSON J.†

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Honorable SIR JOHN S. D. THOMPSON, K.C.M.G., Q.C.

*Mr. Justice Henry died on May 4th, 1888.

† Appointed October 27th, 1888.

ERRATUM.

Errors in cases cited are corrected in the table of cases cited.

Page 412—Line 10 from bottom. For *Atty. Gen.* v. *Wright* read *Atty. Gen.* v. *Murphy.*

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P. A. CHOQUETTE, (RESPONDENT IN COURT BELOW)..... } APPELLANT;

AND

DAMASE LABERGE *et al.* (PETITIONERS IN COURT BELOW..... } RESPONDENTS.

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ON APPEAL FROM THE DECISION OF THE SUPERIOR COURT FOR LOWER CANADA (ANGERS J.)

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF MONTMAGNY.

R. S. C. ch. 9. sec. 11—Service of Election Petition—Defective—Art. 57 C. C. P.—Preliminary objections.

The service of an election petition made in the Province of Quebec, at the defendant's law office, situated on the ground floor of his residence and having a separate entrance, by delivering a copy thereof to the defendant's law partner who was not a member of, nor resident with, the defendant's family is not a service within sec. 11 ch. 9 R. S. C., and art. 57 C. C. P. and a preliminary objection setting up such defective service was maintained and the election petition dismissed. (Gwynne J. dissenting.)

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

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APPEAL from the decision of the Superior Court of Lower Canada, (Angers J. presiding,) dismissing the preliminary objections to the election petition.

The petition against the return of the respondent Philippe Auguste Choquette as member for the electoral district of Montmagny, was presented on the 25th April, 1887.

On the 30th April, 1887, preliminary objections were filed by the respondent, and on the 14th October, 1887, were dismissed by the Superior Court. The present appellant thereupon appealed to the Supreme Court of Canada under sec. 50 (a) ch. 9 R. S. C.

The question determined on this appeal was raised by the objections to the service of the petition. The appellant complained:—

1. That the service was not made when it should have been made.

2. That it was not made on the person to whom it should have been made.

Both appellant and respondent admitted that the question raised was to be decided by the construction placed on sec. 11 of the Dominion Controverted Elections Act, and art. 57 of the code of civil procedure, as applied to the facts of this case.

The Dominion Controverted Elections Act sec. 11 says:—

"An election petition under this act, and notice of the date of the presentation thereof, and a copy of the deposit receipt shall be served as nearly as possible in the manner in which a writ of summons is served in civil matters, or in such other manner as is prescribed."

Article 57 of the Code of Civil Procedure reads as follows:—

"Service must be made either upon the defendant in person, or at his domicile, or at the place of his

ordinary residence, speaking to a reasonable person belonging to the family. In the absence of a regular domicile, service may be made upon the defendant at his office or place of business, if he has one."

As to the facts of the case, the following was the evidence of the bailiff who made the service—Philippe Gendreau :—

Translation.—" I received the documents in question from Mr. Belleau (solicitor for petitioner). I went to the office of Mr. Choquette, where he actually lives and I served a copy on Mr. Martineau as being the partner of Mr. Choquette. Mr. Choquette, the respondent, practises as an advocate in partnership with Mr. Martineau of whom I have spoken. Their office as advocates and attorneys is in the basement (sous-sol) of the house occupied by the defendant as his ordinary residence, and where his domicile is. I am in the habit of serving Messrs. Choquette & Martineau in their quality of attorneys. Usually to enter the said office you pass by a separate outside door, but you can get there also by the residence of defendant. Those who go to the said office to transact business invariably pass by this separate outside door of which I have just spoken, and not by the residence of defendant. If there are any who pass by this latter way I am not aware of it, and for myself I have never gone through there.

When I effected the said service I spoke to the said Mr. Martineau, partner of the said respondent as attorney, and it was to him also I gave the papers I had to serve. Mr. Martineau does not live in the house with Mr. Choquette the defendant, he goes there only to the office of which I have spoken during office hours; outside of these hours he lives at some distance from there, at his residence, where his wife and children are.

* * * * *

Cross-examined.—The defendant has no office dis-

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tinct from his domicile; the basement of the house where the office is is also occupied by the family of the defendant as a residence. The room occupied as his office is in communication with all the other rooms of his house, * *

Re-examined.—When I said a little while ago that the defendant had no office distinct from his domicile, I intended to say that his office and his domicile are in the same building, and I did not intend to say that the family of Mr. Choquette lived at his office. His family do not live there. I have seen Madame Choquette there several times; I do not know if she goes there habitually.

Magloire Paquet—I have been employed a long time as a writer in Mr. Choquette's office, both before and since his partnership with Mr. Martineau.

* * * * *

His office and residence are in the same house, but they are separate and distinct the one from the other. Those who go to the office do not pass through the dwelling, but by a door which is on purpose for the office.

The family of Mr. Choquette, his wife, his servants, are never seen in the office.

Cross-Examined.—His private dwelling communicates with the office. There is no difference between the separation of the office and the dwelling and the separation of the other rooms of the house in the lower part of the house. The office does not constitute an addition (allonge) nor a building outside the house. It is only a room in the house like all the others.

Pierre Remon Martineau.—I am the partner of the defendant as advocate and attorney, and we have our offices as attorneys in the basement of defendant's house. When the bailiff Gendreau came to serve the petition in this cause I had just arrived at the office,

coming from the post office, and he arrived at the same time by another gate. We met each other near the door and he said to me "I have papers to serve at the office," thereupon I asked him in. I sat down at my desk and he put on my desk the papers bearing the title of the present cause, saying that they were an original and a copy of an election petition. I took a glance at them and saw that they were copies of a copy and that he had no original. * *
He did not ask if the defendant was there, nor whether he was there or at his own house. There was no other part of the basement of the defendant's house, with the exception of the office, which was occupied; the rest of the basement of the house is a high basement (sous-bassement haut). In summer a part of this sous-bassement is occupied as a kitchen the rest serves as a wood cellar. In winter the person who attends the kitchen in summer makes use of it for washing, and it is necessary to pass through it also to get wood. The office has a special door to go outside by. * *
When strangers come to pay a visit and the defendant wishes to bring them into his dwelling he makes them go round outside to get there. The doctor is the only person I have seen pass by the kitchen. The dwelling of the defendant was occupied at this date by his wife and servants and the petition could have been served on them; the defendant himself was there up to noon of the day in question. The doctor of whom I have just spoken is Dr. Marmette uncle of the defendant's wife.

Cross-examined.—Q. Will you swear that this part of this house which you call *sous-bassement* is not habitually occupied by the family of the defendant? A. As I have already said, in summer this part is almost as much occupied by the family, apart from Madame Choquette, as the upper part, but in the daytime and

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not in the night. I am not able to speak as to the night because I am not there. I have excepted Madame Choquette because I saw her less frequently below than the other members of the family. I know a Miss Bender who went in by the office to reach the house of Mr. Choquette; she was a cousin of Madame Choquette and it was in summer, and I have never seen any other member of the family go in that way. I know that they make the kitchen below in summer but not in winter. I have been in this room used as a kitchen in summer, but not in the others. I have been in the passage and from there have seen wood on the other side of the *sous-bassement*. I have frequently seen persons going about the *sous-bassement*. Mr. Choquette to reach his office always comes by the door which communicates with the summer kitchen. Besides the defendant there are members of his family, that is to say Madame Choquette and her little daughter, who have communication between the house and the office, but Madame Choquette comes rarely, the little girl often in summer, because in winter they do not occupy this side room."

Belcourt for appellant.

Belleau for respondent.

Sir W. J. RITCHIE C. J.—It appears that the appellant was not in Montmagny at the time of the alleged service; the objection in this case is that no copy of this petition was served, not as in *Julien* v. *de St. George*, (1), that the evidence of service is insufficient. Now the law expressly declares that the service shall be as nearly as possible in the manner in which a writ of summons is served in civil matters or in such other manner as is prescribed; article 57 of the code of civil precedure points out how such service must be made,

(1) 8 Q. L. R. 361.

viz., either upon the defendant in person or at his domicile or at the place of his ordinary residence, speaking to a reasonable person belonging to the family and it is only in the absence of a regular domicile that the service may be made upon the defendant at his office or place of business if he has one. It is very clear in this case that the service was not upon the defendant in person nor at the place of his ordinary residence, nor was it on a reasonable person belonging to defendant's family upon whom the service could have been made, it being shown he had a domicile and ordinary place of business and reasonable members of his family, but it was at the office or place of business of the defendant on his partner not being a member of his family.

It is not for us to inquire whether this was not for all practical purposes as good if not possibly a better service than at his residence on a member of his family; it may or may not have been so; what we have to determine is, was it a legal service which gave the court jurisdiction over the defendant?

Section 10 Controverted Elections Act clearly contemplates a personal service or service at the domicile, and if this cannot be, then upon some other person, or in such other manner as the court or judge on the application of the petitioner directs.

I am clearly of the opinion that the service was not a legal service within either the letter or the spirit of the Dominion Controverted Elections Act sec. 11 and art. 57 of the code of civil procedure, and the defendant had a right by way of preliminary objection to ask to have the service declared null and void. Now what are the preliminary objections or grounds of insufficiency which the section contemplates the respondent may urge? They are any he may have against the petition or petitioner or against any further proceeding

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on the petition. The objection in this case comes peculiarly within this latter category; the respondent says, by it, "not having been served with the petition in the manner required and prescribed by law, I have not been legally brought before the court having jurisdiction over the petition filed and you have no right to take further proceedings thereon against me." If this cannot be treated as a preliminary objection I am at a loss to know when or how the respondent is to assert his objection to the petition being further proceeded with or to allege or show that he has not been properly brought within the jurisdiction of the court in which the petition is filed. I cannot conceive an objection coming more directly under the designation of a preliminary objection to an election petition or a more substantial one than an objection such as this, which alleges that the election petition has not been properly and legally served and so the defendant has not been made subject to the jurisdiction of the court, and therefore, should not be compelled to answer the petition.

FOURNIER J.—Le présent appel est d'un jugement de l'honorable juge Angers renvoyant les objections préliminaires produites par l'intimé contre la pétition d'élection contestant la validité de son élection comme membre de la Chambre des Communes pour le district électoral de Montmagny.

La seule question que soulève cette cause est de savoir si l'avis de la présentation de la pétition a été légalement signifié par les pétitionnaires à l'intimé.

L'intimé allègue que la signification en a été faite ni à l'endroit, ni à la personne indiqués par la loi.

Au lieu de la signification personnelle, souvent fort difficile à faire et assez souvent éludée, la section 11 de l'acte des élections contestées a introduit le mode de signification adopté en matières civiles en déclarant ce qui suit:—

An election petition under this act, and notice of the date of presentation thereof, and a copy of the deposit receipt, shall be served as nearly as possible in the manner in which a writ of summons is served in civil matters, or in such other manner as is prescribed.

En conséquence de cette disposition, le service de l'avis de présentation de la pétition devait être fait conformément à l'article 57, C. P. C., de la province de Québec, décretant comme suit :—

Cette signification se fait soit au défendeur en personne, ou à domicile, ou au lieu de sa résidence ordinaire, en parlant à une personne raisonnable faisant partie de la famille. A défaut de domicile régulier l'assignation peut être donnée au défendeur, à son bureau d'affaire, ou établissement de commerce, s'il en a un.

Dans le cas actuel la signification de l'avis de présentation de la pétition n'a été faite ni au domicile de l'appelant, ni à une personne raisonnable de sa famille. L'huissier chargé de cette mission s'est rendu au bureau d'affaires professionnelles de l'appelant qui exerce sa profession d'avocat en société avec M. Martineau. Leur bureau se trouve dans la partie inférieure de la maison où l'appelant a son domicile légal.

En vertu des règles de pratique de la Cour Supérieure, les avocats pratiquants sont obligés d'élire dans le rayon d'un mille du palais de justice, un domicile où ils transigent leurs affaires professionnelles et où leur sont faites toutes les significations de pièces de procédure. C'est au domicile professionnel ou bureau d'affaires que l'avis en question a été signifié en le remettant à M. Martineau, qui ne réside pas avec l'appelant et ne fait pas partie de sa famille. La signification d'après l'art. 57 ne peut avoir lieu au bureau d'affaires qu'à défaut de domicile régulier. L'appelant en ayant un, c'est à ce domicile que la signification devait se faire. Quoique faite au bureau d'affaires, cependant le rapport fait à la cour constate contrairement à la vérité, que cette signification a été régulièrement faite au domicile de l'appelant parlant à une personne de sa famille, Ce rapport a été attaqué comme entaché de

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faux parce qu'il contient l'énoncé que la signification avait été faite à l'appelant (défendeur), "parlant *à une personne raisonnable de la famille du dit Philippe Auguste Choquette, à son domicile, à Montmagny.*"

L'appelant a fait une preuve complète de la fausseté de cet avancé par le témoignage de l'huissier lui-même qui dit à ce sujet: "Lorsque j'ai fait la signification j'ai parlé au dit M. Martineau associé de l'intimé (maintenant appelant) comme procureur, et c'est à lui aussi que j'ai remis les papiers que j'avais à signifier. M. Martineau ne demeure pas chez M. Choquette le défendeur ; il y va seulement au bureau dont je viens de parler pendant les heures de bureau, hors de ces heures il demeure à quelque distance de là, à sa résidence oû sont sa femme et ses enfants."

Le témoignage de P. R. Martineau auquel les papiers ont été laissés constate que l'huissier les a déposés sur son bureau, sans demander si le défendeur était au bureau ou chez lui. Le bureau est la seule partie occupée dans le soubassement de la maison, à l'exception d'une partie qui sert de cuisine en été. Ces faits positivement établis font clairement voir que la signification n'a pas été faite conformément à l'article 57 C. P. C. M. Martineau, quoique l'associé professionnel de l'appelant, n'avait aucune qualité pour recevoir cette signification, parce qu'il n'était pas une personne de sa famille. Il n'était obligé, ni légalement, ni moralement, d'en rendre compte à l'appelant. L'huissier avait toutes les facilités possibles pour faire une signification légale. En conséquence des relations d'affaires existant entre M. Martineau et l'appelant on pourrait peut-être dire que les intérêts de ce dernier étaient aussi en sûreté entre les mains de son associé que si les papiers eussent été remis à une servante de sa famille ; mais le code n'admet pas d'équivalent. Il n'y a que deux manières de faire les significations : à la personne même et, à défaut,

à son domicile, parlant à une personne raisonnable de sa famille :

Service must be made, dit l'article 57, either upon the defendant in person, or at his domicile.

Le vice dont est entachée la signification n'est pas seulement un défaut de forme, une simple irrégularité, mais c'est la violation d'une formalité essentielle ; car dans notre procédure, comme dans le code français, il est d'absolue nécessité de faire voir à qui et à quel domicile la signification a été faite.

C'est par l'assignation que le défendeur est obligé à comparaître devant le juge ou la cour, sous les peines du défaut. C'est elle qui saisit le juge de la cause et lui impose le devoir de la juger s'il reconnait qu'il est compétent à cet effet. Sans une assignation à domicile ou à la pérsonne, le juge n'a aucune juridiction pour décider la cause. Lorsque les objections à l'assignation reposent, comme dans le cas actuel, sur des formalités essentielles, on ne peut pas les traiter comme de simples objections techniques, car, sans leur accomplissement, le juge n'a pas de juridiction. En attaquant la régularité du service de l'avis, l'appelant a soulevé, comme il en avait le droit, par ces objections préliminaires, une question de droit que la cour aurait dû juger en sa faveur. Ayant prouvé clairement les faits constatant l'illégalité de la signification et le code art. 57 C. P. C. exigeant impérativement le service à domicile ou à la personne, il a droit d'obtenir l'infirmation de ce jugement.

Il ne peut pas ici s'élever de question sur l'existence du droit d'appel. La sec. 50 sec. (*a*) dit qu'il y aura appel :—

From the judgment, rule, order or decision of any court or judge on any preliminary objection to an election petition, the allowance of which objection has been final and conclusive and has put an end to such petition, or which objection if it had been allowed would have been final and conclusive and have put an end to such petition.

Il est évident que si l'objection qu'il n'y avait pas de

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signification légale eût été admise, comme elle aurait dû l'être, elle aurait mis fin à la pétition et partant la décision à cet égard est appelable. L'appel doit être alloué avec dépens.

HENRY J.—This is an appeal from a decision of one of the judges of the Superior Court of Quebec during the pendency of the matter before that court under a petition of the respondents, against the election and return of the appellant, the sitting member for the House of Commons, and upon one of the preliminary objections to the petition filed, and urged by the appellant. The petition and accompanying documents were served by the bailiff by handing a copy thereof to the partner in business of the appellant, who is an advocate residing at the town of Montmagny, and during his absence.

From the evidence it appears that the office in question is in the basement of the appellants residence—the dwelling being above it and access to it being by another entrance. Besides the office there is in the basement what is called a summer kitchen, not used in the winter season, and a wood house.

An objection under the practice in Quebec was raised to the mode of service which was overruled by the judge, and from this decision the appeal has been taken to this court. The point was fully argued recently before this court and we have to decide it.

The 11th section of the Controverted Elections Act provides that:—

An election petition under this act and notice of the date of the presentation thereof and a copy of the deposit receipt shall be served as nearly as possible in the manner in which a writ of summons is served in civil matters, or in such other manner as is prescribed.

We are, therefore, to ascertain the mode of service of a writ of summons in a civil matter in the Province of Quebec. That is regulated by article 57 of the Code

of Civil Procedure, which is as follows:—

Service must be made either upon the defendant in person, or at his domicile, or at the place of his ordinary residence, speaking to a reasonable person belonging to the family. In the absence of a regular domicile, service may be made upon the defendant at his office or place of business, if he has one.

Thus, we see, that but two modes of service are provided for and the article is imperative. One of the two must, by the article, be adopted where the party to be served has a domicile. In this case it is shown and admitted that the appellant had a domicile.

He was not served personally, and does the evidence show that he was served at his domicile in the manner prescribed by the article? To constitute such a service it must be at his domicile, the party making the service, when doing so, "speaking to a reasonable per-" son belonging to his family."

The service was not in that part of the building in question which formed the domicile or residence of the appellant. The office where the service was made although under the same roof with his residence was specially set apart from the other part of the building occupied as his private residence, and occupied as well by his partner as himself. His partner had an interest therein and control of it to the same extent as he had. He could open and close it at will and eject any one but his partner therefrom. That a door opened into the residence does not alter the character or holding of the office. The office was not generally used as a passage way to the residence as the evidence shows, although on some occasions so used by one party, not of the appellant's family, who was permitted to do so.

The service therefore was not at the domicile or residence of the appellant as required by the article. Besides, the party spoken to was the partner in business of the appellant, and not a member of his family. He

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neither ate nor lived in the residence of the appellant, and how can he be called "a reasonable person belonging to the family" residing in the appellant's residence.

The service is defective, therefore, in both requisites, and under the practice in Quebec the appellant not having been served in either of the two ways prescribed by the article was not bound to answer any more than he would have been had no service whatever have been made.

The learned judge who tried and decided upon the preliminary objections was of the opinion that the service upon the appellants' partner, at their office, should be considered equivalent to the service upon an illiterate servant ignorant of the importance of the documents received. If that question were open for consideration his decision might be sustained but it is not; and we are bound by the express terms and provisions of the article.

The objection is not merely a technical but substantial one affecting the jurisdiction of the judge. The article enunciates the principle that such jurisdiction shall be exercised only when the party in question is legally served as prescribed, and in the absence of such service no judge could legally proceed to try the merits.

If the learned judge decided there was no regular service, that would have put an end to the petition and involved the conclusion that he had no jurisdiction to proceed further. From such a decision an appeal by the petitioners to this court would have lain. It was to all intents and purposes a preliminary objection involving the fate of the petition and was essentially such a decision as either party might appeal from. I am, therefore, of opinion the appeal should be allowed and the petition dismissed with costs.

TASCHEREAU J. concurred with FOURNIER J.

GWYNNE J.—On the 26th April, 1887, the above respondents filed a petition, under the provisions of the Controverted Elections Act, in the Superior Court of the Province of Quebec, in which province the electoral district of Montmagny is situated, praying that the election and return of the above appellant as member of parliament for the said district should be set aside and declared null and void by reason of bribery and other corrupt practices alleged to have been committed by the said appellant himself and by his agents on his behalf and with his knowledge and consent. Upon the 30th day of the said month of April and within five days after the service of the petition and accompanying notice the appellant, as required by the 12th section of the Controverted Elections Act, ch. 9 of the Revised Statutes, presented thirty objections in writing of a very peculiar and technical character which he called "preliminary ob-"jections" against the said petition and the said petitioners and against all further proceeding thereon, in the words of the statute. Two of these objections affected the qualification of the petitioners to present the petition; all the others related to irregularities and those of a very technical character alleged to exist in the presentation of the petition—in the making of the deposit required by law,—in the copy of the petition served—in the service of the petition and accompanying notice, and in the return of the bailiff who effected the service. These objections were dismissed as unfounded by an order of the Superior Court in which the petition was filed bearing date the 14th October, 1887. From this order the appellant has appealed to this court and the only point opened before us was one affecting the regularity of the service of the petition.

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In my judgment this appeal must be dismissed with costs. It is to my mind very clear that the Controverted Elections Act does not give any appeal to this court upon such a purely technical point of practice as is raised by a question affecting only the manner in which service was effected of the election petition which, as is apparent on the case, the appellant received, a point which is not appealable in any other case or proceeding whatever. The service appears to have been effected by delivery to the appellant's business partner for the appellant at their place of business situate in the dwelling house of the appellant, of copies of the petition and other papers required by law, which papers the appellant's partner immediately upon their receipt by him forwarded to the appellant who received them into his own hands in time to enable him to draw himself the objections which upon the 30th April he filed in court, two of which as already noticed called in question the qualification of the petitioners to present the petition; after taking this proceeding it was in my opinion incompetent for him, as the learned judge of the Superior Court in effect adjudged, to contend that there was some irregularity in the service and therefore the court had not jurisdiction to try these two preliminary objections affecting the merits of the case and to dismiss them if insufficient. The filing of these objections was a proceeding wholly unnecessary, if service had not been effected on the appellant, and inconsistent with the contention that he had not been served with the petition. If he was not served and the case should be proceeded with he had his perfect remedy by prohibition.

Now that there is no appeal to this court from the decision of a judge upon such a purely technical point of practice as the sufficiency and regularity of the service of the election petition upon the appellant is

abundantly clear unless such a purely technical point of practice constitutes a good "preliminary objection" in the sense in which that term is used in the statute, and that it does not constitute such an objection is to my mind free from doubt.

By the 12th section of the act it is enacted that

Within five days after the service of the petition and the accompanying notice the respondent may present in writing any preliminary objections or grounds of insufficiency which he has to urge against the petition or the petitioner or against any further proceedings thereon and shall in such case at the same time file a copy thereof for the petitioner, and the court or judge shall hear the parties upon such objections and grounds and shall decide the same in a summary manner.

Now if any doubt exist as to the meaning of the words "against any further proceeding thereon" in the connection in which they appear in this section, all such doubt is removed by the 5th section which shows that what is meant, is not that these words so used should throw open all questions of mere practice affecting the regularity of the service of a petition as "preliminary objections" under the statute so as to render any decision upon such purely technical point of practice appealable to this court, but that what is intended is an objection against any further proceeding on the petition by reason of the ineligibility or disqualification of the petitioner thus limiting the preliminary objections in the sense in which that term is used in the statute to points of substance only affecting the sufficiency of the matter stated in the petition, and the qualification of the petitioners to present it.

The 5th section shews with what intent the words "or against any further proceeding" in the 12th section are used. It enacts that:

A petition complaining of an undue return or undue election of a member, or of no return or of any unlawful act by any candidate not returned, by which he is alleged to have become disqualified to sit in the House of Commons, at any election may be presented to the court by any one or more of the following persons.

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(a) A person who had a right to vote at the election to which the petition relates, or

(b) A candidate at such election; and such petition is in this act called an election petition: provided always, that nothing herein contained shall prevent the sitting member from objecting under section twelve of this act to any further proceeding on the petition by reason of the ineligibility or disqualification of the petitioner, or from proving under section forty-two thereof that the petitioner was not duly elected.

This appears to me to be the natural construction of the act, and it avoids what appears to me to be a forced construction, namely, one which would make appealable to this court a purely technical point of practice which is not appealable in any other case or proceeding whatsoever.

Appeal allowed with costs.

Solicitors for appellant: *Choquette & Martineau.*

Solicitors for respondent: *Belleau, Stafford & Belleau.*

EUGENE PROSPERE BENDER (DEFENDANT) ..... APPELLANT;

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*March 7, 8.
*Dec. 13.

AND

CHARLES W. CARRIER *et al.*, (PLAINTIFFS) ..... RESPONDENTS.

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

Executory contract—Non-fulfilment of—Action for price—Temporary exception—Incidental demand—Damages—Cross-appeal.

In March, 1883, B. contracted with C. *et al.* for the delivery of an engine in accordance with the Herreshoff system to be placed in the yacht "Ninie" then in course of construction. The engine was built, placed in the yacht, and upon trial was found defective. On the 31st August C. *et al.* took out a *saisie conservatoire* of the yacht "Ninie" and claimed $2,199.37 for the work and materials furnished. B. petitioned to annul the attachment and pleaded that the amount was not yet due, as C. *et al.* had not performed their contract, and by incidental demand claimed a large amount. After various proceedings the *saisie conservatoire* was abandoned and the Court of Queen's Bench, on an appeal from a judgment of the Superior Court in favor of B., both on the principal action and incidental demand, ordered that experts be named to ascertain whether the engine was built in accordance with the contract and report on the defects. A report was made by which it was declared that C. *et al's.* contract was not carried out and that work and materials of the value of $225 was still necessary to complete the contract.

On motion to homologate the experts' report, the Superior Court was again called upon to adjudicate upon the merits of the demand in chief and of the incidental demand, and that court held that as C. *et al.* had not built an engine as covenanted by them, B's. plea should be maintained, but as to the incidental demand held the evidence insufficient to warrant a judgment in favor of B. On appeal to the Court of Queen's Bench that court, taking into consideration the fact, that the yacht "Ninie" had, since the institution of the action, been sold in another suit at the instance of one of B's. creditors, and purchased by C. *et al.*, the proceeds being deposited in court to be distributed amongst

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

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B's. creditors, credited B. with $225 necessary to complete the engine, allowed $750 damages on B's. incidental demand, and gave judgment in favor of C. *et al.* for the balance, viz., $1,225 with costs.

The fact of the sale and purchase of the yacht subsequent to the institution of the action did not appear on the pleadings.

On appeal to the Supreme Court of Canada and cross-appeal as to amount allowed on incidental demand by Court of Queen's Bench it was:

Held, reversing the judgment of the Court of Queen's Bench, Sir W. J. Ritchie C.J. and Taschereau J. dissenting, that as it was shewn that at the time of the institution of C. *et al's.* action, it was through faulty construction that the engine and machinery therewith connected could not work according to the Herreshoff system, on which system C. *et al.* covenanted to build it, their action was premature.

Held also, that the evidence in the case fully warranted the sum of $750 allowed by the Court of Queen's Bench on B's. incidental demand, and therefore he was entitled to a judgment for that amount on said incidental demand with costs. Taschereau J. was of opinion on cross appeal, that B's. incidental demand should have been dismissed with costs.

APPEAL and cross-appeal from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing judgment of the Superior Court.

The action was brought for the recovery of an amount of $2,199.37 being the balance of the sum of $3,199.37, consisting of an amount of $2,000—the price agreed upon for the construction of an engine, and $1,199.37 for materials supplied to and work done by the plaintiffs for the defendant. It was accompanied by a writ of attachment by means of which the plaintiffs caused to be seized the steam yacht, "Ninie," upon which the work had been performed.

The pleadings, writings forming part of the contract, and the various incidents and proceedings in the cause until the judgment now appealed from was rendered are sufficiently stated in the head note and judgments hereinafter given.

Irvine Q.C. and *Amyot* for appellant contended that

as a matter of fact, three courts and a report of experts, had all found that the plaintiffs had not fulfilled their contract to furnish an engine on the Herreshoff system, which worked perfectly; that their action was premature, and that the evidence warranted the judgment delivered in the Superior Court in favor of the defendant on his incidental demand.

Bossé Q.C. for respondents contended that if there was any defect in the engine or its working, the appellant was responsible, as the plaintiffs followed the plans and had carried out his instructions, he having himself superintended the putting in of the engine and placed it in charge of a second class engineer, who had never before heard of a Herreshoff boiler, and, moreover, that as the engine had been sold to pay off the defendant's liabilities, it was impossible for plaintiffs to complete the engine as directed by the Superior Court, and the Court of Queen's Bench justly and rightly held that the defendant could not, by allowing the vessel to be sold, deprive plaintiffs of all recourse for the sum of $2,000, being for work which had increased the price of adjudication by that amount. On the cross-appeal the learned counsel contended that if plaintiffs were entitled to succeed on the principal demand there could be no cross demand, and, moreover, that the damages claimed were not proved.

Irvine Q.C. in reply contended that the engine had been placed in the yacht by plaintiffs and they were responsible for its proper working, and that the fact of the sale of the "yacht" was not before the court, but if that fact is taken into consideration as a ground for saying that the respondents are no longer, through no fault of theirs, in a position of fulfilling their contract, it must be remembered that it is equally admitted by respondents, that the yacht has been bought by them and is still in their possession.

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Sir W. J. RITCHIE C.J.—This was an action brought by Carrier to recover a certain amount claimed for the price of an engine for a yacht delivered to Bender. There is a cross demand for damages. It cannot be denied that Carrier did not fulfil his contract according to its terms, and by reason of the non-performance of the contract, a deduction from the amount claimed S. was allowed by the court below. After careful consideration of the case I think the judgment of the Court of Appeal should be affirmed.

The yacht has been sold at the suit of Bender's creditors, and he has consequently received its value less, it may be assumed, the amount the experts found Carrier's work was deficient. By this sale it was obviously put out of the power of Bender to call on Carrier to make good the deficiencies and complete the yacht. But he or his creditors must be assumed to have received the value and consideration for the yacht, which included the engine supplied by Carrier and for which he ought to pay less $225 the value found by the experts, which the Court of Appeal adopted and with which we should not interfere, as the deficiency in Carrier's contract. In addition to this Bender should receive in reduction of the price he was to pay for the yacht, the amount of damages which Bender sustained by reason of the non-completion of the contract; this the Court of Queen's Bench has awarded him, amounting to $750, and I am not prepared to say erroneously. The result therefore is, viz:—

Amount of contract and materials		$3,199 37
Damages	$750	
Deduction in accordance with report of experts	225	
		975 00
		$2,224 37
Paid on account		1,000 00
Amount awarded by Court of Queen's Bench..		1,224 37

STRONG J.—I have read the judgment which will be delivered by my brother Fournier, and I concur in the conclusions which he has arrived at and the reasons given by him therefor.

FOURNIER J.—Cette cause, quoique en apparence fort compliquée par les nombreux incidents de procédures auxquels elle a donné lieu, n'offre cependant qu'une simple question de fait à résoudre. Il s'agit uniquement de savoir si le contrat fait entre l'appelant Bender et les intimés Carrier *et al* pour la construction de l'engin du yacht "Ninie" a été exécuté de manière a donner droit d'action aux intimés pour le prix du contrat.

Ce contrat a été formé par les écrits suivants :—

Lévis, P. Q., 6 mars 1883.

A E. P. Bender, Ecr., assistant-ingénieur,
Travaux Publics, Ottawa.

Monsieur,

Nous vous ferons un engin composé sur le "le système Herreshoff" de la description suivante :

Cylindre haute pression, 9 diamètre. } 18 de
" basse pression, 16 " } course

Avec arbre à manivelle en fer, do pour hélice en acier, avec chemise en bronze, coussins en cuivre, hélice en fonte. Le tout livré à l'atelier ici, le 15 mai prochain, pour deux mille piastres, payables moitié quand les engins seront à moitié faits, et la balance au Ier uillet prochain, en réglant par billet endossé par votre père. Si vous désirez avoir l'hélice en bronze ou autre métal, vous pourrez l'avoir en payant la différence du coût avec la fonte. Les matériaux et la main-d'œuvre devront être de première qualité, et l'engin devra fonctionner parfaitement s'il est installé par nous dans le bâtiment.

Vos dévoués, etc.,
CARRIER, LAINÉ & CIE,
Lévis.

Lévis, 6 mars 1883.

A MM. Carrier, Lainé & Cie.,
Messieurs,

J'accepte l'offre que vous me faites pour la construction d'un engin composé destiné au yacht "Ninie."

Je remplirai les conditions demandées, si en retour la machine est de première classe, d'après les spécifications mentionnées dans le

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rapport du bureau de la marine américaine, à MM. Herreshoff, de B. R. I., sur l'engin du "Leila," qui est exactement le même, sauf l'hélice qui devra être en fonte et le shaft d'acier, à moins que je décide de payer la différence du coût de la matière brute.

Je demeure, Messieurs,

Votre très humble,

E. P. BENDER.

Dans leur déclaration, ainsi que dans l'affidavit qu'ils ont donné pour obtenir une saisie conservatoire, les intimés, Carrier *et al*, ont allégué que Bender leur devait la somme de $2,199.37 pour ouvrages faits et matériaux fournis tant en vertu d'un contrat verbal qu'en vertu de leur soumission du 6 mars 1883, que de l'acceptation que Bender en a faite par écrit le 9 mars 1883, et ils allèguent en outre

Que tous les dits ouvrages et matériaux étaient nécessaires pour la confection et l'installation de l'engin et accessoires d'icelui pour le yacht à vapeur le "Ninie" alors en voie de construction par le dit Eugène Prosper Bender, et étaient indispensables à la construction du dit yacht, dans lequel ils ont été placés par les dits Carrier, Lainé et compagnie, et duquel yacht ils forment maintenant partie intégrante.

Que par les dits ouvrages la valeur du dit yacht a été augmentée somme susdite et qu'en raison de et par iceux, il a été terminé et complété.

Le compte de particularités de la demande se compose de :

1° of an item of $2,000 for I compound engines shaft and screw, and 2° of a large number of charges for materials, use of plaintiff's forge and machines and time of their employees.

Bender a plaidé à cette action par une exception péremptoire en droit temporaire, alléguant que la construction de l'engin, en conséquence de l'insuffisance des valves, du défaut d'un réservoir à eau chaude (*hot well*) et d'autres défectuosités, qui ne peuvent être constatées que par des experts, l'ouvrage fait par les intimés était tout à fait inutile; que leur contrat n'était pas exécuté et que pour le compléter il en coûterait encore plus que leur demande.

Il plaide aussi les mêmes faits par exception en droit

perpétuelle et, de plus, qu'il avait souffert en conséquence de l'inexécution du contrat, des dommages au montant de $10,140.43, pour lesquels il se porte demandeur incident.

En réponse à ces plaidoyers, les intimés ont allégué que l'engin avait été construit conformément aux plans et devis fournis par l'appelant et que tous les ouvrages avaient été faits par ses ordres et sous sa direction, et que c'est lui-même, l'appelant, qui avait fait défaut de fournir les accessoires nécessaires pour assurer le bon fonctionnement de l'engin.

L'appelant avait aussi produit une pétition demandant l'annulation de la saisie conservatoire en se fondant sur les moyens invoqués par ses plaidoyers à l'action.

Après une longue enquête, l'hon. juge Caron rendit, le 9 décembre 1884, jugement maintenant l'exception temporaire et renvoyant l'action des intimés *quant à présent*. Sur la demande incidente, il condamna les intimés (demandeurs) à payer au défendeur $1,190

Pour dommages par lui soufferts relativement aux gages qu'il a payés aux hommes de l'équipage de son yacht et de la nourriture qu'il leur a fournie et aussi pour la valeur du charbon inutilement dépensé et de la glace perdue.

Ce jugement ayant été porté à la cour du Banc de la Reine fut infirmé le 27 mai 1887 et une référence à experts a été donnée.

Les experts régulièrement nommés firent un rapport dont les intimés demandèrent l'homologation, et l'appelant le rejet en partie. Après audition sur mérite l'hon. juge Andrews rendit son jugement maintenant l'exception temporaire de l'appelant et renvoyant l'action des intimés. N'ayant pas trouvé la preuve du demandeur incident suffisante il renvoya sa demande incidente avec dépens.

Ce jugement n'ayant satisfait aucune des parties, elles se portèrent respectivement appelante de nouveau

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à la cour du Banc de la Reine qui rendit, le 6 février 1886, le jugement qui est maintenant soumis à cette cour.

Par ce dernier jugement la cour du Banc de la Reine a décidé que l'engin fourni par les intimés n'est pas conforme aux devis mentionnés dans le rapport de la marine américaine sur l'engin du "Leila," et que des parties importantes ont été omises et que les parties ainsi omises ont été estimées par les experts à la somme de $225. Elle a aussi décidé qu'il est établi en preuve que le tube en cuivre appelé condenseur n'a ni la forme, ni les dimensions, ni les liaisons requises dans le système Herreshoff, qui comprend un réservoir d'eau chaude appelé "*hot well*," qui n'existe pas et n'a pas été remplacé par aucun équivalent dans la machine fournie par les intimés, et qu'en raison de l'insuffisance du condenseur et de l'absence du réservoir (*hot well*) la machine du yacht Ninie n'a pu fonctionner. La cour a aussi considéré que l'inexpérience du mécanicien employé par l'appelant (Bender) a pu aggraver les difficultés, mais, néanmoins, il résulte de la preuve que les vices inhérents à la machine, et surtout l'absence du réservoir d'eau chaude et autres vices de construction ont été les causes principales qui ont empêché la machine de fonctionner. Ici, la cour au lieu de prononcer une condamnation obligeant les intimés à compléter leur contrat, a pensé que la vente du yacht Ninie faite par autorité de justice par les créanciers de Bender l'obligeait à modifier son jugement, et considérant que quoique cette vente eût mis les intimés dans l'impossibilité de compléter le dit engin elle ne les dispensait cependant pas de réparer les dommages que l'appelant avait éprouvé jusqu'à la dite vente pour ne lui avoir pas fourni une machine ou engin conforme aux conditions intervenues entre eux, lesquels dommages elle a évalués à la somme de $750. Elle a enfin

condamné les intimés à payer à l'appelant $225 pour prix et valeur des parties du dit engin que les dits intimés n'ont pas fournies, et déduisant ces deux sommes du montant de la demande des intimés elle a condamné l'appelant Bender à payer $1215 aux intimés avec les intérêts et les dépens de la demande principale en première instance, moins les dépens de la saisie-arrêt et les frais d'expertise y compris les frais pour homologuer et faire rejeter le tout ou partie du rapport d'experts, chaque partie devant payer ses propres frais tant sur la dite saisie-arrêt que sur les expertises qui ont eu lieu, ainsi que l'appel des dits appelants.

Les trois jugements déjà prononcés jusqu'ici sur le mérite de cette cause s'accordent tous sur la nature du contrat fait entre les parties et sur les faits que ce contrat n'a pas reçu son exécution.

Il résulte des écrits des parties un contrat des plus explicites pour la construction de l'engin en question d'après le système Herreshoff. Un seul point n'était pas finalement déterminé par ces écrits et requérait une preuve supplémentaire, c'est la partie du contrat au sujet de l'installation de l'engin et de la responsabilité qui en résulte. Elle se lit comme suit :

Les matériaux et la main-d'œuvre devront être de première qualité et l'engin devra fonctionner parfaitement s'il est installé par nous dans le bâtiment.

Les intimés ont prétendu par leur réponse spéciale que l'installation dans le yacht n'a pas été faite par eux, mais par l'appelant lui-même qui doit en porter toute la responsabilité. Cette prétention n'a évidemment été imaginée qu'après coup dans le but de se soustraire à la responsabilité de livrer un engin qui devrait fonctionner parfaitement s'il était installé par eux. La preuve de cette installation par eux est complète, bien que les deux principaux témoins qui en parlent—Zéphirin Leblanc et Johnny Samson—aient fait tout en leur pouvoir pour dénaturer les faits. D'après

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eux, ce n'est que sous la direction et les ordres de Bender qu'ils ont travaillé à cette installation et non comme ouvriers de la boutique des intimés.

Pour faire voir jusqu'à quel point Leblanc a poussé sous serment la complaisance pour son maître, je citerai cette partie de son témoignage où il se convainct de fausseté :—

Q. Vous considérez que l'obligation de M. Carrier était finie quand l'engin était sorti de la boutique?

R. Quand l'engin était livré, oui.

Q. Il n'était pas obligé de le poser?

R. Non.

Q. Vous en êtes bien certain?

R. Oui.

Q. Vous considérez que la pose de l'engin et le reste, c'était sous la direction de M. Bender?

R. Oui.

Q. M. Carrier n'a eu rien à y voir?

R. Non.

Q. Il chargeait bien le temps de ses hommes mais ça ne faisait pas partie du contrat?

R. Non.

Q. C'était complètement en dehors de cela?

R. Oui.

Q. Comment expliquez-vous le fait que vous veniez travailler comme cela pour M. Bender, que ce n'était pas M. Bender qui vous payait, c'était la boutique?

R. Le temps était chargé à M. Bender.

Q. Mais c'était la boutique qui vous payait?

R. Oui.

Q. Quelle affaire la boutique avait-elle à payer pour M. Bender?

R. Je n'en sais rien.

Par le langage assuré et positif que tient le témoin sur la nature du contrat on croirait que c'est lui-même qui l'a fait. Il en limite l'étendue à la livraison de l'engin ; dit qu'il n'était pas obligé de le poser et qu'il l'a été sous la direction de Bender. Cependant il n'a pas été présent au contrat et n'en a pu connaître quelque chose que par ouï-dire. Le contrat est par écrit et les intimés ont spécialement pourvu au cas où l'installation de l'engin se ferait par eux-mêmes. Leblanc,

qui a travaillé à cette installation comme ouvrier de la boutique des intimés, dont le temps était marqué par un des commis des intimés et payé par eux, non pas par Bender, a, malgré cela, l'audace de dire que c'est Bender qui faisait l'installation. Il n'a pas d'autre motif pour en tirer cette conclusion que le fait que Bender assistait assez souvent à des travaux où il avait placé la plus grande partie de son avoir. Sa présence est suffisamment expliquée par son intérêt et ne constitue pas une ingérence dans les travaux. Les mêmes remarques doivent s'appliquer au témoignage de Johnny Samson.

Indépendamment des inductions tirées par Leblanc et Samson contrairement à la vérité des faits nous avons sur cette importante partie de la cause les allégations des intimés eux-mêmes, qui forment à ce sujet une preuve complète que l'installation de l'engin et des accessoires a été faite par eux-mêmes.

On a déjà vu plus haut que les intimés dans leur affidavit pour obtenir une saisie conservatoire et dans leur déclaration ont allégué :

Que tous les ouvrages et matériaux étaient nécessaires pour la confection et l'*installation* de l'engin et accessoires d'icelui pour le yacht à vapeur "Ninie" alors en voie de construction par le dit défendeur, et étaient indispensables à la construction du dit yacht dans lequel ils ont été placés par les demandeurs et dont ils forment maintenant partie.

Cette déclaration si formelle faite par les intimés eux-mêmes au sujet de l'installation de l'engin dans le yacht doit mettre fin à tout doute et réduit à néant les assertions mensongères de leurs témoins à cet égard. Non-seulement ils admettent avoir installé l'engin, mais ils en demandent les frais dans leur compte de particularités. Il résulte de tout cela que ce qui était indéfini dans la soumission et l'acceptation au sujet de l'installation de l'engin est devenu clairement et finalement déterminé par les admissions des intimés qu'ils

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ont eux-mêmes fait l'installation et qu'ils sont en conséquence obligés de livrer un engin fonctionnant parfaitement.

Les intimés ont-ils rempli cette obligation? Il est évident que non. Les honorables juges Caron et Andrews, qui ont chacun d'eux séparément jugé cette cause au mérite, ont décidé que les intimés n'avaient pas exécuté leur contrat et ont, en conséquence, renvoyé leur action avec dépens. La cour du Banc de la Reine a également décidé que le contrat n'avait pas été exécuté. Elle a indiqué dans son jugement, en partie cité plus haut, les principaux points sur lesquels les intimés avaient failli à leur obligation. Je crois inutile de les répéter ici.

En se fondant sur la vente du yacht, survenue pendant l'instance, la cour du Banc de la Reine a cru trouver un moyen de mettre fin au litige, si dispendieux pour les parties; mais cette solution est-elle légale? En face d'un contrat aussi clair et défini, et d'une preuve certaine et positive de sa non-exécution, la cour pouvait-elle se dispenser de décider l'unique question soulevée par l'exception temporaire, de savoir si les intimés, sans avoir rempli leur contrat, avait un droit d'action? La preuve ne laissant aucun doute sur l'inexécution du contrat l'action des intimés devait être renvoyée. Cette proposition de droit ne saurait être contestée; il est hors de doute qu'une partie qui n'a pas encore exécuté ses obligations, n'a pas d'action pour contraindre son co-contracteur à exécuter les siennes.

Il n'est pas douteux que la vente du yacht augmente les difficultés à règler entre les parties, mais c'est précisément à cause de ces nouvelles complications dont nous n'avons pas les détails et dont il n'y a aucune preuve que la cour du Banc de la Reine aurait dû s'en tenir à la contestation entre les parties. Chaque partie

aurait eu dans ce cas ce qu'il avait strictement droit d'avoir. L'action des intimés eût été renvoyée comme elle devait l'être, et l'appelant Bender aurait sans doute vu les intimés se mettre à l'œuvre pour réparer l'engin, le mettre en état de fonctionner parfaitement et aurait été mis en demeure de l'accepter en payant ce qu'il devait. Chacun eût ainsi obtenu ce qu'il devait avoir d'après son contrat. Mais on objecte la vente du yacht et on dit que les choses ne sont plus entières. Il n'y a de cela ni allégation ni preuve légale. Ce fait n'apparaissant pas au dossier n'aurait pas dû servir de bâse au jugement sur le litige en question. Mais si on prend pour vrai le fait que le yacht a été vendu, il faut également prendre pour vraie la mention du fait que ce sont les intimés qui en ont fait l'acquisition. Dans ce dernier cas, il n'y a donc plus aucune difficulté à renvoyer l'action, parce que les intimés peuvent facilement se mettre en position d'exécuter leur contrat vis-à-vis de Bender. Dans tous les cas qu'ils aient le yacht ou non, le fait non allégué ni prouvé de sa vente ne pouvait justifier l'admission d'un droit d'action qui n'existait pas encore. Je suis en conséquence en faveur du renvoi de l'action principale.

Quant à la demande incidente bien que les dommages accordés par la cour du Banc de la Reine ne me semblent pas suffisants pour couvrir les pertes subies par Bender, mais comme ils sont d'une nature assez difficile à préciser, je ne crois pas devoir différer sur ce point.

Je suis pour confirmer l'opinion de la cour du Banc de la Reine, accordant $750.00 de dommages sur la demande incidente et les dépens.

HENRY J.—This case arose in the first place by proceedings taken on the 31st of August, 1883, by the respondents to seize the steam yacht "Ninie," then

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recently built by the appellant, and in which the respondents had placed an engine built by them for the yacht under the declaration following:—

Les demandeurs representent:

Que le défendeur leur doit une somme de deux mille cent quatre-vingt dix-neuf piastres trente-sept cents, montant du compte produit, étant pour les divers ouvrages et matériaux y mentionnés, faits, fournis et livrés par les demandeurs à et pour le défendeur aux temps, lieu, pour les prix et des valeurs y mentionnés, et sur la promesse du défendeur de payer les dites sommes.

Que les dits ouvrages ont ainsi été faits tant en vertu de conventions verbales, qu'en vertu de la soumission en date du six mars dernier, maintenant produite et duement acceptée par le défendeur, qu'en vertu de l'ordre fait et signé par le dit défendeur le neuf mai dernier.

Que tous les dits ouvrages et matériaux étaient nécessaires pour la confection et l'installation de l'engin et accessoire d'icelui pour le yacht à vapeur le "Ninie," alors en voie de construction par le dit défendeur et étaient indispensable à la construction et complétion du dit yacht, dans lequel ils ont été placés par les demandeurs et dont ils forment maintenant partie.

Que par les dits ouvrages la valeur du dit yacht a été augmentée de la susdite somme et qu'ils ont terminé et complété le dit yacht et son équipement.

Que le dit yacht est d'un port suffisant pour être et doit être enrégistré, mais qu'il ne l'a pas encore été.

Qu'il est sur le point d'être enrégistré et de faire un voyage et que par ces deux faits les dits demandeurs perdront sur icelui leur privilège d'ouvriers, fournisseurs de matériaux et constructeurs, comme aussi leur privilège de dernier équipeur.

Que le défendeur refuse de payer la susdite somme, qu'il est insolvable, et que les demandeurs n'ont d'autre ressource pour être payés que par l'exercise du dit privilège, et que sans un bref de saisie arrêt simple pour saisir le dit yacht et conserver le dit privilège les dits demandeurs perdront leur privilège et leur creance.

Pourquoi les demandeurs demandent que la saisie arrêt faite en cette cause soit déclarée bonne et valable, qu'il soit de plus dit et adjugé qu'ils ont sur le dit yacht leur privilège susdit pour le paiement de leur dite créance, et que le défendeur soit condamné à leur payer la susdite somme de deux mille cent quatre-vingt-dix-neuf piastres trente sept cents avec intérêt et les dépens.

To which was added particulars commencing 1883, May 29; To 1 pair compound engines H. P. G., L.P.H., and x' 18 stroke, with shaft and screw, $2,000.00; and

amounting in all to $3,199.37, from which was deducted, May 7 : By cash on account $1,000.00, leaving a balance claimed of $2,199.37.

To that petition the appellant alleged as follows :—

Que le trente et un août dernier, les demandeurs on fait émaner en cette cause un bref de saisie arrêt simple avant jugement, contre le défendeur, pour la somme de deux mille cent quatre vingt dix neuf piastres et trente sept cents, sur l'affidavit de Charles William Carrier l'un des demandeurs et produit au dossier ;

Qu'en vertu du dit bref, les dits demandeurs, le trente et un août dernier ont fait saisir sur le défendeur " le yacht " Ninie," tel qu'il se trouve dans le port de Québec," et ont appointé trois gardiens à la dite saisie, tel qu'il appert au procès-verbal de saisie produit en cette cause ;

Qu'en outre, le trois septembre courant, les dits demandeurs ont opéré et fait opérer une seconde saisie du dit yacht, le décrivant comme suit : " dans le port de Québec le yacht " Ninie " avec ses engins et apparaux," nommant deux gardiens à la saisie, ne donnant pas mainlevée de la dite première saisie, et basant encore cette deuxième saisie sur le dit bref de saisie arrêt simple avant jugement ;

Que le dit bref de saisie et les dites saisies sont illégales, irrégulières, informes et doivent être cassées, annulées et que mainlevée doit être accordée, de la dite saisie, et le dit bref de saisie mis à néant ;

Que l'affidavit au soutien du bref susdit est insuffisant et faux ;

Que sans entrer dans le mérite de la créance alléguée par les demandeurs, il est faux que les demandeurs soient eu aucune façon les derniers équipeurs du dit yacht " Ninie."

Que les dits demandeurs ont bien fourni et placé dans le dit yacht " Ninie " un engin et accessoires mais que cela ne constitue pas un équipement, ne les rend pas "derniers équipeurs," et cela sans admettre les qualités des dits engins et travaux ;

Qu'après que les dits travaux furent faits, le dit yacht " Ninie," a fait un voyage en dehors du hâvre de Québec, et s'est rendu sur la haute mer, dans le golfe St-Laurent,et qu'en aucun temps depuis, les dits demandeurs n'ont fourni quoique ce soit au dit yacht ;

Qu'il est faux que le trente et un août dernier, le dit yacht fut sur le point de faire un voyage, attendu que le dit yacht était en réparation nécessitée par les mauvais ouvrages et matériaux dont les demandeurs réclament le prix ;

Qu'il est faux que le dit défendeur soit insolvable, et qu'au contraire le yacht susdit qni vaut dix huit mille piastres, fait voir la solvabilité du defendeur, qui vaut en outre en propriétés et argents

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au-delà huit mille piastres.

Que le privilége d'ouvrier fournisseur de matériaux et constructeur ne donne pas droit à une saisie arrêt avant jugement sans être accompagné de l'affidavit ordinaire que le débiteur cache et récèle ses biens, ou encore qu'il est immédiatement sur le point de quitter la province.

Que l'affidavit susdit ne donne aucun droit a l'émanation du dit bref de saisie arrèt simple;

Que la dite deuxiéme saisie est encore nulle parcequ'elle constitue saisie pardessus saisie;

Que le dit affidavit est incomplet, insuffisant, non fondé en fait ni en loi;

Que pour les fins de la présente, le dit défendeur demande le rapport immédiat du dit bref;

Pourquoi le dit défendeur conclut à ce que le dit bref de saisie arrêt simple avant jugement soit immédiatement rapporté devant cette cour, que le dit bref de saisie arrêt avant jugement et les dites saisies opérées en vertu d'icelui, soient déclarées illégaux, irréguliers, nuls, de nul effet et annulés, qu'ils soient cassés rejetés et mis de côté, que mainlevée des dites saisies soit accordée au défendeur avec dépens distraits aux soussignés, et qu'acte soit donné au défendeur avec dépens distraits aux soussignés, et qu'acte soit donné au défendeur de ce qu'il se réserve tout recours en dommages contre les dits demandeurs.

To the above answers was pleaded a general denial and claiming the right to make the seizure

The appellant by *exception temporaire* set out as follows:—

Et le dit défendeur, en réponse à l'action, per exception péremptoire en droit temporaire, dit:

Que tel qu'il appert par la pièce A des demandeurs, en cette cause produite le six mars dernier, les demandeurs s'engagèrent envers le defendeur comme suit:

Nous vous ferons un engin composé sur le système "Herreshoff" de la description suivante:

Cylindre Haute Pression 9" diam. } x 18 de course
" Basse " 16 " }

avec arbre à manivelle en fer, do pour hélice en acier, avec chemise en bronze, coussins en cuivre, hélice en fonte. Le tout livré à l'atelier, ici, (Lévis) le quinze mai prochain (1883), pour deux mille piastres payables moitié quand les engins seront à moitié faits et la balance au 1er juillet prochain par billet endossé par votre père:

Si vous désirez avoir l'hélice en bronze ou autre métal, vous pourrez l'avoir en payant la différence du coût avec la fonte.

Les matériaux et la main-d'œuvre devront être de première qualité et l'engin devra fonctionner parfaitement s'il est installé par nous dans le bâtiment.

Que le six mars dernier, les demandeurs livrèrent au défendeur la lettre ou soumission ci haut relatée, et qu'en réponse à icelle, le défendeur répondit dans les termes suivants :

Lévis, 6 mars 1883.

A Messieurs Carrier et Lainé ·

Messieurs,

J'accepte l'offre que vous me faites pour la construction d'un engin composé, destiné au yacht "Ninie."

Je remplirai les conditions demandées si, en retour, la machine est de première classe, d'après les spécifications mentionnées dans le rapport du Bureau de la marine américaine, à Messieures Herreshoff de B. R. I. sur l'engin du "Leila," qui est exactement le même, sauf l'hélice qui devra être en fonte et le shaft d'acier, à moins que je décide de payer la difference du coût de la matière brute" et qu'alors et la le défendeur livra aux demandeurs cette dernière, que les demandeurs acceptèrent comme la base du marché qu'ils faisaient entre eux.

Qu'il fut, par les conventions entre les parties, parfaitement reglé, stipulé et entendu que les demandeurs placeraient à bord du dit yacht, alors en construction, un engin d'après le dit système, lequel serait parfait en tous points, et fonctionnerait aussi bien que ceux faits par la célèbre compagnie manufacturiere Herreshoff susdite ;

Que le défendeur faisait alors construire le dit yacht de dimensions spéciales pour le rendre conforme aux exigences du dit système d'engins, et qu il avait choisi ce système en raison des grands avantages qu'il offrait à tous le points de vue notamment de la vitesse, de l'économie, de la solidité et de la sûreté ;

Que les demandeurs devaient livrer les dits engins et accessoires le quinze mai dernier, afin de permettre au défendeur de profiter de la saison alors prochaine de la navigation, et que le défendeur, après la confection et livraison susdite, devait avoir un mois et demi de délai pour payer la balance des deux mille piastres, le dit paiement devant se faire au moyen d'un billet signé par le père du défendeur, ce qui comporterait un nouveau délai pour le paiement final.

Que nonobstant cela, et malgré que le dit yacht fut prêt à recevoir le dit engin le dit quinze mai dernier, les demandeurs, sans la faute de défendeur, ne furent pas en position de le livrer et ne le livrérent pas à la dite date, et malgré que le défendeur eût dès le sept mai dernier, savoir à la premiére demande des demandeurs, payé mille piastres aux demandeurs en accompte du dit contrat, et tel que porté en icelui.

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Que le dit engin ne fut prêt a être livré que le vingt neuf mai dernier, et ce dans un état imparfait comme il sera dit plus bas, que les dits demandeurs installérent eux-mêmes le dit engin dans le dit bâtiment, devenant ainsi doublement garants, savoir par la loi et par la dite convention que les matériaux et la main d'œuvre fournis par eux seraient de première qualité et que l'engin fonctionerrait parfaitement; que de fait les dits matériaux et la main-d'œuvre susdits ne sont pas de première qualitié et qu' au contraire ils sont dé qualité inférieure;

Que le dit engin ne fonctionne pas parfaitement, qu'il ne fonctionne même pas et que le contrat n'a pas été exécuté;

Que malgré plusieurs essais faits avec l'assistance des demandeurs et de leurs employés, le dit engin n'a pu encore fonctionner, et que tel qu'il est il est inomplet, mal construit et ne répond nullement à sa destination.

Que, sans un bon engin, le dit yacht n'est d'aucune utilité, ne peut-être navigueé, et cause au défendeur la perte de plus de quinze mille piastres que la confection du dit yacht lui a couté.

Que le défendeur a fréquemment mis les demandeurs en demeure de terminer leur dit contrat et de faire en sorte que le dit engin fonctionnât parfaitement, et ce tant verbalement que par protêt notarié fait et signifié par le ministére de Maitre Auger notaire, le seize août dernier, mais que les demandeurs refusêrent et négligèrent de ce faire.

Que le fait que le dit engin ne fonctionne pas est dû au vice intrinséque de sa construction, laquelle n'est pas conforme au système Herreshoff;

Que sans prétendre être homme de l'art ni donner détail des différences entre l'engin fourni par les demandeurs et ceux du système Herreshoff, ni le détail des défauts de l'engin fourni par les demandeurs, le défendeur allègue que, dans ce dernier, les valves des pompes ne sont pas du diamètre voulu, sont d'un diamêtre insuffisant, tant celle de suction que de jet et autres, qu'ainsi elles ne fournissent pas, â la bouilloire, la quantité d'eau requise, ce qui enraie et obstrue toute la machinerie; et de plus, que les demandeurs ont fait défaut de placer un puits chaud ("hot-well") au-dessus de la pompe à air ("air pump,") ce qui est indispensable et fait partie des engins construits d'après le dit système;

Qu'ils ont mis des couverts (jackets) extérieurs aux cylindres de fonte.

Que les chante-pleurs sont improprement faites et ne restituent pas l'eau au réservoir comme ils devraient le faire;

Que les dits défauts et plusieurs autres. que le défendeur établiera par des hommes de l'art, rendent le dit engin incomplet, impropre à l'usage pour lequel il était destiné, et font que le défendeur n'a

pu encore utiliser le dit yacht pour les fins de la navigation, et qu'il n'a été pour lui qu'une source de dépenses;

Qu' à l'époque de l'action en cette cause, le dit défendeur ne connassait encore aucun des détails ci-haut donnés quant aux dits défauts, qui constituent des défauts cachés que les hommes de l'art et spécialistes peuvent seuls découvrir, et que pour les constater il a fait venir, à grands frais un ingénieur de la dite compagnie manufacturière.

Que le dit système Herreshoff est inconnu par les constructeurs d'engin dans cette partie du pays, et que le défendeur est dans cette alternative de faire compléter le dit engin de manière à ce qu'il fonctionne parfaitment par les demandeurs qui ont prouvé leur incapacité à cet égard, ou de faire remorquer à grand frais son bâtiment à Bristol, dans l'Etat du Rhode-Island, pour faire faire les dits ouvrages par la dite manufacture Herreshoff.

Que le coût des dits changements, complétion et réparation pour mettre le dit engin en ordre parfait aux frais du défendeur, excèderait le montant de la réclamation prétendue des demandeurs;

Que, de plus, le mauvais fonctionnement du dit engin, en ne fournissant pas au boiler une quantité suffisante d'eau, a endommagé ce dernier qui était en ordre parfait et d'excellente confection, l'a rendu impropre à l'usage auquel il était destiné et a diminué du tiérs, savoir; de neuf cent soixante et deux piastres et soixante et quinze cents $962.75, (sa valeur primitive de $2,888.25).

Que, de plus, le mauvais fonctionnement du dit engin a gâté trois soupapes de sureté de la valeur de dix-neuf piastres et demie.

Que le dit yacht, à la connaissance des demandeurs, a été spécialement construit pour naviguer dans le bas du fleuve Saint-Laurent, à l'eau salée, et que dans l'état dans lequel sont les dits engines et accessoires, il est impossible d'entreprendre de tels voyages, ni aucun autre voyage;

Que le défendeur a toujours été prêt à payer, aux demandeurs, tout compte légitime, dès que ces derniers auraient rempli leur contrat, ce qu'ils ont toujours négligé de faire.

Que les demandeurs, dans la construction et le placement du dit engin, n'ont pas apporté la science pratique, les connaissances, l'habilité désirables, ont de mauvaise foi entrepris ce qu'ils se sont montrés incapables de faire, ont grossièrement trompé le défendeur et l'ont induit en erreur sur la qualité des ouvrages qu'ils étaient capables et promettaient de faire;

Que les dommages ci-haut ne sont qu'une partie de ceux que les demandeurs, par leur défaut de remplir leurs obligations, ont illégalement et de mauvaise foi fait subir au défendeur.

Que le dit engin, tel qu'il est fait, loin d'être utile au défendeur, lui a causé des dommages excédant douze mille piastres.

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Qu'en raison de tout ce que ci-haut, les demandeurs n'ont pas encore rempli leur dit contrat.

Que le défendeur ne sera tenu de payer la balance du dit contrat que lorsqu'icelui sera exécuté et terminé..

Pourquoi le défendeur demande que l'action des demandeurs soit, quant à présent renvoyée avec dépens, distraits aux soussignés, et sauf aux demandeurs à se pourvoir.

The appellant also pleaded the usual defence au fond en fait.

The respondents pleaded a *réponse speciale à l'exception temporaire* as follows :—

Les demandeurs par leur présente réponse spéciale à l'exception péremptoire en droit temporaire du défendeur disent et alléguent :

Que l'item de deux mille piastres porté au compte de particularités produit est le prix de l'engin tel que décrit dans la soumission alléguèe dans l'action, et que les autres items du dit compte sont pour de l ouvrage et matériaux faits et fournis par les demandeurs au défendeur à sa demande réquisition spéciale au bord du dit yacht pour transporter l'engin et le placer dans le dit vaisseau.

Que les chemises en fonte ont été faites à la rêquisition spéciale du défendeur et sous sa direction.

Quê le dit engin de même que tous les travaux faits et matériaux fournis par les demandeurs l'ont été sous la direction et surveillance constante du défendeur d'après ses ordres et sont conformes aux plans et dessins fournis par lui pour être exêcutés par les demandeurs et maintenant produits.

Que les demandeurs ont en tous points nempli lerr marché, mais que le défendeur n'a pas placé dans le dit vaisseau les accessoires nécessaire au fonctionnement d'un engin d'apres le système Herreshoff, lesquels ne sont pas compris dans les travaux que les demandeurs devaient faire en vertu de leur marché avec le dêfendeur, et que c'est en raison de cette omission que l'engin n'a pu fonctionner d'une maniére régulière.

Pourquoi les demandeurs persistant dans les conclusions de leur action demandent le renvoi de la dite exception temporaire avec dépens.

The appellant then pleaded by way of *exception perpétuelle* in substance as far as the important issues to be decided are concerned, pretty much as contained in his exception temporaire, and in reply to the *réponse speciale à l'exception peremptoire en droit perpetuelle* of the respondents, he pleaded a general denial.

He then pleaded a " demande incidente " for damages

enumerated for a large amount for the non-performance by the respondents of the contract; in which it is alleged that he the appellant frequently placed them *en demeure* to finish their said contract so as to make the engine work perfectly, as well verbally as by notarial protest made and served on the 26th August, 1883; but that they refused and neglected to do so, and that he the defendant was ready and offered the respondents to return the engine to be made complete according to the said bargain and to substitute an engine that would work perfectly.

That allegation of a defective engine is denied by the respondents who allege in reply, substantially, that they completed their bargain and plead that all work done and material furnished were under the direction and constant surveillance of the appellant, and were according to his orders and comformable to plans and designs furnished by him, and that the respondents fulfilled their bargain, but that the appellant did not put in the vessel the accessories necessary to the working of the engine made by the system of Herreshoff which were not comprised in the work to be done by the respondents, and which caused the imperfect working of the engine.

The "accessories" mentioned I take to be intended to refer to something other than the work to be done by the respondents, and there is no evidence to sustain that allegation.

It will be apparent from the evidence that the engine was not made, as by the contract required, according to the system of Herreshoff. That was shown abundantly by the report of the experts and so decided by all the courts. For that failure and the resulting consequences the respondents were by their contract liable unless the appellant was, at the time of the commencement of the legal proceedings now under consideration,

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by some act or actions of his estopped from setting up that defence. The respondents alleged in their pleadings that the engine was built and all the other works done under the special surveillance of the appellant, but I cannot find the evidence to sustain that allegation. It is true some drawings were handed to them by the appellant, but his doing so was merely suggestive, and as they knew that he was not a person of any skill as to the matter they were not necessarily bound to adopt them, and if their adopting of them was apparently a deviation from the contract before doing so they were bound to so inform him and require him to expressly adopt them in substitution. This does not appear to have been done. Besides, it is not at all clearly shown that the work was altered in any way by the fact of those plans or sketches having been given.

It is also alleged that the appellant superintended placing the engine and other works made by the respondents in the yacht. Such is to some extent shown, and if the failure in the working of the engine was shown to have been caused by any improper placing or putting in of the machinery that might be held to excuse the respondents. Such, however, is not shown, but on the contrary it is proved that the failure was caused by the imperfection in the construction of several parts of the machinery.

Had, then, the respondents by the completion of their contract, or by showing that its want of completion was due to the appellant, shown that when they seized the yacht they had an available cause of action against him? If not, then the seizure was illegal and cannot be sustained. After the appellant had a trial of the machinery, of which he was previously unable to form an opinion, he immediately by a notarial protest and otherwise informed the respondents of their failure to

perform their contract, and offered to re-deliver the engine and machinery to them to be made according to the contract. If not according to the contract it was then their duty to have accepted that offer, but instead of doing so they caused the seizure of the yacht four or five days afterwards. Here then the dealings in respect of the contract ceased, and the question is to be decided solely as to the legal rights of the parties at that time. What took place subsequently as to the levy on the yacht by other parties, creditors of the appellants, her sale and purchase by the respondents, cannot and should not affect the legality of the original seizure by the respondents either one way or another.

Under the issues raised and the evidence as to them it is my opinion that the respondents failed to fulfill their contract, that they have not pleaded or proved any justification therefor, and that the appellant in consequence sustained serious loss and damage.

The experts, who call themselves arbitrators, but were not, in one part of their report "declare that the respondent (now the appellant) has suffered loss from the non-fulfilment of the contract on the part of the appellants (now respondents) to the gross amount of two hundred and twenty-five dollars. They find, also, that the 'condenser' (a most important part of the machinery, and without which properly made no machinery can work properly, if at all,) was not made, either in form, dimensions or connections, according to the requirements of the Herreshoff system." There is thus shown an important breach of the contract.

The experts express an opinion that the want of knowledge and experience of the Herreshoff system on the part of the engineer who was on board the yacht was another cause of the failure of the machinery, but how can it be asserted in reference to machinery that

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they themselves found was not according to Herreshoff's system.

Herreshoff's system to work satisfactorily, as all other perfect systems, must be thoroughly applied, and if from ignorance or design a party who has contracted to supply an engine according to that system fails to do so in any important feature, the party for whom it is to be supplied need only ascertain that fact and refuse to take it—even if it were of a system superior to that contracted for and could be shown to be as good or better than it. If I purchase a horse to be black in colour I am not bound to accept a white one, if even of more value. The same law applies to articles contracted to be manufactured by a particular person or at a particular place. It was an engine to be built on the Herreshoff principle that the appellant contracted for and that he was entitled to get, and as soon as he discovered after a trial that it was not so, and besides that it was defective and would not work, he had a perfectly legal right to take the course he did.

The experts have, in my opinion, not overestimated for the failure in perfecting the machinery by allowing two hundred and twenty-five dollars to which the appeal court added seven hundred dollars to the appellant under his incidental claim, deducting the aggregate of those two sums from the amount of the respondents' claim. I am of the opinion that the demand of the respondents should be dismissed and that the appellant is entitled to have a judgment for seven hundred and fifty dollars being the amount to be awarded by the court of appeal with costs in all the courts.

TASCHEREAU J.—I would dismiss the appeal with costs and allow the cross-appeal with costs. Judgment against Bender for $1,975 with interest from service of

action, and all costs on the action and seizure not including those of *expertise* of which each party shall pay half, and incidental demand dismissed with costs.

Appeal allowed with costs and cross-appeal dismissed with costs.

Solicitors for appellant: *Blanchet, Amyot & Pelletier.*

Solicitors for respondents: *Bossé & Lanctot.*

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*Oct. 27.
*Dec. 14.

E. BEAUDET *et al*.....APPELLANTS;

AND

THE NORTH SHORE RAILWAY CO...RESPONDENTS.

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

43-44 *Vic. ch.* 43 *sec.* 9 (*P. Q.*)—*Award—Validity of—Faits et articles—Art.* 225 *C. C. P.*

E. B. *et al.* joint owners of land situate in the city of Quebec were awarded $11,900 under 43-44 Vic. ch. 43 sec. 9, for a portion of said land expropriated for the use of the North Shore Railway Company.

On the 12th March, 1885, E. B. *et al.* instituted an action against the North Shore Railway Company, based on the award. The company not having pleaded foreclosure was granted, and on the 21st April, process for interrogatories upon *faits et articles* was issued, and returned on the 20th April. The company made default. On the 18th June, the *faits et articles* were declared taken *pro confessis.* On the 16th May E. B. *et al.* consented that the defendants be allowed to plead, but it was only on the 7th July that a plea was filed, alleging that the arbitration had been irregular and was against the weight of evidence. On the 2nd September, E. B. *et al.* inscribed the case for hearing on the merits, on which day the railway company moved to be authorized to answer the *faits et articles* and the motion was refused.

The notice of expropriation and the award both described the land expropriated as No. 1, on the plan of the railway company deposited according to law, but in another part of the notice it described it as forming part of a cadastral lot 2345 and in the award as forming part of lots 2344-2345. On the 5th December, judgment was rendered in favor of E. B. *et al.* for the amount of the award. From this judgment the railway company appealed to the Court of Queen's Bench (appeal side) and that court reversed the judgment of the Superior court, holding *inter alia* the award bad for uncertainty, and that the case should also be sent back to the Superior Court to allow the defendants to answer the *faits et articles.*

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

On appeal to the Supreme Court of Canada it was

Held, 1, reversing the judgment of the court of Queen's Bench(appeal side, that there was no uncertainty in the award as the words of the award and notice were sufficient of themselves to describe the property intended to be expropriated and which was valued by arbitrators.

2. That the motion for leave to answer *faits et articles* had been properly refused by the Superior Court. Taschereau J. dissenting.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court in favor of the appellants.

This was an action brought by the appellants against the respondents claiming the sum of $11,900, being the amount of an award made under the provisions of "The Quebec Consolidated Railway Act, 1880."

The notice by the North Shore Railway Company to appellants was as follows:—

"NOTICE BY THE NORTH SHORE R.R. CO. TO E. BEAUDET *et al.*

"L'An mil huit cent quatre-vingt-trois, le quinzième jour de juin, à la réquisition de la Compagnie du Chemin de fer du Nord, corps politique et incorporé.

"Je, Notaire public pour la Province de Québec, residant en la cité de Québec, soussigné, me suis exprès transporté au bureau de Monsieur Amedée Auger, Secrétaire Trésorier d'une association de construction portant le nom de Elisée Beaudet, ou étant et parlant à Monsieur Jacques Onésiphore Trudel, commis dans le dit Bureau, j'ai déclaré et signifié aux dits Elisée Beaudet et autres: que la dite Compagnie du Chemin de fer du Nord requiert pour la construction et le déplacement d'une partie de son chemin autorisé par l'acte quarante cinq Victoria 2eme section, chapitre vingt, une portion de terre de deux arpents et quarante perches en superficie tel que maintenant jalonnée et

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faisant partie du lot numéro (2345) deux mille trois cent quarante cinq du cadastre pour la paroisse de St-Sauveur de Québec, et portant le numéro un sur le plan du tracé du Chemin de fer tel que déposé suivant la loi."

The award was as follows :—

"AUTHENTIC AWARD OF THE ARBITRATORS.

"L'An mil huit cent quatre-vingt-trois le vingt huitième jour d'août.

"Ont comparu, devant le Notaire pour la Province de Québec, en la Puissance du Canada, résidant en la cité de Québec, soussigné.

"Monsieur Jean-Baptiste Bertrand de la paroisse de St-Roch de Québec, marchand de bois.

"Arbitre nommé par la Compagnie du Chemin de fer du Nord.

"Monsieur David Bell, de la paroissè de St-Sauveur de Québec, manufacturier, arbitre nommé par l'Association de Construction portant les noms de Elisée Beaudet et autres, et Monsieur Joseph Grondin de la paroisse de Charlesbourg, agent d'assurance, tiers arbitre nommé par Messieurs Bertrand et Bell, le tout conformément aux dispositions de l'acte refondu des chemins de fer de Québec 1880.

"Lesquels ont déclaré ;

"Que sous l'autorité de l'acte 45 Victoria chap., XX la dite Compagnie du Chemin de fer du Nord requiert, pour la construction et le déplacement d'une partie de sa voie ferrée, le terrain suivant. Savoir :

"Un certain terrain situé en la paroisse de St-Sauveur de Québec, contenant deux arpents et quarante perches en superficie, borné au Nord-Ouest, au Sud-Est et à l'Ouest par la dite association et à l'Est par les héritiers Tourangeau, et faisant partie des lots numéros (2344-2345) deux mille trois cent quarante quatre et deux mille trois cent quarante cinq du cadastre pour la

dite paroisse de St. Sauveur et portant le numéro un sur le plan du tracé du chemin de fer tel que déposé suivant la loi.

Qu'après avoir au préalable prêté le serment requis par la loi ainsi qu'il appert par les certificats ci-annexés sauf quant au certificat de M. J. Bertrand, qui n'est pas produit, ils ont procédé à l'examen du dit terrain et dépendances et pris tous renseignements nécessaires.

"Et qu'après avoir mûrement délibéré, Messieurs Bell et Grondin se sont accordés sur le montant de l'indemnité qui doit être constatée par leur sentence arbitrale.

"Et procédant en conséquence, par les présentes, à la reddition de la dite sentence les dits arbitrees David Bell et Joseph Grondin, ont fixé à la somme de onze mille neuf cent piastres l'indemnité que la dite Compagnie du Chemin de fer du Nord aura à payer à la dite association de construction pour le terrain sus décrit.

"A la charge par ces derniers de libérer le terrain précité de toutes rentes constituées hypothéques, servitudes et autres charges quelconques affectant le dit terrain. Messieurs Grondin et Bell réclament en sus de l'indemnité ci- haut, l'intérêt de cette indemnité à six pour cent depuis la possession par la Compagnie du terrain exproprié.

"Dont acte fait et passé à Québec, sous le numéro cinq cent quarante deux des minutes de François Eusèbe Blondeau, Notaire soussigné.

"En foi de quoi Messieurs David Bell et Joseph Grondin, ont signé avec le Notaire, Monsieur Bertrand s'étant absenté avant la reddition et la lecture de la dite sentence.

Signé, DAVID BELL.
JOSEPH GRONDIN.
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A proper notice was given to all the arbitrators of the day on which it was to be made, viz., 14th August, but it was adjourned and the award was rendered on the 28th August, at which meeting Bertrand withdrew during the sitting. In his evidence at the trial he said :—

The two other arbitrators have concurred in the award which has been rendered after the fulfilling of all the essential formalities. I received all the necessary notices, and all the proceedings have been regular before the arbitrators. I only refused to sign because I considered that the amount awarded was exaggerated and unjust.

The pleadings sufficiently appear in the head note and in the judgment of Fournier J. hereinafter given.

Pelletier for appellant.

As to the objection regarding the *faits et articles.*

The default of the defendants was first recorded on 26th April, 1885, then on a formal motion the interrogatories were held *pro-confessis.* Over two months afterwards the defendants apply to answer, without filing their answers, without offering to pay the costs incurred, and in spite of the terms of the consent in virtue of which they had—long after the delays,—filed their plea, which they were only entitled to do on condition that the case would not be delayed. There must be a certain limit to delays obtained by means of omissions on behalf of parties. Pending the long *délibéré*, was it not the duty of the defendants to make a motion accompanied, as usual, with their answers and with the offer of paying the costs as required by law in such instances? The defendants have not thought fit to act in that way. Is it not probable that they were afraid of being allowed to file their answers? Then the case might have gone back on the enquête roll and evidence might have been adduced proving that the plaintiffs' pretentions were correct.

The Superior Court was obviously right in granting some kind of protection to the plaintiffs against the

extraordinary delays, omissions and defaults of the defendants. The same court could not, on motion, reverse and annul the judgment already rendered, declaring the *faits et articles* taken *pro-confessis.*

Then the Court of Appeal orders the case to be sent back to the Superior Court, for the defendant to answer upon *faits et articles,* and new arbitrators to be appointed.

Why then order the case back to the Superior Court in order that the *faits et articles* should be answered?

What benefit would result from that for either party?

If the *faits et articles* are to be answered, what is the use of appointing new arbitrators?

As to uncertainty the lot described in the notice, is exactly the same as the one mentioned in the award, to wit: "lot number one upon the plan of the *tracé* of "the railroad as deposited according to law."

The plan of the railroad, "deposited according to law," became the real and only legal plan and description of the lot in question. Both the notice and the award give its area: "2 *arpents et* 40 *perches.*" So soon as that plan was deposited it was by law substituted for the general cadastral plan, which can no longer apply to the lot of which the said plan is a parcelling out and sub-division.

The second objection raised by the defendants in their factum before the Appeal Court is that there seems to be no notice to the arbitrators of their sitting on the 28th August.

It is alleged by the action—not specifically denied, and proved by the *faits et articles*—that such meeting was an adjourned one, as decided by the arbitrators at their meeting of the 14th, duly called by the notice produced in the record. Subs. 18 (of said Sec. 9) provides for those adjourned meetings.

But let us go a step further. The three arbitrators

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appeared before the notary on the 28th of August. Bertrand, the defendants' arbitrator, who withdrew during the sitting of the 28th, when examined as a witness by the defendants, says that they have examined many witnesses, and adds: That he had received all the necessary notices and all the proceedings had been regular.

The third objection raised is that the plaintiffs have no juridical existence as a company. The defendants' notice served on the plaintiffs shows that defendant had accepted them as joint proprietors; they sued as such; no exception to the form has denied their qualities (Code of Procedure arts 116 et 119).

The defendants, not having denied the qualities assumed by the plaintiffs in the writ of summons, must be held to have admitted them and to have waived all possible objection. It is too late to have the award invalidated for defect of form.

Subs. 27 of the said section 9 is also a peremptory answer to that objection. It says: "Nor shall it be "necessary that the party or parties to whom the sum is to be paid be named in the award."

Duhamel Q.C. and *Drouin* for respondents.

The illegalities on which we based our plea are the following:

1. That there is no identity between the ground valued by the arbitrators, and the one that they were charged to valuate.

In fact, by the notice given by the respondents to the appellants in conformity with sub-sec. 13 of sec. 9 of the Quebec Consolidated Railway Act, notice which according to this sub-section must contain "a description of the lands to be taken, &c.," the respondents requested two arpents and forty perches forming part of the lot 2345 of the official cadastre for the parish of St. Sauveur. But the majority of the arbitrators with-

out taking account of this injunction, adjudged on another parcel of land, on a parcel forming part of the lots 2344 and 2345 of the official cadastre for the parish of St. Sauveur.

Consequently there is no conformity between the designation inserted in the notice and the one contained in the sentence ; and on the part of the arbitrators there was adjudication on a litigation not submitted to them

2. Sub-sec. 22 of sec. 9 of the same act decrees that: " A majority of the arbitrators at the first meeting of their appointment, or the sole arbitrator, shall fix a day on or before which the award shall be made." It does not appear by the record that there was any such day fixed. There is in the record a notice from one of the arbitrators but this notice, which could not fulfil the prescription of the above disposition, is made for the 14th of August, and the pretended sentence has been rendered on the 28th of August.

3. The pretended sentence of arbitrators does not mention the names of the owners on the ground expropriated and on which it is adjudged. They are there designated in this manner " *l'association de construction portant les noms de Elisée Beaudet et autres.*" But this association not being incorporated has no juridical existence. It is true that it is alleged in the declaration, " Que les mots 'Association de construction portant les noms de Elisée Beaudet et autres' employés dans les titres sont une expression de convention employée pour désigner les Demandeurs comme propriétaires indivi des dits immeubles," but this allegation is of no value because it is not proved, and even if proved it could not cover this absence of designation of parties required by the law. One of two things, either the proceedings and the sentence of the arbitrators have a judicial quality and then no

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doubt that the names and qualities of all the parties ought to be mentioned, at least in the sentence ; or, they have an extra judicial quality and the designation of names and qualities is still rigorously exacted by the Article 1344 of the Civil Code of Procedure of Lower Canada.

In any case the judgment of the Court of Appeal was correct in ordering the record to be sent back to the Superior Court in order to allow the respondents to answer the *faits et articles*, for it is in accordance with the jurisprudence and the law (Article 225 Civil Code of Procedure Bas Canada). The circumstances and excuses set forth on the motion, the impossibility for the respondents to assemble their board, and above all, the fact that the answers were made and deposited in the prothonotary's office, at the time of its presentation,—implied certainly good faith on the part of the respondents.

Sir W. J. RITCHIE C.J.—I think the judgment of the Superior Court should be restored. I think the arbitration was quite regular and the award perfectly good and binding on the parties; that there is no object whatever to be gained by sending the case back to answer upon *faits et articles* and that there is nothing in the objection that the award does not mention the names of the owners of the ground expropriated. The names in the award are the same as those used by the railway company in their notice of expropriation and in the arbitration throughout, and as to the *considérant* :

Considérant qu'il y a aussi erreur dans le jugement final rendu le cinq décembre mil huit cent quatre-vingt qnatre, approuvant la sentence arbitrale, en autant que la dite sentence contient une description du terrain évalué, différente de celle du terrain dont l'appelante a demandé l'expropriation, et que cette différence dans cette description rend la sentence arbitrale incertaine quant au terrain exproprié

I think this view cannot prevail. This, in my opinion, is just a case where the maxim *falsa demonstratio non nocet* applies. There is adequate and sufficient definition with convenient certainty of what was intended on the application and award, that is to say, the words of the notice and award, exclusive of the *falsa demonstratio*, are sufficient of themselves to describe the property intended to be expropriated and which was valued by the arbitrators. As has been stated the characteristic of cases strictly within the above rule is this, that the description, so far as it is false, applies to no subject, and so far as it is true it applies to one subject only; and the court, in these cases, rejects no words but those which are shown to have no application to any subject.

Now in this case the words "Et portant le numero "un sur le plan du tracé du chemin de fer tel que "déposé suivant la loi" must be referred to for the purpose of determining the land the company sought to expropriate. Without these words it would be impossible to locate the lands to be expropriated.

The land valued by the arbitrators is described as

Une portion de terre de deux arpents et quarante perches en superficie, tel que maintenant jalonnée, et faisant partie du lot numero (2345) deux mille trois cent quarante cinq du cadastre pour la paroisse de St. Sauveur de Quebec, et portant le numéro un sur le plan du tracé de chemin de fer tel déposé suivant la loi.

And in the award the land is described as follows:

Un certain terrain contenant deux arpents et quarante cinq perches en superficie, borné au nord-ouest, au sud-est et à l'ouest par la dite association, et à l'est par les héritiers Tourangeau et faisant partie des lots numéros (2344 et 2345) deux mille trois cent quarante-quatre et deux mille trois cent quarante cinq du cadastre pour la dite paroisse de St. Sauveur, et portant le numéro un sur la plan du tracé du chemin de fer tel que déposé suivant la loi.

So that whether it was part of lot 2345 or part of lots 2344 & 2345, or these numbers be rejected altogether, the rest of the description specifies the land

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beyond all doubt as part of lot number one of the railway plan. It is therefore clear that the notice and the award refer precisely to the same parcel of 2 arpents & 40 perches of land and is the same land taken possession of by the defendants, viz; lot number one upon the plan of the *tracé* of the railroad, as deposited according to law and which they sought to expropriate. Under these circumstances there can be no doubt there was a good and sufficient description. The arbitrator of the company under oath says all the proceedings were regular and that he differed from the other arbitrators only as regards the amount. The appeal, in my opinion, should therefore be allowed.

STRONG J.—I have read the judgment which will be delivered by Mr. Justice Fournier and I fully concur in the reasons given by him for reversing the judgment appealed from.

The appeal should be allowed with costs.

FOURNIER J.—L'action des appelants demandait la confirmation d'une sentence arbitrale rendue par des arbitres nommés en vertu de l'acte consolidé des chemins de fer de Québec, 43-44 Vict., ch. 43, pour faire l'évaluation du terrain exproprié pour le passage du chemin de fer de la compagnie intimée. Celle-ci a plaidé la nullité de cette sentence, sans, cependant, indiquer par sa défense un seul moyen de nullité. Elle en a aussi attaqué le mérite en prétendant que le montant accordé excède la valeur réelle de la propriété et n'est pas justifié par la preuve. Quant à ce dernier moyen il est évident qu'en vertu des arts. 1353 et 1354 du code de procédure l'intimée n'avait aucun droit de remettre en question devant la Cour Supérieure le mérite de la contestation qui avait été soumise aux arbitres. Elle ne devait attaquer cette sentence que par des moyens de nullité pouvant l'affecter, ou des questions

de forme pouvant en empêcher l'exécution. Elle n'en a allégué ni prouvé aucun, et en conséquence la Cour Supérieure a renvoyé son plaidoyer, confirmé la dite sentence et condamné l'intimée à en payer le montant.

Ce jugement a été porté en appel à la Cour du Banc de la Reine, et là, pour la première fois, l'intimée a invoqué, pour attaquer la sentence en question, des moyens de nullité qu'elle n'avait pas plaidés.

Le premier est que la propriété requise par l'intimée et désignée dans l'avis qu'elle a donné n'est pas la même que celle décrite dans la sentence arbitrale. 2° Qu'il n'apparaît pas avoir été donné avis aux arbitres de leur séance du 28 août, à laquelle la dite sentence a été rendue. 3° Que les appelants n'ont pas d'existence légale comme compagnie.

La première et la deuxième de ces questions seules méritent une réponse ; car la cour du Banc de la Reine en a fait des considérants de son jugement, infirmant celui de la cour Supérieure. Quant à la troisième, la cour d'Appel n'ayant pas jugé à propos d'en faire mention, je ne crois pas devoir m'y arrêter. Les motifs qui ont fait le base de son jugement sont : 1° le refus de permettre à l'intimée de répondre aux interrogatoires sur faits et articles auxquels elle avait fait défaut de comparaître. 2° Le défaut d'identité de la propriété requise avec celle décrite dans la sentence arbitrale. 3° Le défaut des arbitres d'avoir fixé à leur première séance la date de la prononciation de leur sentence.

La plus importante de ces questions est celle concernant le refus de la cour Supérieure de permettre à l'intimée d'être relevée de son défaut sur faits et articles et d'offrir ses réponses. En général, il est assez facile dans une contestation sérieuse de se faire relever de ce défaut. L'article 225 du C. P. C. dit :—

The party who thus makes default may, however, answer the interrogatories afterwards, before the hearing of the case, but he must bear

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whatever costs are occasioned by his default.

L'art. 221 dit que les parties peuvent être interrogées en tout état de cause mais sans retardation du procès ou jugement.

En consultant le dossier on voit que l'intimée n'a guère attaché d'importance à sa contestation. L'action est entrée en cour le 24 mars 1884; l'intimée a été forcée de plaider le 16 avril, et la cause a été inscrite aux enquêtes *ex parte* pour le 26. Les appelants avaient obtenu une règle pour faits et articles rapportable ce jour-là, à laquelle l'intimée fit défaut. Le 23 juin les faits et articles sont pris et considérés comme avoués et confessés, *pro confessis*. L'enquête des appelants est close et celle de l'intimée fixée péremptoirement au 26 juin sans opposition de sa part. Ce jour là son enquête est déclarée close généralement sous la réserve du droit d'entendre deux témoins qui le sont plus tard. Ce n'est que le 7 juillet, plus de deux mois après l'entrée de l'action et après la clôture de l'enquête que l'intimée produit ses plaidoyers. Les parties soumettent la cause au juge le 8 juillet et le délibéré est déchargé le 9 sans qu'on sache pour quel motif. Le 2 septembre la cause est de nouveau inscrite pour audition finale au mérite pour le 17 du même mois. Le 16 l'intimée produit l'affidavit de T. E. Normand avec un avis de motion pour permission de répondre aux faits et articles. Le 19 cette motion est renvoyée avec dépens. On voit par les dates de la procédure que c'est plus de quatre mois et demi après l'enregistrement du défaut sur faits et articles que la demande d'en être relevée a été faite, et au moment où la cause était inscrite pour audition finale. Cette permission n'était évidemment demandée que dans le but gagner du temps. L'honorable juge a compris que dans des circonstances où l'intimée avait fait preuve de tant de négligence, il ne pouvait sans violer l'article 221 accorder cette demande. Cet

article déclare que l'interrogatoire sur faits et articles aura lieu sans retardation de cause. L'enquête étant close généralement, permettre alors de répondre aux interrogatoires, c'était priver les appelants du bénéfice de la preuve leur résultant du défaut de comparution et du jugement déclarant les interrogatoires comme avoués et confessés, et les obliger à refaire leur enquête. C'était évidemment retarder la cause, en violation de l'article 221. Indépendamment de cette objection insurmontable, il en existe encore plusieurs autres pour justifier le refus de l'honorable juge. D'abord cette permission de répondre après le défaut ne peut être accordée qu'avant l'audition de la cause, "*before the hearing of the case.*" La cause avait déjà été entendue lorsque la demande a été faite, et elle était au moment d'être entendue pour la deuxième fois. L'art. 225 ne donne pas la facilité de répondre à l'audition, mais avant, "*before the hearing*," il était trop tard pour faire cette demande qui, d'ailleurs, n'était pas faite conformément au dit article. En effet cet article impose à l'octroi de cette permission une condition absolue, c'est celle de payer les frais occasionnés par le défaut "*but he must bear the costs occasioned by his default*" Il aurait dû accompagner sa motion du montant de la différence de frais et honoraires entre l'état où en était alors la procédure, et celui où il aurait fallu la remettre pour continuer l'enquête. L'intimée ne s'étant pas conformée à cette condition, la motion ne devait pas être reçue. De plus l'excuse que le bureau de direction ne s'est réuni que le 4 septembre pour autoriser les réponses est insuffisante. Normand ne jure pas qu'il n'y a pas eu de réunion du bureau entre le 26 avril et 4 septembre, et d'ailleurs l'absence de réunion du bureau n'est pas une excuse acceptable, c'était le devoir des officiers de la compagnie d'en convoquer une spécialement pour cet objet s'il ne devait pas y en

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avoir pour d'autre affaire. Convaincu que le bénéfice du défaut doit rester acquis aux appelants, et qu'il en résulte une preuve complète de toutes les allegations de sa demande, je suis d'avis que ce motif seul serait suffisant pour faire infirmer le jugement de la Cour du Banc de la Reine.

Si bien fondé que soit le refus de permettre la production des réponses sur faits et articles, j'inclinerais probablement à les recevoir, si les deux autres considérants du jugement étaient bien fondés en fait, mais je regrette d'avoir à dire que je ne partage pas l'opinion de la cour du Banc de la Reine à cet égard. Je crois que, comme question de fait, l'identité de l'immeuble dont il s'agit, tel que décrit dans l'avis d'expropriation et dans la sentence arbitrale, est parfaitement établie. Il en est de même de la présence de l'intimée, ou plutôt de son arbitre, lorsque la sentence a été prononcée. L'objection à l'identité du terrain consiste dans le fait que l'avis d'expropriation ne fait mention que de partie du lot cadastral 2345, tandis que la sentence mentionne partie des lots 2344, 2345 du même cadastre. Toutes les propriétés dans la province sont cadastrées et désignées par numéros. C'est leur désignation officielle tant qu'elle n'est pas modifiée en vertu d'une loi. Dans ce cas-ci elle l'a été en vertu de l'acte des chemins de fer 43-44 Vict., ch. 43. En vertu de la section 8, lorsqu'une compagnie de chemin de fer veut exproprier des terrains pour le passage de son chemin, elle doit faire faire une carte ou plan du chemin de fer, son cours, des terrains qu'il doit traverser et qui devront être expropriés à cette fin; aussi, un livre de renvoi pour le chemin de fer qui contiendra :—

a. Une description générale des terrains ;

b. Les noms des propriétaires des terrains et occupants, en tant qu'ils pourront être constatés ; et

c. Tous les renseignements nécessaires pour bien

comprendre la carte.

Ces procédés doivent être examinés et certifiés par le Commissaire d'agriculture et des travaux publics.

Dans la carte préparée par les ingénieurs de la Cie., les lots ou partie de lots requis pour le passage du chemin de fer ont été désignés par des numéros particuliers. Celui des appelants est désigné par le n° 1 sur la carte du chemin de fer et il est désigné par le même n° dans l'avis et dans la sentence arbitrale, et c'est maintenant sa description légale, il ne peut être connu autrement et la référence aux n^{os} du cadastre dans l'avis n'était qu'une indication sans utilité et nullement obligatoire après l'approbation officielle et le dépôt du plan du chemin de fer. Dans l'avis et dans la sentence la description devenue la seule légale et officielle est donnée comme étant de deux arpents et 40 perches avec référence au plan du chemin de fer et en indiquant le n° de ce plan. L'identité est parfaite et l'erreur impossible. Si cette objection avait quelque fondement, l'intimée n'aurait-elle pas dû en prendre avantage par son plaidoyer et mettre les appelants en demeure de faire la preuve de cette identité, si elle n'était pas déjà suffisamment prouvée par l'avis et la sentence ainsi que par les autres documents en preuve? Je considère donc cette objection comme une pure technicité qui ne peut aucunement affecter la sentence ni en empêcher l'homologation.

Quant au défaut d'avis du jour où devait être prononcée la dite sentence arbitrale, la réponse est que la déclaration contient une allégation qui n'a pas été niée spécialement que cet avis a été donné et que la réunion des arbitres le 28 juin avait eu lieu en vertu d'un ajournement. Si ces faits n'étaient pas amplement établis par la preuve au dossier, ils le seraient dans tous les cas par l'absence de réponse aux faits et articles. Mais il y a plus que cela, le procès-verbal

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authentique de la réunion des arbitres, le 28 juin, rédigé par le notaire Blondeau, fait preuve de la réunion des trois arbitres. Cette réunion n'a pu avoir lieu qu'en vertu d'un ajournement que la loi déclare un avis suffisant (voir sec. 9, ss. 18). De plus la preuve de la présence de l'arbitre de l'intimée déjà faite par le procès-verbal, est encore confirmée par son propre témoignage dans lequel il déclare positivement y avoir été présent et n'avoir laissé la séance que parce qu'il différait d'opinion d'avec ses collègues. Voici ce qu'il dit à ce sujet :—

J'étais l'un des experts choisis pour faire l'arbitrage dont il est question en cette cause. Je n'ai pas concouru dans la sentence rendue. Nous avons examiné plusieurs témoins et dans mon opinion cette sentence n'est pas conforme à la preuve faite devant nous.

Dans ses transquestions il ajoute :—

C'était là mon opinion, mais j'étais seul de mon opinion; les deux autres arbitres, formant la majorité, ont concouru dans la sentence rendue après l'observation de toutes les formalités essentielles. J'ai reçu tous les avis nécessaires et toutes les procédures ont été régulières devant les arbitres. J'ai seulement refusé de signer parce que je considérais le montant adjugé exagéré et injuste. J'étais l'arbitre nommé par la défenderesse.

Ainsi, il est évident que le considérant fondé sur le défaut d'avis n'est pas fondé. Par tous ces motifs, je suis d'avis que le jugement de la Cour du Banc de la Reine doit être infirmé avec dépens, et celui de la cour Supérieure rétabli.

HENRY J.—This is an action to recover the amount of an award made by arbitrators in favor of the appellant for lands taken from him and others for the railway of the respondent company.

No objection to the appointment of the arbitrators, who were nominated by the parties, was made, but two objections were taken to the award.

One, that the arbitrators did not at their first meeting appoint a time for the final meeting to make their award. I will deal with this objection first. In the

first place it is not shown that they did not do so. The proof of that issue was on the respondent company and not having adduced the proof of the allegation we have no right to assume it was not done. The respondent company was represented at the final meeting by their own arbitrator who attended and took part with the two other arbitrators in respect to the subject matter of the reference and in the deliberations as to the award, which was made in his presence. The company having been present by their arbitrator are estopped from making the objection.

The provision in the statute upon which the respondent company relies to sustain the objection was made solely to limit the time for making the award, which by the proceedings was not otherwise done, and when the time for making the award is so limited and no award be made within the time so limited the power of the arbitrator ceases and any award subsequently made would not be binding; but if before an award should be made the parties interested should mutually extend the time in a proper manner, or the arbitrators should extend it, it would be binding. Sub-section 22 of section 9 provides "and if the same (the award) is not made on or before such day or some other to which the time for making it has been prolonged either by consent of the parties, or by resolution of the arbitrators, then the sum offered by the company, as aforesaid, shall be the compensation to be paid by them." I therefore think the objection on that ground must fail.

Another objection was made that the description of the lands in the award differs from that in the submission. Such an objection was not pleaded, and I am of opinion that to get any benefit from the contention it should have been. By the statute the award might have been invalidated if it did not clearly state th

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sum awarded, or did not describe clearly the property expropriated, but I think such a defence cannot be considered unless specially pleaded.

The Court of Appeal rested its judgment on two points:

1. That of variance in the description of the land between the notice of expropriation and the description in the award, and

2. That the respondent company was not present when the award was made.

I have already stated that, in my opinion, the respondent company was present by its arbitrator.

We have now to compare the description of the lands in the notice of expropriation with that in the award.

The land expropriated is described in the notice for that purpose as:

Une portion de terre de deux arpents et quarante perches en superficie, tel que maintenant jalonnée, et faisant partie du lot numéro (2345) deux mille trois cent quarante-cinq du cadastre pour la paroisse de St. Sauveur de Québec, et portant le numéro un sur le plan du tracé du chemin de fer tel que déposé suivant la loi.

The description in the award is:

Un certain terrain contenant deux arpents et quarante-cinq perches en superficie, borné au nord-ouest, au sud-est et à l'ouest par la dite association, et à l'est par les héritiers Tourangeau et faisant partie des lots numéros (2344 et 2345) deux mille trois cent quarante-quatre et deux mille trois cent quarante-cinq du cadastre pour la dite paroisse de St. Sauveur, et portant le numéro un sur le plan du tracé du chemin de fer tel que déposé suivant la loi.

There was no evidence produced to show that the land described in the award differs on the ground from that described in the notice of expropriation; there was none to show that the boundaries mentioned in the award are not exactly the same as cover the same two acres and forty perches staked off as stated in the notice —the quantity is the same in both. The plan in question is referred to in both, and with it both agree as

far as shown and which appears on reference to it. The only difference that can be discovered is that two numbers of the cadastre are stated in the award while but one is stated in the notice. That however is unimportant for if the plan, which the statute refers to as settling the size and shape of the lot expropriated, is referred to in both the notice and award, there can arise no doubt as to the land mentioned in the award being the same as that expropriated in quantity and shape, and the other parts of the description in the notice and award may be rejected as surplusage.

There is therefore no variance as contended for by the respondent company.

There was another point referred to in the argument which was that the plaintiffs could not sue jointly on the award, but I am of the opinion their action will lie. The land belonging to them was expropriated in one lot. The notice was directed to the appellant and others. It was served, we must assume, on all of them. They were treated, therefore, as owners jointly, or as tenants in common. There is no evidence that I can see that they did not so hold. The award declares that the sum awarded should be paid to the same parties and I think that without any plea or evidence adduced we must assume them to be entitled to recover. I am of opinion that the appeal should be allowed and the judgment of the Superior Court affirmed with costs.

TASCHEREAU J.—I would dismiss this appeal. The plaintiffs' action cannot stand upon the record as it now is. They are not the parties in favor of whom the award was made. They have not alleged nor proved that they are the association in favor of whom the award was made. Then there is no proof of Dr. Trudel's death, as alleged in the declaration. Even the *faits et articles* do not cover that fact. The 26th

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relates to a Dr. Dorion. The case should be remitted to the Superior Court, with permission to the defendant to answer the *faits et articles.*

GWYNNE J.—This is an action upon an award made by two of three arbitrators appointed under the provisions of the statute in that behalf to assess the value of a piece of land belonging to the plaintiffs and required by the defendants to be expropriated for the purposes of their railway. The declaration specially alleges the award and the performance of all matters necessary to be performed to give effect to it. Interrogatories sur *faits et articles* served upon the defendants were ordered to be taken *pro confessis* for default in answering them. The defendants having neglected to plead to the action were, by special consent of the plaintiffs, allowed to plead upon certain conditions which, however, never were fulfilled. They filed however pleas besides the general issue to the following effect:

1. That the said award had no legal validity and had been irregularly and illegally made. 2. That the said award is completely at variance with the proof advanced before the said arbitrators and

3rd. That the award made by the said arbitrators is much more extensive than the evidence and the value of the piece of land in question warranted.

A motion made by the defendants two months after the interrogatories sur *faits et articles* had been taken *pro confessis*, and without performance of the conditions upon which the plaintiffs had consented to the defendants pleading to the action, for leave to produce answers to the interrogatories having been refused by the court, the case was heard upon the merits. The defendants examined two witnesses which were the only witnesses

offered by them in support of their pleas. In the Superior Court judgment was rendered in favor of the plaintiffs upon the ground that the defendants wholly failed to support their pleas impeaching the award. The Court of Queen's Bench in appeal reversed this judgment upon the grounds that the motion of the defendants for leave to file answers to the interrogatories had been wrongly refused, and that in the judgment of the majority of the said Court of Appeal the piece of land mentioned in the award was different from the piece of land of which the defendants by their notice required the expropriation; and on the ground further that the arbitrators had not, at their first meeting, appointed a day on or before which their award should be made; wherefore the Court of Appeal set aside the award and ordered and adjudged that the parties should proceed anew to the appointment of arbitrators to determine the value of the piece of land which the defendants required to be expropriated. It is from this judgment that the present appeal is taken.

The appeal must in my opinion be allowed, for not only was there no evidence offered sufficient to invalidate the award, but the pleas themselves contained no allegation sufficient for that purpose. To a declaration averring as the declaration in this case does, the performance of all acts essential to give validity to the award, it is no plea to say that the award has been illegally and irregularly made, or that it has no legal validity. If any thing which was necessary to give the award validity had been omitted to be done, such matter should have been specially pleaded in a plea stating what was the particular matter which was omitted, the omission of which is relied upon as making the award null and void; for if the omission should appear to have been in respect of some matter of mere form, such an omission would not make the

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award null. As to the plea that the award is more extensive than the evidence and the value of the piece of land warranted that was a matter not open in the present action; and if it had been, the evidence offered by the defendants upon the point, only went to this that the defendants' arbitrator was of opinion that the amount awarded by the other two arbitrators was excessive. Then the grounds upon which the Court of Queen's Bench in appeal have annulled the award are, in my opinion, neither raised upon the record, nor, if they were, are they established by the evidence.

It is not pleaded that the piece of land in respect of which the award was made is a different piece of land in whole or in part from that of which the defendants required the expropriation, and assuming such an objection to be open on the record there was no evidence offered in support of it. The grounds upon which the Court of Appeal arrived at the conclusion that the piece of land in respect of which the award has been made is a piece of land different from that of which the defendants by their notice required the expropriation, are quite inadequate.

The piece of land required by the defendants is by their notice declared to be a piece of land containing precisely two arpents and 40 perches and designated as number one upon a plan of the railway deposited according to law and which piece of land the notice describes as forming part of a cadastral plan No. 2345 of the Parish of St-Sauveur de Quebec. The material part of this notice is that the defendants require the piece of land designated as No. 1 on the railway plan as deposited according to law. Now the award is made in respect of the same piece of land containing just two arpents and forty perches, and designated as number one on the plan of railroad deposited according to law, and further describing it as forming parts

of cadastral numbers 2344 and 2345 in the Parish of St-Sauveur de Quebec. Now whether the piece of land so required by the defendants, and which was designated on the plan upon which they were by law required to designate it as number one, was situated wholly on the piece of land known as the cadastral plan No. 2345, or partly upon that cadastral lot and partly upon an adjoining lot designated as cadastral lot No. 2344 in the Parish of St-Sauveur, makes no difference whatever, the plaintiffs being, as is admitted, owners of the whole piece required by the defendants and designated on their plan deposited according to law as No. 1. There can be no uncertainty for the defendants could only have taken possession of, and have only taken possession of, and are by the award required to pay for, the piece of land containing the two arpents and forty perches which they have designated on their plan deposited according to law as number one. Then again, there is no plea upon the record that the arbitrators had not at their first meeting appointed a day on or before which the award should be made nor, assuming such a plea, without more to offer a good defence to the action did the evidence warrant the conclusion that no such day had been appointed or an adjudication of nullity of the award for that reason; in fact no evidence was offered to establish the default suggested by the Court of Appeal, nor does the point appear to have been noticed in the Superior Court. If there had been such default and if it had been legally established, and if the effect of the fault was to nullify the award, then the judgment of the Court of Appeal was erroneous in ordering a new arbitration to be had, for in the event of the section, which directs the arbitrators at their first meeting to appoint a day on or before which their award shall be made, applying so as to nullify their award if made in contravention of

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of that section, then in such a case the act directs that the amount tendered by the defendants shall be the compensation to be paid by them.

The appeal should be allowed with costs and the judgment of the Superior Court restored.

Appeal allowed with costs (1).

Solicitors for appellants: *Blanchet, Amyot & Pelletier.*

Solicitors for respondent: *Drouin & Flynn.*

(1) Application for leave to appeal to the Privy Cuncil was refused.

THE CITY OF LONDON FIRE INSURANCE CO. (DEFENDANTS)..... } APPELLANTS;

1887 *Nov. 22, 23.

AND

JOHN SMITH (PLAINTIFF)..... .RESPONDENT.

1888 *Mar. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire Insurance—Description of property—Error in policy—Statutory condition—Just or reasonable variation—Waiver.

The agent of an insurance company filled in an application for insurance on a building built of boards and fixed the premium at the rate demanded on brick buildings, there being no tariff value for board buildings. The words "boards" was so badly written that it was difficult to decipher it, but the character of the building was designated on a diagram on the back of the application which the agents were instructed to mark with red in case of a brick, and black in case of a frame building. It this case it was in black. At the head office the word intended for boards was read "brick" and the policy issued as on a brick building. A loss having occurred the company, under a clause in the policy, caused an arbitration to be had, but afterwards refused to pay the amount awarded to the insured, claiming that by reason of the error in the policy there was no existing contract of insurance.

Held, affirming the judgment of the court below, that as there had been no misrepresentation by the assured, and no mutual mistake, the parties were *ad idem* and the contract was complete, and even if it were otherwise the company could not set up this defence after treating the contract as existing by the reference to arbitration under the policy.

By the 17th condition in ch. 162 R. S. O. a loss is not payable until thirty days after the proofs of loss are put in unless otherwise provided by statute or agreement of the parties.

Held, per Ritchie C. J. and Fournier, Henry and Gwynne JJ. that this is a privilege accorded to the company and while the time may be further limited by agreement it cannot be extended.

Per Strong J.—That a variation of the condition by inserting a clause in the policy extending the time to 60 days is not a variation by agreement of the parties, nor is such varied condition a just or reasonable one.

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

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APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) which sustained the plaintiff's verdict and refused a new trial.

This is an action by the plaintiff against the defendants, under the following circumstances:—

On the third day of July, 1883, the plaintiff made an application to the defendants through one Stafford, their local agent at Renfrew, to insure a building at Renfrew for $2,500. A policy subsequently issued upon this application, and on the 15th day of April, 1884, a fire occurred. Proofs of loss were sent by the company to Stafford, the local agent, on the 16th April. Stafford was away from home at the time, but returned on the 24th April. He handed the papers to Smith, the plaintiff, instructing him to fill them up and to leave them with Mr Eady, a local magistrate, for him, Stafford, to get and send to the office, which Stafford says he did on the 26th April, 1884. An action was brought on the 4th June, 1884. On the 24th June, the magistrate's certificate was demanded. On the 19th July, 1884, an arbitration having been had between the parties, an award was made fixing the loss at $1,700, and the value of the property at $2,500. The action came on for trial at the Pembroke fall assizes for 1884, and was tried before Mr. Justice Rose and a jury, when judgment was given for the plaintiff. The defendants thereupon moved before the Queen's Bench Divisional Court to set aside the judgment, which court unanimously dismissed the motion with costs. The defendants thereupon appealed to the Court of Appeal for Ontario, which court unanimously dismissed the appeal with costs, and the defendants thereupon appealed to this court.

The following facts will show the nature of the

(1) 14 Ont. App. R. 328. (2) 11 O. R. 38.

defence to this action: When the insurance was effected the company's usual printed form of application was filled up by the agent from the answers of the plaintiff and from his knowledge of the premises derived from personal inspection and examination; the property was described as a building two stories high, &c., built of "burds" covered with shingles, situate and being No. on the west side of Raglan St., Block 2, No. 79, Goad's plan. It was a wooden building made of boards six inches wide laid flat one on top of another, and the word "burds" which is very distinctly thus written in the application, was written and intended by the agent for the word boards and seems to be a mere misspelling of that word.

On the back of the application is a diagram of the building, and the printed direction to the agent at the top of the blank space left for the diagram requires that brick or stone buildings shall be shown in red and frame buildings in black. The diagram shows the buildings in black.

The local agent fixed the rate for the premium at 1½ p. c. His authority to fix a rate was not denied. This was the company's rate for a brick building. He said on the trial that he considered a solid board building a safer risk than a brick building, and would not rate it any higher. The tariff provided no special rate for a board building.

The policy issued by the company insures "the property hereinafter described, and more fully described in the requisition for insurance, that is to say," on the building only of a two story brick building, situate, &c., the word written "burds" in the application being read at the head office as "brick."

It was contended by the defendants on the motion to set aside the verdict that the parties were never *ad idem*, and consequently no valid contract existed be-

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tween them. The courts below held that, assuming this was a valid defence, the company could not claim the benefit of it as, under a clause in the policy, they caused the plaintiff's claim to be submitted to arbitration, and by so doing recognized the existence of a contract between them.

Another objection to the verdict was that the evidence showed the insured premises to have been occupied, at the time of effecting the insurance, by objectionable characters who had been threatened with violence by the villagers and were finally driven out of the place, the company contending that the insurance was effected under an apprehension of an incendiary fire on the premises. As to this it was shown that the premises were vacant for some time before the fire, and the jury found that the risk was less when vacant than when occupied by the above mentioned tenants.

A further objection was that the action was brought too soon. A statutory condition in the policy was that the insurance should not be payable until thirty days after due proofs unless otherwise provided by statute or the agreement of the parties. In this case the policy provided that the loss should not be payable until sixty days after completion of claim which the court below held was an unreasonable condition.

Robinson Q.C. for the appellants.

As to weight of evidence see *Campbell* v. *Hill* (1); *Sutherland* v. *Black* (2).

The weight of evidence may make the judgment perverse. *Greet* v. *Citizens Ins. Co.* (3).

The company had a right to notice when the premises became vacant which was a change material to the risk. (Ritchie C.J. refers to *Foy* v. *Etna Ins.*

(1) 23 U. C. C. P. 473. (2) 10 U. C. Q. B. 515; 11 U. C. Q. B. 243.
(3) 5 Ont. App. R. 596.

Co. (1) where the contrary was held.)

Then as to the condition that the insurance shall not be payable for thirty days after proof of loss. The judge at the trial held this condition to be unreasonable, but it is submitted that the company can make what conditions they choose. The statutory condition is that it shall not be payable for thirty days unless otherwise provided by statute or agreement. That clearly authorizes an extension of the time to sixty days

This special condition has never been the subject of judicial decision, but there are a number of cases in which the reasonable nature of conditions has been discussed. *Ballagh* v. *The Royal Mutual Ins. Co.* (2); and the judgment of Moss C.J., in the same case on appeal (3); *May* v. *The Standard Ins. Co.* (4); *Butler* v. *The Standard* (5); *Parsons* v. *Queen's Ins. Co.* (6); *Ulrich* v. *National Ins. Co.* (7); *Morrow* v. *Waterloo County Mut. Ins. Co.* (8).

McCarthy Q.C. for the respondents.

There is no misdirection complained of and no error in law in the judgment on the trial. All that is complained of is in the discretion of the judge and jury with which discretion an appellate court, and especially a second appellate court, will not interfere. *Metropolitan Ry. Co.* v. *Wright* (9); *Allen* v. *Quebec Warehouse Co.* (10); *Eureka Woollen Mills Co.* v. *Moss* (11); and *Bickford* v. *Howard* (12); *Black* v *Walker* (13).

As to the condition extending the time of payment to sixty days that can be placed on no higher ground

(1) 3 All. (N.B.) 29.
(2) 44 U. C. Q. B. 70.
(3) 5 Ont. App. R. 87.
(4) 5 Ont. App. R. 605.
(5) 4 Ont. App. R. 391.
(6) 2 O. R. 45.
(7) 42 U. C. Q. B. 141.
(8) 39 U. C. Q. B. 441.
(9) 11 App. Cas. 152.
(10) 12 App. Cas. 101.
(11) 11 Can. S. C. R. 91.
(12) Cassels's Dig. 163.
(13) Cassels's Dig. 461.

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than that of its reasonable or unreasonable character. That is dealt with in the case of *Queen's Ins. Co.* v. *Parsons* (1). In the same case in the Privy Council (2) it was held that this was a question to be decided at the trial.

The latest case on the question is *The Great Western Ry. Co.* v. *McCarthy* (3) decided on a statutory condition similar to that in question here. I would also refer to *Sands* v. *Standard Ins. Co.* (4); *May* v. *The Standard Ins. Co.* (5).

As to the authority of the agent to bind the company see *Insurance Co.* v. *Wilkinson* (6).

Sir W. J. RITCHIE C. J.—The first and really the substantial objection proceeds entirely upon this, that the company took the word spelt "burds" in the application to mean bricks and issued the policy describing the subject matter of insurance as a brick building. In the language of the statement of defence they say that if the plaintiff intended to insure the building as a wooden one, no contract was made by reason of a want of mutual understanding between the parties as to the subject matter of the agreement.

Stafford, the agent who filled in the application says:

I say that that is meant for boards, it is not very plain; it is my own handwriting.

The plaintiff swears it was—

Never meant for a brick building in the application. The agent filled in the diagram on the back of the application.

I have examined the original application and am unable to make "brick" out of the word in dispute, and am of opinion it must have been intended for boards, spelt "burds." But if there is any difficulty in deciphering the word I think the intention of the parties and the identification and character of the pro-

(1) 2 O. R. 56.
(2) 7 App. Cas. 96.
(3) 12 App. Cas. 218
(4) 26 Gr. 113; 27 Gr. 167.
(5) 5 Ont. App. R. 605.
(6) 13 Wall. 222.

perty to be insured is clearly established beyond all reasonable question by the diagram in black on the application, which clearly indicated to the company that the house was not a brick building. That such were the view and intention of both the agent of the insurers and the insured is conclusively shown by the certificate of the agent indorsed on the application and his evidence that he had inspected the property personally and therefore knew that the building to be insured was constructed of boards and not of brick, and therefore, acting honestly (and neither his *bona fides* nor that of the assured has been assailed) he could not have transmitted the premium on a brick building when he knew from personal examination it was a board one. He also certifies that the property was steadily profitable and fully recommended the risk; that the premium was paid and the company was now in the risk. What risk but the one he had personally inspected, which, unquestionably, was a house built with boards?

Under these circumstances had the company honestly considered that the word written was intended for brick and not for boards, in view of the discrepancy between the word and the diagram surely they should have placed the matter beyond all doubt and not have retained the premium of the assured and allowed him to remain under the impression that his property was covered by the policy transmitted to him. In addition to which the defendants clearly recognized the policy as an existing contract of insurance by calling for further proofs of loss and the magistrates' certificate mentioned in condition 13, after they had notice of the error in the description; a thing, as Mr. Justice Osler justly remarks, they clearly had no right to do except upon the assumption that there was an existing contract.

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I think the jury were right in finding that the vacating of the premises by the Bromleys was not material to the risk in the view of increasing it and that, on the contrary, that the risk was less after the Bromleys had left and that there was no incendiary danger threatened at the time of the application, and such finding should not be disturbed.

The 17th statutory condition is :—

The loss shall not be payable until thirty days after completion of the proofs of loss unless otherwise provided by statute or the agreement of the parties.

With reference to this condition I am inclined to adopt the construction put upon it by Mr. Justice Burton, namely,

That it is a privilge given by law to the companies and the statute does not seem to contemplate any further extension but simply that the company shall have that delay, unless, under a statute or by their own agreement, that period is shortened.

STRONG J.—I concur generally in the conclusion of the judgment of Mr. Justice Gwynne, and also in the reasons given therefor with the exception of those relating to the defence based on the variation of the 17th condition. That variation I hold not to have been warranted by the agreement of the parties and not to be just and reasonable, agreeing in this respect with the judgments of Mr. Justice Osler and Mr. Justice Rose.

FOURNIER J.—I entirely agree with the learned Chief Justice in both questions raised in this appeal, on the one as to the description of the property insured as well as that relating to the interpretation of the 17th statutory condition. I think the proper construction of that condition is, that the parties can agree to a shorter period than thirty days but not to a longer. The variation here is, that the loss shall not be payable until sixty days after completion of the claim which, I think, is not allowable under the statute.

HENRY J.—I am in favor of dismissing this appeal. I think it is clear what the respondent intended to insure, and the mistake in the policy was due to the company, who cannot be allowed to retain the premiums and, at the same time, claim the benefit of the mistake.

GWYNNE J.—Upon the question as to the property insured being described in the policy as a "brick" building when in fact it was built of boards laid across each other and plastered at both ends, I do not think we can now interfere. The policy may I think be read as

insuring against loss and damage by fire the property more fully described in the requisition for this insurance No. 7270, which forms part and parcel of this policy and hereafter described, that is to say, as the building only of a two story brick building, &c.,

We must, I think, read the finding of the jury to be that in the requisition the building was described as being built of boards.

The company's agent, whose duty it was to fix the rate, inspected the building before accepting the risk, and was aware of the precise nature of the structure which he considered to be safer than brick as against loss or damage by fire, and he fixed the rate according to the company's rate for a brick building. The description of the building in the policy as being of brick appears to have been the mistake of the company themselves, and in a matter which, in their opinion, was not material, judging by their acts after they had full knowledge that the building was not of brick, for they instituted a reference to arbitration under the 16th statutory condition to determine the amount of the plaintiff's loss in respect of the property insured. This reference, although not interfering with the defendant's right to dispute the plaintiff's right to recover under the policy (having regard to its conditions) is based however upon the fact of the existence of the

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policy as a contract between the insurers and the insured, and was a recognition by the defendants of the then existence of the policy. The institution by the defendants of such reference after their attention had been specially drawn to the fact that the building was not brick appears to be quite inconsistent with their present contention, namely, that there never was any contract in existence by reason of the defendants and the plaintiff never having been *ad idem*. Neither do I think, in view of the finding of the jury upon the other questions submitted to them to support which findings I cannot say that there was not sufficient evidence if believed, that we can disregard these findings and order a new trial.

The only remaining question is that arising upon the construction of the 17th statutory condition and the variation thereof endorsed upon the policy.

It may perhaps seem singular that so much difficulty should have arisen in construing these statutory conditions when we reflect that they were framed by a committee of the learned judges of Ontario specially commissioned for the purpose.

This 17th condition is not one affecting the validity of the policy or the right of the insured to indemnity for his loss, it is a condition affecting the insured's remedy only and it prescribes merely the time when his loss shall be exigible. This being its nature, its more natural place would seem, I think, to have been in the body of the act rather than as a condition endorsed upon the policy.

If the condition be one which is subject to variation under the provision in the act relating to variations I must say that I can see nothing which would justify a court in adjudging a variation from 30 days to 60 days from the completion of the proofs of loss before the loss should be paid to be unjust and unreasonable. I cannot concur in the opinion that every variation

which makes a condition more onerous upon the insured than is the statutory condition is of necessity unjust and unreasonable—that, in fact, the terms "more onerous and burthensome" are equivalent to "unjust and unreasonable." I cannot bring my mind to believe that either the committee of judges who framed these conditions or the legislature which gave to them the force of law were of opinion that the conditions thus made statutory reached the utmost limit of exaction that was just and reasonable. As framed they were no doubt deemed to be just and reasonable, but if they were intended to express the utmost limit of exaction that was just and reasonable the provision as to variations could not have been framed as it is, nor, indeed, would any provision at all as to variations have been necessary. It is as exactions that the variations are authorized. Now an exaction is something forced upon the insured against his will, at the sole will of the insurer if the policy is accepted. If then only such variations were intended to be authorized as should be less onerous and burdensome upon the insured than the statutory condition in the same matter, neither the committee of judges nor the legislature would have spoken of such variations as "exactions" and it would have been quite absurd that the legislature should have clogged such variations with the condition that to acquire validity

they should be held by the judge or court before whom a question is tried relating thereto, to be just and reasonable to be exacted by the company.

The statutory conditions being themselves framed as being conditions just and reasonable to be exacted a variation which should make any such conditions to be less onerous, must of necessity be just and reasonable, and it is only in the case of a variation exacting something more onerous upon the insured than the statutory condition in the same matter enacts, that any

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question could arise calling for the decision of a judge or court to determine whether the variation is a just and reasonable one to be exacted by the company.

I do not see that any rigid rule can be laid down applicable to all cases as a test adequate to determine whether a variation of any of the statutory conditions is just and reasonable or not. The question can only arise when to an action on the policy the defence is rested upon the breach by the insured of some or one of the statutory conditions as varied, which defence is met by the contention set up by the plaintiff that the condition as varied is not just and reasonable, and that therefore the statutory condition without the variation (which is suggested to be unjust and unreasonable) should apply. Such affirmative proceeding from the insured to avoid the effect of the variation would seem to require, in accordance with the ordinary rule, that he should suggest in support of his contention some reason to the court or judge called upon to determine the question. Every case must, as it appears to me, depend upon its own circumstances and the sound sense of those who are called upon to determine the question, and no rule can be laid down applicable to all cases. In the present case the question does not, as it appears to me, arise, for the language of this 17th statutory condition is peculiar and seems to me to exclude this condition from the general provisions as to variations in conditions. The condition is:—

The loss shall not be payable until thirty days after completion of the proofs of loss unless otherwise provided by the statute or agreement of the parties.

What is meant by the words "unless otherwise provided by statute" it is difficult to see but with this we are not at present concerned; but the latter words, "or agreement of the parties," seem to me to point to an actual, positive agreement of the parties and not to a variation exacted by the company—as to which the

provision of the statute is that the court or judge before whom the question arises is to determine whether the variation be just and reasonable. I agree with Mr. Justice Burton that the condition critically examined is that the loss shall not be payable until thirty days after completion of the proofs of loss unless a shorter period is agreed upon by the parties. It shall not be payable *before* the expiration of thirty days from completion of the proofs of loss, unless otherwise provided by agreement of the parties—that is to say unless the parties agree that it shall be ; the language of the condition is not that the loss shall be payable upon and after the expiration of thirty days from the completion of the proofs of loss unless otherwise provided by agreement of the parties—the object is merely to postpone the insured's remedy for thirty days after completion by him of his proofs of loss ; that such a length of time shall elapse after completion of his proofs of loss before he can bring his action unless the parties shall provide otherwise, that is to say shall agree that such a length of time shall not elapse after completion of his proofs of loss before he can bring his action. This being the literal construction of the 17th condition I think we should so read it to prevent the plaintiff's right of action being, as it would now be, wholly barred by the provision of the 22nd statutory condition which provides that

> Every suit, action or proceeding against the company for the recovery of any claim under or by virtue of the policy shall be absolutely barred unless commenced within the term of one year next after the loss or damage occurs.

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

Appeal dismissed with costs.

Solicitors for appellants: *Morphy & Millar.*

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

1887
*May 5.
*June 22.

HUGH BRADY (PETITIONER-PLAINTIFF) ..... } APPELLANT;

AND

MICHAEL STEWART, *et al.*, (DEFENDANTS) ..... } RESPONDENT.

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

Litigious rights, sale of—Arts. 1582–1583–1584, § 4 *C. C.* (*P. Q.*)

B. became holder of 40 shares upon transfers from D. & al, in the capital stock of the St. Gabriel Mutual Building Society. At the time of the transfers the shares in question had been declared forfeited for non-payment of dues. Subsequently by a Superior Court judgment rendered in a suit of one C., other shares, which had been confiscated for similar reasons, were declared to be valid and to have been illegally forfeited. Thereupon B. by a petition for writ of *mandamus* asked that he be recognized as a member of the society and be paid the amount of dividends already declared in favor of and paid to other shareholders. B.'s action was met, amongst other pleas, by one, setting forth: that B. had acquired under the transfers in question, litigious rights and that, by law, he was only entitled to recover from the respondents the amount he had actually paid for the same, together with legal interest thereon and his cost of transfers.

Held, affirming the judgment of the court below, Fournier and Henry JJ. dissenting, that at the time of the purchase of said shares, B. was a buyer of litigious rights within the provisions of Art. 1583 C. C., and under Art. 1582 could only recover from the liquidators the price paid by him with interest thereon.

Also, that the exception in Art. 1584 § 4 of C. C. only applies to the particular demand in litigation which has been confirmed by a judgment of a court, or which having been made clear by evidence is ready for judgment.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, Appeal side (1) affirming the judgment of the Superior Court, maintaining a plea of litigious rights.

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

(1) M. L. R. 2 Q. B. 272.

The appellant sued the respondents, the liquidators of the St. Gabriel Mutual Building Society, claiming a *mandamus* to compel them to acknowledge him as a shareholder in the society, and to collocate him for dividends on 40 shares, he held under transfers, on equal terms with other members. The principal plea set up by respondents was that appellant was a buyer of litigious rights and under Art. 1582 of the Civil Code, could only recover the price paid, with interest thereon.

The material facts of the case are as follows: Hugh Brady, the appellant, purchased from George Dalrymple, Samuel McFee, Alexander Coultry and William Haddlesley, all members of the St. Gabriel Mutual Building Society, their books or shares in the latter. At the time of this purchase, the books belonging to these members had been confiscated and declared forfeited for non-payment of dues. Dalrymple and the other shareholders (appellant's vendors had been notified of such forfeiture, and had acquiesced therein, until the society went into liquidation.

Subsequent to the society going into liquidation, the appellant, not a member of the said Society, procured from the shareholders above mentioned, transfers of their respective books or shares for a consideration, in most of the cases, of twenty five cents on the dollar of the amount each had paid into the society; and in one case, as the evidence discloses, in consideration of the sum of $15 dollars, another further sum being payable in the event of the appellant being successful in his proposed lawsuits against the respondents for the recovery of the whole amount of the said books or shares.

Subsequent to the acquisition of these books or shares by the appellant, a test case, on behalf of the shareholders, whose books had been forfeited but not transferred, was institnted against the respondents by

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one Rev. Mr. Charbonneau, whose shares had been so forfeited; and the Court of Queen's Bench, in appeal, held that the forfeiture in question, not having been accompanied by all the formalities required by law, was insufficient and illegal. It was subsequent to this judgment that the appellant instituted his action, in which were rendered the judgments now appealed from.

D herty for the appellant.

The question is whether art 1583 of the Civil Code applies. At this time when the present appellant acquired these shares were they litigious rights? Refers to report of the case in 2 M. L. R. 272, and Troplong Vente (1); Marcar dé Droit Civil (2).

Curran Q.C. for the respondent cited Pothier, Contrat de Vente (3); 4th Report of Codifiers (4) on arts. 99-100 now arts. 1552, 1583 C. C. (4).

Sir W. J. RITCHIE C. J.—There can be no doubt that at the time this purchase was made the shares had whether rightly or wrongly been declared confiscated and forfeited by the company for non payment of dues, and that the company at the time of the transfer were insisting on the validity of such confiscation and forfeiture and did not withdraw such contention until the decision of a suit by another party, whose shares had been similarly confiscated and forfeited, whereby such confiscation and forfeiture was declared invalid, and there can be no doubt that it was well understood by all parties that an action for the recovery of the rights claimed would be necessary, in fact the purchase was made on speculation by appellant with full knowledge that the company considered the forfeiture effective and the claim disputed, and in the belief that before anything could be realized litigation would be necessary.

(1) Vol. 2 par. 987 p. 486.
(2) Vol. 6 on arts. 1699-1670 N.S.
(3) Nos. 583, 590.
(4) Vol. 2 p. 70.

The evidence of the appellant himself is conclusive to my mind, and as to the litigious character of the right sold establishes the case of the respondent.

On his examination as to the purchase of these shares he says :—

I bought them at very reduced prices. I paid Alex. Coultry $40.50 for his shares ; I paid Sam. McKee $51.25 for his shares ; I paid to Wm. Haddlesley $19.25, and I paid to Geo. Dalrymple $15 for his shares, with the understanding that if I succeeded in getting the whole amount paid on his shares I would give him a further sum of $15. Thus he only paid $126 for shares which, according to his claim, would give him $727.75 for dividends already declared, as well as establish his rights to the future dividends.

McKee says :—

I understood that a lawsuit would have to be instituted before we could get the amount, and I sold Brady the books at his own risk ; and Wm. Haddlesley being asked whether he sold a lawsuit, answered, " I understood it that way, certainly."

As William Haddlesley says :—

I am one of the former shareholders of the St. Gabriel Mutual Building Society. I was in possession of the book, no one hundred and forty-six (146) which I have now before me, and on which was paid seventy-seven dollars ($77.00). After paying that amount I stopped payments, and after stopping payments the socie'y considered me confiscated. I had received several notices that I was in arrears, and after a while I was informed that my book was considered confiscated.

It was after liquidation that I sold my book to the best of my belief, before selling my book I remember at least once that I went to the plaintiff's Brady's house at a meeting of the forfeited shareholders. We had the meeting for the purpose of clubbing together to fight the directors or liquidators, and to try and receive the amount of our books. Our intention that is the intention of the meeting and of myself, one of them, was to take legal proceedings against the liquidators. Some time after I sold my book to the plaintiff, Hugh Brady, for the amount stated in transfer, of twenty-five per cent. on the amount paid.

Q. So that in fact at the time you sold your book, you sold a law suit ?

A. I understood it that way certainly, but I was clear, of the whole thing ; that was what I understood.

Q. You could not get the amount without a suit before you sold to Mr. Brady ?

A. No.

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Ritchie C.J.

And I do not think that a subsequent decision in a suit by another party that a similar confiscation had been declared of no effect, can avail the appellant under the 4th exception of art. 1584, C. C., viz., that the provisions of art. 1582 do not apply "when "the judgment of a court has been rendered affirming "the right or when it has been made clear by evidence "and is ready for judgment" because I agree with the majority of the Court of Appeal as appears by the judgment of that court as delivered by Mr. Justice Cross," that it only applies to the particular demand in litigation, having been confirmed by the judgment of a court," or when it has been made clear by evidence and is ready for judgment.

I think that the judgment of the Court of Appeal should be affirmed.

STRONG J.—I am of the same opinion for the reasons given in the judgment of the Court of Queen's Bench.

FOURNIER J.:—Il est admis que l'appelaut est devenu membre de la "Société mutuelle de construction de St. Gabriel," en vertu de divers transports qui lui ont été faits par George Dalrymple, William Haddlesey, Alexander Coultry et Samuel McPhee, des actions que chacun d'eux possédait dans le fonds social de la dite société. Par résolution du 19 juillet 1879, cette société constituée en vertu du ch. 69 des Statuts du Bas Canada s'est règulièrement mise en liquidation conformément aux dispositions de l'acte. Les intimés liquidateurs ayant omis le nom de l'appelant de la liste des actionnaires, celui-ci s'est adressé à la Cour Supérieure pour se faire reconnaître comme propriétaire de quarante actions dans la dite société et faire ordonner aux liquidateurs de le porter sur la feuille de dividendes des deniers provenant de la réalisation des biens de la dite société pour la somme de $727.75 pour sa part des dividendes déjà déclarés.

Les intimés ont produit en réponse à cette demande plusieurs plaidoyers qui ont été ou rejetés ou abandonnés, à l'exception de celui par lequel ils ont allégué que par les divers transports qui avaient été faits à l'appelant il est devenu acquéreur de droits litigieux, et qu'en vertu de la loi il ne pouvait réclamer d'eux que le montant qu'il avait actuellement payé pour acquérir ses actions, avec l'intérêt et les frais de transports. La seule question qui s'élève en cette cause est de savoir si les divers transports acceptés par l'appelant peuvent être considérés comme une cession de droits litigieux donnant aux intimés le privilège de réclamer le bénéfice du retrait accordé par l'art. 1582, C. C. La nature des créances dont l'appelant est devenu le cessionnaire n'a certainement rien de litigeux, il s'agit d'actions pour des montants déterminés, régulièrement souscrites, dans le fonds social d'une société régulièrement constituée en vertu de la loi. Les souscripteurs originaires en ont fait cession à l'appelant pour valable considération et sa position, comme les représentant en vertu des transports qui lui ont été faits, est admise. Peut-on signaler dans tous ces faits qui constituent l'appelant créancier des actions en question, un seul point litigieux ou contestable, il est évident que non. Un droit est litigieux, dit l'article 1583 C. C., lorsqu'il est incertain, disputé ou disputable par le débiteur. Cet article n'a évidemment aucune application aux faits concernant la cession dont il s'agit. Il est impossible de considérer qu'il y ait la moindre incertitude au sujet de l'existence de la créance ; aucune contestation n'étant soulevée dans la cause au sujet du droit lui-même, on ne peut pas non plus dire qu'il est disputé, et enfin il est clair qu'il n'est pas disputable en conséquence de l'évidente certitude de son existence. Il ne doit pas suffire à un débiteur de dire sans aucune apparence de raison qu'il dispute ou conteste sa dette pour rendre celle-ci disputable. Cela ne peut dépendre

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de la volonté seule du débiteur. La loi indique elle-même qu'il faut pour cela un motif, elle signale en premier lieu l'incertitude du droit. Ce défaut doit provenir de la nature de la créance elle-même. L'article, en ajoutant que le droit doit être *disputé* ou *disputable*, signifie sans doute que ce sera pour des motifs attaquant la créance elle-même, comme si par exemple le débiteur niait la considération, alléguant fraude, etc., ou enfin pour toutes autres raisons qui pourraient faire perdre à la créance cédée son caractère de certitude.

Les intimés n'ont absolument rien de ce genre à opposer à la créance cédée. Leur prétention qu'elle est litigieuse n'est que le résultat d'une erreur palpable de leur part. A l'époque du transport en question il se trouvait un certain nombre d'actionnaires qui s'étaient laissés tomber en arrérage. Sous l'impression que dans le cas de défaut de paiement après un certain délai les règlements de la société prononçaient *de plano* contre les actionnaires en retard la peine de confiscation de leurs actions, et croyant que cette peine avait été prononcée parce que leurs noms n'apparaissaient pas dans la liste des actionnaires, les liquidateurs avaient d'abord décidé de les traiter comme ayant perdu leurs droits. Mais les actionnaires se trouvant dans ce cas, se liguèrent pour porter dans leur intérêt commun cette question devant les tribunaux. Le cas du Rév. M. Charbonneau en tous points semblable à celui de l'appelent, fut choisi pour décider la question. Il fut établi qu'il n'y avait eu aucune confiscation de prononcée ni par la loi ni par les directeurs de la société, des actions sur lesquelles il y avait des arrérages à payer. L'honorable juge Mathieu qui a prononcé le jugement dans cette cause le 16 août 1883, résume ainsi les faits dans quelques-uns de ses considérants : —

Attendu que le requérant a répondu que ses actions n'avaient pas été confisquées et qu'il n'avait jamais cessé d'être membre de la dite société ; que la section 4 des règlements de la dite société pourvoit

à l'envoi d'avis aux membres arriérés, mais ne déclare pas la confiscation et n'autorise pas le secrétaire à faire cette confiscation; que l'expiration du délai, après l'envoi de l'avis ne constitue pas la confiscation; mais qu'il fallait que cette confiscation fût déclarée par la société, et que les directeurs mêmes n'avaient pas le droit de confisquer les actions: que les directeurs n'ont jamais passé de résolution confisquant les actions du requérant; que les rapports des directeurs n'ont jamais mentionné que les actions du requérant avait été confisquées, et que cette mention eût-elle été faite, cela n'aurait eu aucun effet sur la question en litige; que la prétendue confiscation alléguée par les défendeurs est illégale:

Considérant que par la section 15 de l'acte concernant les sociétés de construction, chapitre 69 des statuts refondus du Bas-Canada, il est décrété que chaque telle société pourra confisquer et déclarer confisquées en faveur de la société les actions de tout membre qui pourra négliger de payer, ou qui doit des arrérages sur le nombre des versements qui pourra être fixé par aucune stipulation ou reglement;

Considérant qu'il paraît évident par les dispositions de cette section que chaque cas particulier doit être soumis à la société qui doit donner une décision et déclarer confisquées les actions du membre s'il se trouve dans les cas mentionnés dans les règlements où il aura encouru la confiscation;

Considérant qu'il n'est pas prouvé que la dite société se soit jamais prononcée sur la confiscation des actions du requérant, et que le contraire appert par la preuve, et qu'il est constant qu'il n'y a jamais eu telle confiscation;

Considérant que la prétention des défendeurs que la confiscation a eu lieu de plein droit par l'avis donné et par l'opération de la dite section 4 des dits règlements est mal fondée; que cette section 4 des dits règlements n'a pas la portée que les défendeurs lui donnent, et que si cette disposition des dits règlements avait ce sens, il s'en suivrait qu'elle serait illégale comme contraire aux dispositions de la dite section 15 du dit statut, et qu'il est décrété par le dit statut que les règlements ne pourront pas être contraires à ses dispositions;

Considérant que la confiscation des actions du dit requérant ne pouvait être prononcée sans que le requérant eût été mis légalement et régulièrement en demeure; qu'il n'est pas prouvé qu'il ait eu mise en demeure régulièrement et que la confiscation même n'est pas prouvée; que le nom du requérant n'a pas été rayé de la liste des membres avant la mise en liquidation de la dite société; que la requête du dit requérant est bien fondée et que les défenses des dits défendeurs sont mal fondées;

On voit par les motifs donnés par l'hon. juge qu'il n'y avait aucune raison de fait ni de droit pouvant

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justifier la confiscation des actions du Rév. M. Charbonneau. Les faits de cette cause étant absolument les mêmes, il faut en conclure également qu'il n'y a pas eu et qu'il ne pouvait pas avoir lieu à la confiscation des actions de l'appelant. Comme c'est uniquement sur ce motif de confiscation que les intimés se sont appuyés pour prétendre que la cession faite à l'appelant en était une de droits litigieux, il est évident que cette prétention est absolument sans fondement et conséquemment que les droits cédés n'étant pas disputables par la société intimée, il n'y avait pas lieu d'invoquer le bénéfice de l'art. 1582.

Malgré la prétention contraire des intimés, les appelants et plusieurs de ses cédants savaient que les droits en question n'étaient pas litigieux; quelques-uns d'eux il est vrai comprenaient qu'en conséquence de l'erreur des intimés, au sujet de la confiscation, une action pourrait être nécessaire pour rétablir la vérité sur ce point.

Les intimés ont cité dans leur factum une partie du témoignage de l'appelant pour prouver qu'à sa connaissance les droits en question étaient litigieux. Cette citation de leur factum lui a fait dire d'une manière absolue :

Of course, it is because these shares were disputed that I bought them at reduced price.

Il y a erreur dans la citation par l'omission des mots suivants : "*in the way they were.*" Ce qu'il a réellement dit d'après le dossier, c'est ce qui suit :—

Of course, it is because these shares were disputed in the way they were that I bought them at reduced price.

La différence dans le sens de ces deux phrases est évidente. D'après celle du factum on lui fait dire d'une manière absolue qu'il a acheté à prix réduit parce que les droits étaient disputés; tandis que dans son témoignage, en ajoutant; "*in the way they were,*" il disait en réalité qu'il a acheté à prix réduit par suite de la prétention erronée qu'il y avait eu confiscation.

D'ailleurs, dans une autre partie de son témoignage, il dit positivement qu'il savait que cette prétention était erronée.

Je ne crois pas qu'il y ait eu d'incertitude au sujet des droits cédés ; mais en supposant qu'il y en eut eue à une certaine époque dans l'esprit de quelques actionnaires, il n'y en avait certainement plus lorsque l'appelant a intenté son action. Alors celle du Rév. M. Charbonneau qui n'avait été prise que pour faire décider la légalité de la prétendue confiscation était jugée et avait donnée gain à ceux qui avaient soutenu le contraire. L'appelant, à la vérité, n'étant pas nominalement partie dans cette cause, ne peut invoquer ce jugement comme devant avoir force de chose jugée, mais comme l'un des intéressés qui ont pris part aux délibérations des autres actionnaires, dont le résultat a été d'adopter le moyen d'une poursuite au nom du Rév. M. Charbonneau pour faire décider par les cours la question de confiscation, il peut certainement invoquer ces circonstances pour démontrer qu'à sa connaissance personnelle, si son droit avait pu être litigieux, il avait, au moment de son action, cessé de l'être ; qu'étant alors devenu certain par l'effet de cette décision, il pouvait invoquer avec avantage l'exemption créée par le paragraphe 4 de l'article 1584.

Par ces motifs, ainsi que pour les raisons exposées par l'honorable juge Ramsay dans ses notes sur cette cause, je suis d'avis que l'appel devrait être alloué avec dépens.

HENRY J.—Concurred with FOURNIER J.

TASCHEREAU J.—The appeal should be dismissed for the reasons mentioned in the judgment of the Superior Court

Appeal dismissed with costs.

Solicitors for appellant : *Doherty & Doherty.*

Solicitors for respondents : *Curran & Grenier.*

1887
*Mar. 1.
*June 20.

W. A. REBURN (DEFENDANT)..... APPELLANT;

AND

LA CORPORATION DE LA PAROISSE DE STE. ANNE DU BOUT DE L'ISLE (PLAINTIFFS).. RESPONDENT.

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

Municipal Council—Powers of—Improvement of roads—Procès-verbal homologated—Effect of Arts. 100-461, 705 *M. C. (P. Q.)—Appeal R. S. C. ch.* 135 *sec.* 29 (*b*).

Where a *procès-verbal* of a Municipal Council directing improvements to be made on a portion of a road situated within the municipality has been duly homologated, it cannot subsequently be set aside by an incidental procedure, but, like a by-law it can only be attacked by a direct procedure as indicated in the Municipal Code (P. Q.) arts. 100-461.

Parent v. *Corporation St. Sauveur*, 2 Q. L. R. 258, approved.

By a *procès-verbal* made by the Municipal Council of Ste. Anne du Bout de L'Isle a portion of the road fronting the land of one R. was ordered to be improved by raising and widening it. Upon R.'s refusal to do the work the Council had it performed, paid $200 for it and subsequently sued R. for the said $200.

The Court of Queen's Bench, P. Q., on appeal affirmed a judgment in favor of the Municipal Council for that amount. On appeal to the Supreme Court it was

Held, Per Fournier, Henry and Gwynne J.J. (Strong and Taschereau J.J. dissenting, and Ritchie C.J. expressing no opinion on the point) that although the matter in controversy did not amount to $2,000, yet, as it related to a charge on the appellant's land whereby his rights in future might be bound, the case was appealable. R. S. C. ch. 135 sec. 29 (b).

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

This was an action brought by the respondents against the appellant to recover the sum of $200 paid by the

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

respondents to one W. A. Reburn, for raising and widening the road fronting appellant's property situated within the municipality of the Parish of Ste. Anne du Bout de l'Isle in virtue of a *procès-verbal* duly homologated by the said Municipal Council the 20th August, 1877.

To this action the appellant pleaded *inter alia* the nullity of the *procès-verbal* for irregularities and that the road ordered by the *procès-verbal* is a macadamized road and county councils alone have jurisdiction to order them.

The *procès-verbal* made by the council contained the following directions:—

"3. That the said road be raised with stones to-wit, with large stones at first and then with small broken stones, not more than two inches square so as to make an even surface six inches higher in the middle than at the sides.

"4. That the said road be made 26 feet wide on its whole length.

"That the work to raise and widen the said front road of W. A. Reburn be done by the interested parties as follows:

"The said W. A. Reburn shall do alone at his own expense the whole work necessary to raise and widen his front road according to the paragraphs 3 and 4 of said *procès-verbal*, upon a length of 666 feet and 8 inches beginning at the north-east line of his property and the remainder to be done by all the proprietors of land situate between the boundary of the Parish to and including the property of Joseph Petit dit Lamarche."

The appellant appealed from the municipal council to the county council and the *procès-verbal* was upheld.

Laflamme Q.C. for appellant.

This case depends on a single question of municipal law, namely: What was the authority of the council to alter the road under the circumstances of the case?

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The road is a highway established from the beginning of the colony on the Island of Montreal. To the parish is assigned certain authority with respect to roads and bridges, and it has control of county roads, that is, roads between two local municipalities.

In this case the road which has been opened since the establishment of the colony had never been altered; the municipality of the parish of St. Anne ordered a *procès verbal* to alter it. This *procès-verbal* remained in abeyance during the month of May 1877, and then the appellant petitioned the council to be relieved from the work.

Two things were asked for by the petition, the alteration of the road and relief from the work. The former was granted and the road ordered to be raised; the prayer for relief was refused.

The council appointed a superintendent of the work who made a report; this report was confirmed by the council and Reburn was ordered to macadamize the road in front of his property. He considered this beyond the authority of the council; that they could impose such a duty on all the land owners but not on a particular one and disobeyed the order; whereupon the council ordered the work to be sold. It was bought by a son of the appellant who, on an action to recover the amount, pleaded want of authority. The court held that the order should have been appealed from and that the father was estopped by the act of his son in purchasing.

But there was an appeal from the order. The appellant represented to the council that it was illegal. See 8 L. N. 67.

It is submitted that this is not local, but county, work and could only be ordered by the county. Arts. 754 and 757 Mun. Code. Arts. 533-534.

Bisaillon for the respondents.

It is submitted that there is no right of appeal in

this case. No future rights are involved; the appellant is merely called upon to pay $200 in consequence of not performing work ordered by the council. If he does the work that is an end of the matter. See *Le Curé de la St. Vierge* v. *Bank of Toronto* (1).

Then as to the merits. The appellant himself petitioned the County Council to have an action taken about this road and under Art 794 a superintendent was appointed and his *procès verbal* was duly homologated.

The raising and widening of a road is not macadamising it and therefore the local council had jurisdiction over this matter under article 802 Mun. Code.

It is contended that this is a county road, but the appellant has admitted the jurisdiction of the local council, by his petition. Art. 755 Mun. Code says what is a county road.

(Taschereau J.—We have no evidence to decide whether it is a county road or not.)

(Strong J.—The judgment in this case would not be *res judicata* as to whether or not it is a county road.

This point was not raised in the proceedings.

(Mr. Laflamme.—It was never denied that it was a county road.)

In his plea the appellant says it was a question to be decided by the county council, We claim it is not a road dividing two municipalities but only a connecting road.

(Taschereau J.—Is it held now that because a road connects two municipalities it is a county road ?)

That point was raised for the first time in the court of appeal and all the judges were of opinion that a connecting road is not a county road. See Harrison's Municipal Manual (Ont.) (2).

It is claimed that a road can only be macadamised by a majority of the owners interested but, as I have

(1) 12 Can. S. C. R. 25. (2) 4 Ed. p. 50.

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said, it is not a macadamised road. When the council only raise or widen a road there is no necessity for such majority.

He may be exempted but in this case he was not exempted by the *procès verbal*, which is final and will not now be disturbed.

Cites *Parent* v. *Corporation of St. Sauveur* (1).

Laflamme Q.C. in reply. The appeal should be allowed on two grounds. First, rights in future are affected. It also brings up the question of the municipal by-law. The *procès-verbal* when homologated by the council becomes a by-law. In our province there must be an action to quash, there is no such thing as a rule for that purpose.

Art. 802 Municipal Code must be read in conjunction with art. 533.

Sir W. J. RITCHIE C. J.—Whether this case is appealable or not I think it should be dismissed on the merits. The appellant has not taken the proper steps within the proper time to discuss the validity of the *procès-verbal* and other proceedings in the case. The appellant appears to have appealed in this case and his appeal was dismissed and the *procès-verbal* appears to have been homologated.

It is not competent to attack the validity of the *procès-verbal* by an incidental procedure, but, like a by-law, it should be attacked by a direct proceeding as indicated by the code municipal which puts the *procès-verbal* on the same footing as by-laws in matters of appeal and procedure. See *Parent* v. *Corporation of St. Sauveur* (2), and Art. 100 M. C. (P.Q).

STRONG J.—I am of opinion that this appeal should be quashed for want of jurisdiction.

FOURNIER J.—La sec. 29 de l'acte 49 Vict., ch. 135, réglant la juridiction d'appel à cette cour pour la

(1) 2 Q. L. R. 253. (2) 2 Q. L. R. 258.

province de Québec, met au rang des causes appelables entre autres celles désignées, dans la s.s. *b* par les expressions suivantes :—

Relates.... ....., or to any title to lands or tenements, annual rents or such like matters or things where the rights in future might be bound.

La charge ou servitude imposée à l'appelant par le by-law dont il se plaint est de sa nature permanente, et a nécessairement l'effet d'affecter les droits futurs de l'appelant dans la libre jouissance de sa propriété. Pour cette raison je suis d'avis que la cause est appelable.

L'appelant a été poursuivi par l'intimée pour la somme de $200.00, valeur des travaux de réparation à son chemin de front, ordonnés par un procès-verbal dument homologué le 20 août 1887. Ces travaux consistaient principalement dans ceux décrits aux articles 3 et 4 du dit procès-verbal, ainsi qu'il suit :—

3o. Que le dit chemin soit haussé avec de la pierre, savoir, avec de la grosse pierre d'abord, ensuite de la petite pierre cassée, de la grosseur de pas plus de deux pouces carrés, de manière à faire une surface unie élevée de six pouces de plus au milieu qu'aux bords ;

4o. Que le dit chemin soit élargi partout où il sera nécessaire pour que le dit chemin soit au moins de vingt-six pieds de largeur de route.

L'appelant a offert plusieurs moyens de défense à cette action, entre autres la suffisance du chemin alors existant pour les besoins du public, que si ces travaux ordonnés étaient nécessaires ils auraient dus être mis à la charge de la municipalité, qu'il n'y avait pas eu de demande pour ces changements par la majorité des intéressés; irrégularité de tous les procédés et surtout de ceux concernant l'adjudication des travaux ordonnés, et enfin comme principal moyen de défense " que le dit chemin ordonné par le proces-verbal, est un chemin macadamisé lequel n'est pas dans les attributions d'un conseil de municipalité, mais ne peut être ordonné que par le conseil de comté ou approuvé par lui."

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Dans une réplique l'intimée a allégué que si le dit procès-verbal était irrégulier et illégal, le défendeur devait appeler en temps et lieu de la décision du conseil de la paroisse Ste. Anne du Bout de l'Isle homologuant le dit procès-verbal."

La cour supérieure dont le jugement a été confirmé par celui de la cour du Banc de la Reine a maintenu la prétention alléguée dans la réplique et prononcé jugement contre l'appelant pour la somme demandée.

Le règlement ayant été homologué le 20 août 1877, et l'action signifiée à l'appelant seulement le 21 février 1881, il avait laissé depuis longtemps expirer le délai pendant lequel le code municipal lui permettait d'attaquer le dit procès-verbal. En effet si l'appelant voulait contester la validité du procès-verbal qu'il veut maintenant faire déclarer nul, il aurait dû procéder tel que permis par le ch. 7 du code Municipal-Cassation des règlements municipaux. L'article 705 porte :

Néanmoins toute taxe, contribution, pénalité ou obligation imposée par un règlement sujet à être cassé, et échue avant la cassation du règlement, est exigible nonobstant la cassation de tel règlement, si la requête sur laquelle a été prononcée la cassation n'a pas été présentée à la cour dans les trois mois après l'entrée en vigueur du règlement.

Quant aux procès verbaux, rôles, etc., l'article 100 décrète ce qui suit :—

Tout procès-verbal, rôle, résolution ou autre ordonnance du conseil municipal, peuvent être cassés par la cour de Magistrat ou par la cour de Circuit du comté ou du district, pour cause d'illegalité, de la même manière et dans le même délai et avec les mêmes effets qu'un règlement municipal, et sont sujets à l'application des articles 461 et 705.

Dans la cause de *Simard* v. *la Corp. du comté de Montmorency* (1), il a été décidé par la cour du Banc de la Reine, que lorsqu' aucune procédure en cassation d'un procès-verbal ou acte de répartition n'a été faite, par une partie intéressée sous les articles 100,

461 et 705 C. M., dans le délai de trois mois après les avis requis par la loi et relatifs à ces documents, leur légalité ne pourra être mise en question incidemment, sur un bref de prohibition, et ne peut l'être que par la procédure indiquée par le code (7 juin 1879). Une décision du même genre (15 oct. 1873) avait déjà été rendue sur cette question par l'hon. juge en chef Meredith qui avait jugé dans la cause de *Parent* v. *la Corporation de St. Sauveur* "qu'on ne peut attaquer la validité d'un règlement municipal au moyen d'une procédure incidente" (1).

Je reconnais cette doctrine comme correcte et applicable à tout règlement qui fait voir à sa face qu'il émane d'une autorité compétente quels que soient d'ailleurs les vices de forme dont il peut être entaché, et les intérêts qui peuvent être blessés. Le règlement ou procès-verbal en question était évidemment du ressort du conseil municipal de l'intimée, et l'appelant pour faire redresser les irrégularités et les griefs dont il se plaint aurait dû en appeler dans le délai de trois mois prescrit par le code municipal. Cette réponse s'applique également aux résolutions du conseil approuvant les changements recommandés comme à toute cette partie de son plaidoyer dans laquelle il se plaint d'irrégularités dans les procédés et d'injustice en le soumettant à des charges qu'il considère excessives, ce n'est que sur un appel qu'il aurait pu faire réformer le procès-verbal suivant ses prétentions.

S'il était vrai, comme l'allègue l'appelant, que le procès-verbal a de fait ordonné de macadamiser le chemin en question, je ne crois pas que l'on pût dans ce cas opposer à l'appelant les décisions ci-dessus citées. Le conseil de paroisse n'ayant pas le pouvoir de faire adopter le système de macadamiser les chemins que le conseil de comté peut seul ordonner, il serait évident

(1) 2 Q. L. R. p. 258.

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qu'il aurait agi sans aucune compétence et qu'aucun tribunal ne pourrait donner d'effet quelconque à un tel règlement.

Mais ici, l'intimée a-t-elle substitué le système de macadamiser les chemins à celui ordinairement suivi pour leur confection? Je ne le pense pas. Il ne s'agit que d'une réparation à un bout de chemin dont le sol est marécageux et qu'il s'agissait de rendre plus solide. On avait d'abord pensé à changer l'endroit du chemin, mais après bien des considérations pour et contre, exposées dans le procès-verbal du surintendant spécial, le conseil en a conclu qu'il valait mieux conserver l'ancien chemin existant depuis plus d'un siècle et qui avait coûté beaucoup de travail aux intéressés, te ordonné en conséquence l'exhaussement du chemin sur la terre de l'appelant, de la manière indiquée ci-dessus. Cette réparation ainsi ordonnée ne me paraît pas être l'exercice du droit d'introduire le système du macadam pour la confection des chemins. C'est tout simplement suivant moi l'exercice de la discrétion que peut et doit exercer le conseil dans la construction et la réparation des chemins sous sa juridiction. Il est vrai que ce travail est onéreux, et qu'à l'endroit où passe ce chemin sur la terre de l'appelant sa longueur en est doublée en conséquence d'un détour qu'il y a à faire. Le code municipal a prévu ce cas et ordonne par l'art. 783.

qu'une moitié de ces travaux sera mise à la charge des autres intéressés. Cette diminution à laquelle l'appelant avait droit lui a été accordée. Le travail de réparation tel qu'il a été ordonné me paraît être dans les limites du pouvoir du conseil de l'intimée. Quant aux irrégularités dont se plaint l'appelant au sujet de l'adjudication des travaux, il n'a pas établi qu'elle lui avait porté le moindre préjudice. Il en a eu connaissance, un avis lui avait été donné. D'après la preuve la nature des travaux était parfaitement connu de tous

et avait été clairement expliquée par Amable Vallée, l'inspecteur des chemins. D'ailleurs, comme l'entrepreneur était son fils, l'appelant lui-même s'est intéressé à les faire approuver par le conseil municipal et a même fait préparer par un avocat la résolution adoptée par le conseil municipal acceptant l'ouvrage en question. Appel renvoyé avec dépens.

HENRY J.—I am inclined to the opinion that this case was appealable, but on the merits I think the appeal should be dismissed. It was an imposition to oblige the appellant to macadamize the road in front of his property, and expense to which his neighbors were not subjected, but having allowed the money to be expended and the time for objection in the way prescribed to elapse, he cannot I think be permitted in this action to do so.

TASCHEREAU J.—I am of opinion to quash for want of jurisdiction, with the costs as if quashed on motion.

GWYNNE J.—Was of opinion that the case was appealable, but that on the merits the appeal should be dismissed concurring with Fournier J.

Appeal dismissed with costs.

Solicitors for appellant: *Laflamme, Huntington, Laflamme & Richard.*

Solicitors for respondent: *Lacoste, Globensky, Bisaillon & Brousseau.*

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*March 4.
*May 2.

DAVID RATTRAY.....APPELLANT;

AND

V. W. LARUE, *èsqualité*.....RESPONDENT.

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

Substitution—Minors—Tutor ad hoc—Intervention—Status—Arts. 269-945 *C. C.*

In an action to account and for removal from trusteeship instituted by the party who had appointed the defendant trustee and curator to a substitution created by marriage contract, a tutor *ad hoc* to the minor children and *appelés* to the substitution has not sufficient quality to intervene in said suit to represent the minors.

Art. 269 C. C. provides for the only case where a tutor *ad hoc* can be appointed to minors (1), Strong J. dissenting.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal side) (2) reversing the judgment of the Superior Court which maintained a demurrer to an intervention filed by the respondent as tutor *ad hoc* to minor children in a suit pending between William Herring, in his quality of curator to the institute (*grevé*) and the appellant as trustee appointed to administer the property of the substitution.

The facts and pleadings of the case are fully stated in the report of the case in the court below (2) and in the judgment of Mr. Justice Fournier hereinafter given.

Irvine Q.C. for the appellants.

First, as to the legality of the appointment of Larue.

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

(1) Art. 269 C. C. is as follows: "If, during the tutorship, a minor happen to have any interest to discuss judicially with his tutor, he is, for such case, given a tutor *ad hoc*, whose powers extend only to the matters to be discussed."

(2) 12 Q. L. R. 258.

There was no property in which the minors were interested and no occasion for the appointment of a tutor. The father was alive and was guardian of their persons; if it was necessary to have a tutor a regular tutor should have been appointed.

Larue has no legal status as a tutor *ad hoc*. Such tutor can only be appointed for a special purpose. The law provides that the affairs of a minor, and the care of his person, shall be in a tutor appointed in a particular way, and when the tutor cannot act, in the interest of the minor a tutor *ad hoc* is appointed. Art. 269 C.C. provides for the only case in which a tutor *ad hoc* can be appointed. Here, no tutor was appointed prior to the appointment of the tutor *ad hoc*

Secondly—Even if the tutor was properly appointed he has no right to intervene. The act allows any person likely to be affected by the result of a case to be represented. In this case the decision would not bind the children, nor affect them in any way. This intevention is not to protect the children but to protect Herring, which is not what is intended by the act.

Stuart follows: The law of Lower Canada in regard to tutors is different from the modern law of France. Under our law the parents of minors have no authority, as such, over the latters' property. Under the modern law of France, during the time of the marriage the father has the legal domination over the property of the minors. Upon the death of one of the parents the survivor is the legal tutor of the children. If the survivor dies one of the ascendants is the tutor by law; if he refuse, or if there be no ascendants, a tutor is assigned.

The following statutes and authorities were cited: Arts. 269 and 304 C. C.; art. 14 C. C. P.; *St. Norbert d'Arthabaska* v. *Champoux* (1); *Brousseau* v. *Bedard* (2); *Vallée* v. *Leroux* (3).

(1) 1 Q. L. R. 376. (2) 3 R. L. 447.
(3) 14 R. L. 553.

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Bossé Q.C. for the respondent.

The appellant has waived the objection as to the right of intervention and cannot raise it now. Arts. 154-8466 C. C.

Then as to the appointment of Larue there is nothing in the French law corresponding to art. 269 of our code. See Marchant Code de la Minorité (1) ; Rolland de Villargues (2).

It has never been necessary to appoint a tutor first when the necessity for appointing a tutor *ad hoc* exists. Art. 269 does not contradict this. Arts. 225 to 346 show that it is specially provided for. There is no change in the old law. The spirit of the law is that whenever a party cannot speak for himself a tutor *ad hoc* is appointed to represent his interest.

We have to deal with a demurrer and have not the reasons why a tutor was not appointed; unless there is a plain infringment of the law the court will not infere.

The appointment is good on its face and should stand. Dalloz (3).

Lacoste Q.C. follows and refers art. 921 C.C.P., Proudhon Traité sur l'Etat des Personnes (4) ; Laurent (5). Art. 956 C. C.

STRONG J.—I consider the point involved in the appeal one of those matters of procedure with which this court ought not to interfere. I am of opinion that the judgment of the Court of Queen's Bench should be affirmed.

The judgment of the majority of the court was delivered by

FOURNIER J.—Le litige entre les parties en cette cause s'est élevé sur l'intervention produite par l'intimé

(1) P. 585.
(2) Vol. 9 Vo. Tutelle Nos. 303 et seq. and 310-314.
(3) Verbo Minorité No. 253.
(4) Vol. 2 p. 381.
(5) Vol 4 No. 419.

LaRue, en qualité de tuteur *ad hoc*, dans une action intentée par William Herring en sa qualité de curateur à l'interdiction pour cause de prodigalité, de Dame Isabelle Abbott Young, épouse de Beverly R. Eppes, demandant la destitution de l'appelant Rattray de sa position de fidéicommissaire (*trustee*) des propriétés substituées par Madame Eppes en faveur de ses enfants.

La substitution dont il s'agit en cette cause a été établie par Madame Eppes en vertu de son contrat de mariage avec M. Eppes, avec réserve d'usufruit en leur faveur. Henry Talbot Walcot et l'appelant, nommés fidéicommissaires pour l'administration des biens substitués, acceptèrent cette charge dont, plus tard, Talbot Walcot se fit relever régulièrement. Le seul en office aujourd'hui est l'appelant qui est encore en possession des biens substitués.

Herring en sa qualité de curateur à Madame Eppes a demandé la destitution de l'appelant, parce que ce dernier aurait pendant plusieurs années négligé de payer la rente viagère créée par le contrat de mariage en faveur de la mère de Madame Eppes, pour n'avoir pas place pour le bénéfice de la substitution les capitaux qu'il avait retirés, parce qu'il était devenu insolvable et refusait de rendre compte. Il concluait à la destitution de l'appelant de ses fonctions de fidéicommissaire et demandait un compte final de son administration.

En réponse à cette demande l'appelant produisit un compte faisant voir qu'il avait payé ce qu'il avait reçu, et que dans ces paiements se trouvait une partie du capital substitué en faveur des enfants de Madame Eppes, qu'il avait payé sur demande spéciale de Madame Eppes et de son mari pour acquitter leurs dettes. Ce plaidoyer est demeuré jusqu'ici sans réponse. Se fondant sur le fait qu'une partie des capitaux avait été retirée, un conseil de famille fut convoqué à la réqui-

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sition de Herring. Ce conseil recommanda la nomination d'un tuteur *ad hoc* chargé d'intervenir dans la cause de Herring, demandant la destitution de Rattray et de prendre dans l'intérêt des mineurs appelés à cette substitution des conclusions semblables à celles de Herring.

L'appelant plaida par défense au fonds en droit à l'intervention de W. E. Larue, présent intimé, qui avait été élu tuteur *ad hoc*, et lui niant le droit d'invoquer les moyens qu'il a allégués et le droit de prendre les conclusions prises par son intervention.

La défense en droit fut maintenue et l'action renvoyée par l'honorable juge en chef Stuart. Sur appel, le jugement fut infirmé par la cour du Banc de la Reine à la majorité de trois juges contre deux—faisant une égalité d'opinions en sens inverse dans les deux cours. C'est le jugement qui est maintenant soumis à la revision de cette cour.

Parmi les questions importantes discutées par les savants conseils des parties, tant dans leurs plaidoiries orales que dans leurs factums, il en est une qui les prime toutes et dont la solution doit rendre inutile l'examen des autres. C'est celle de savoir si l'intervenant nommé tuteur *ad hoc* à des mineurs qui n'avaient pas encore de tuteur, possède une qualité légale lui donnant le droit de représenter des mineurs qui n'ont pas de tuteur.

Quelles sont les fonctions du tuteur *ad hoc*, et quand y a-t-il lieu d'en faire la nomination? L'article 269 C.C. dit:

> Si pendant la tutelle il arrive que le mineur ait des intérêts à discuter en justice avec son tuteur, on lui donne, pour ce cas, un tuteur *ad hoc*, dont les pouvoirs s'étendent seulement aux objets à discuter.

D'après cet article il est évident qu'il ne peut y avoir de tuteur *ad hoc* lorsque les mineurs n'ont pas encore de tuteur avec lequel ils puissent avoir des intérêts à

discuter en justice. Si l'on prévoyait que ceux dont il s'agit pouvaient avoir des intérêts à protéger en justice ou autrement, c'est par la nomination d'un tuteur ayant l'administration de leurs personnes et de leurs biens, qu'il aurait fallu commencer. On ne pouvait pas plus, dans le cas présent que dans aucun autre se dispenser de procéder régulièrement, suivant les dispositions du code civil et du code de procédure. La tutelle aurait dû être déférée au père, ou à son défaut pour des motifs légitimes, au parent le plus proche. Pour justifier cette omission, l'intimé argue des intérêts du père en qualité de grevé de substitution, comme étant contraire à ceux de ses enfants qui sont les appelés à cette substitution. Ce motif n'étant pas suffisant pour exclure le père de la tutelle qui lui appartenait de droit, et dont l'exclusion ne pouvait avoir lieu que pour raisons graves,comportant presque toujours contre la des conduite du père un blâme sévère que l'on devait éviter de lui infliger inutilement. L'existence d'intérêts contradictoires entre le grevé et les appelés à une substitution pouvait bien être un excellent motif d'adopter le procédé voulu par le code civil pour la protection des mineurs intéressés, mais ne justifiait nullement la nomination d'un tuteur *ad hoc* que le code n'indique pas comme le procédé à suivre dans le cas qui nous occupe. L'intimé s'est évidemment trompé sur la nature du procédé qu'il devait adopter. Dans ces circonstances, ce n'était pas un tuteur *ad hoc* qu'il fallait nommer, mais bien d'abord un tuteur aux personnes et biens et, ensuite, pour l'exécution de la substitution, un curateur à la substitution comme on verra ci-après par le statut de Québec, 38 Vict. ch. 13. La question de la légalité de la tutelle *ad hoc*, lorsqu'il n'y a pas encore de tutelle aux personnes et biens n'est pas nouvelle. Elle a été soulevée dans la cause de la *Corp. de St. Norbert d'Arthabaska* v. *Champoux*, rapportée au

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1er vol. des L. R. Québec (1) et décidée par la cour de Révision, composée de Sir William C. Meredith, alors juge en chef, et des honorables juges Casault et Tessier. Ce dernier dans ses notes sur cette cause se fait la question suivante :

Notre code de procédure et notre code civil admettent-ils la tutelle *ad hoc* dans ce cas ci ?

Et il y répond comme suit :

L'article 1278 du C.P.C. ne parle du tuteur *ad hoc* que lorsqu'il y a déjà un tuteur général pour contrôler l'intérêt de celui-ci.

L'article 269 C.C. pourvoit au même cas.

D'après ces principes, la tutelle *ad hoc* déférée au mineur est certainement annulable.

L'honorable juge Casault fait au même sujet l'observation suivante :—

Mais la tutelle *ad hoc* n'est qu'une exception au droit commun, que le code nous permet d'employer seulement dans le cas où les intérêts du mineur sont en conflit avec ceux de son tuteur.

L'honorable juge Cross qui avec l'honorable juge Tessier différait de la majorité de la cour du Banc de la Reine dans cette cause, après avoir cité l'article 269 C. C., dit :—

It is therefore manifest that there is no room for a tutor *ad hoc* for minors who have no tutor.

Sir Andrew Stuart, juge en chef, qui a rendu le jugement en cour Supérieure, dit aussi en parlant de l'article 269 :—

Providing for the only case when a tutor *ad hoc* can be appointed to minors and establishes the limits of the powers conferred by said appointment.

En 1871, l'honorable juge J. T. Taschereau, ci-devant membre de cette cour avait également jugé dans la cause de *Brousseau* v. *Bédard* (2) :—

Qu'un tuteur *ad hoc*, ne peut intenter une action pour un mineur qui n'a pas de tuteur.

Comme on le voit, il y a une grande majorité des opinions exprimées, jusqu'ici, par les juges sur la question en débat, en faveur de la négative, contre l'affir-

(1) 1 Q. L. R. 376. (2) 3 Rev. Lég. p. 447.

mative soutenue par les trois juges de la cour du Banc de la Reine qui ont prononcé le jugement. L'opinion des premiers étant fondée sur l'art. 269 C. C. qui ne me semble pas laisser de doute à cet égard, j'adopte leur manière de voir.

Pour confirmer ce que j'ai dit plus haut au sujet de l'erreur commise par l'intimé dans le choix du procédé qu'il avait adopté pour la protection des appelés, il suffit de référer à l'art. 945 C. C. C., tel qu'amendé. Il est vrai qu'en premier lieu cet article n'avait pourvu à la nomination d'un curateur à la substitution que pour le cas où tous les appelés n'étaient pas nés, omettant ceux qui étaient nés, mais cette omission a été réparée par l'amendement qui décrète que ;

Tous les appelés, nés et à naître, sont représentés en tous inventaires et partages par un curateur à la substitution nommé en la manière établie pour la nomination des tuteurs. Ce curateur à la substitution veille aux intérêts des appelés en tous tels inventaires et partages, et les représente dans tous les cas auxquels son intervention est requise ou peut avoir lieu.

D'après cet article, ainsi amendé, il était clairement du devoir de ceux qui voulaient protéger les intérêts des appelés, de prendre ce moyen de les faire représenter. Le curateur n'aurait pas eu, comme le tuteur *ad hoc* des fonctions se limitant à surveiller la contestation en cette cause et se terminant avec elle ; mais il aurait eu la surveillance générale des intérêts des appelés, assisté aux inventaires et partages et aurait pu aussi les représenter dans le présent procès ; tandis que le tuteur *ad hoc* n'a aucun de ces pouvoirs. L'article 946 oblige le grevé à procéder dans les trois mois à l'inventaire des biens substitués et à la prisée des effets mobiliers. Au défaut du grevé de faire procéder à cet inventaire, les appelés, leurs tuteurs ou curateurs, et le tuteur à la substitution, sont tenus de faire procéder à cet inventaire. Le code a, comme on le voit, amplement pourvu à la protection

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des intérêts des appelés par la nomination d'un curateur à la substitution, dont les fonctions sont clairement définies, et qu'aucune loi n'autorise un tuteur *ad hoc* à exercer. La tutelle *ad hoc* n'était donc pas le mode à adopter, mais bien la nomination d'un curateur à la substitution.

L'honorable juge Taschereau m'a remis une liste d'autorités sur lesquelles il se fonde pour arriver à la même conclusion que moi et je me fais un plaisir de les ajouter à mes notes, viz:

Le défaut de qualité peut être opposé en tout état de cause, même en appel. *Re Gaulon* (1); *Re Lombard* (2); *Re Fabrique de Vico* (3); *Re Meysson* (4); *Re Richault* (5); *Re Grandier* (6); Bioche Procédure Vo. Exception (7).

Authorities as to costs: Bioche, Proc. vo. dépens (8); Boitard (9); Boncenne (10); Merlin vo. dépens (11); Merlin vo. Bénéfice d'invent (12); Pigeau (13); *St. Jacques* vo. *Parent* (14); Pothier, Des personnes et choses (15); Henrys (16).

Par tous ces motifs, je suis d'avis que l'appel doit être admis.

Appeal allowed with costs against the respondent personally.

Solicitors for appellant: *Caron, Pentland & Stuart.*

Solicitor for respondent: *J. G. Bossé.*

(1) S. V. 33, 1, 478.
(2) S. V. 36, 2, 485.
(3) S. V. 43, 1, 218.
(4) S. V. 58, 2, 397.
(5) S. V. 69, 1, 242,
(6) S. V. 80, 1, 342.
(7) No. 189.
(8) Nos. 64, 123, 128, 136, 136 et seq.
(9) 1 Vol. No. 286.
(10) 2 Vol. p. 583.
(11) Par. VIII.
(12) Par. XIV.
(13) 1 Vol. 418.
(14) 2 Rev. Lég. 95.
(15) P. 616.
(16) P. 438 2nd ed. in fine.

JAS. B. MACKINNON (PETITIONER).....APPELLANT;

AND

ALPHONSE KEROACK (PLAINTIFF).....RESPONDENT.

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*May 9, 10.

*Dec. 14.

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

Capias—Petition to be discharged—Judgment on—Appealable under sec. 28 of ch. 135 R.S.C., Arts 819-821 C. C. P.—Fraudulent preference—Secreting—Art. 798 C. C. P.—Promissory note discounted—Arts 1036-1953 C. C. P. (P.Q.)

A writ of capias having been issued against McK. under the provisions of art. 798 of C. C. P. (P. Q.) he petitioned to be discharged under art. 819 C. C. P. and issue having been joined on the pleadings under art. 820 C. C. P., the petition was dismissed by the Superior Court. From that judgment McK. appealed to the Court of Queen's Bench for Lower Canada (appeal side) and that court maintained the judgment of the Superior Court. Thereupon McK. appealed to the Supreme Court of Canada.

On motion to quash for want of jurisdiction;

Held, that the judgment was a final judgment in a judicial proceeding within the meaning of sec. 28 ch. 135 R. S. of C. and therefore appealable—Taschereau J. dissenting. *Stanton* v. *Canada Atlantic Ry. Co.* reviewed (1).

On the merits it was:

Held, per Ritchie C.J., Fournier and Taschereau JJ. that a fraudulent preference to one or more creditors is a secretion within the meaning of art. 798 C.C.P.

Also, that an endorser of a note discounted by a bank has the right under art. 1953, C. C. to avail himself of the remedy provided by art. 793 C. C. P. if the maker fraudulently disposes of his property (Strong, Henry, Gwynne JJ. *contra.*)

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

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) (2) sitting at Montreal, rendered on the 27th day of January, 1887,

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

(1) Cassels's Digest 249. (2) 15 Rev. Lég. 34.

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and confirming a judgment of the Superior Court, dismissing a petition of the appellant to quash a writ of *capias ad respondendum* issued against him by the respondent

This was an action brought by the respondent on the 26th November, 1888, against the appellant to recover the sum of $29,686.09, being the amount of 21 promissory notes signed by Sharpe & Mackinnon, the appellant firm, and was instituted by a writ of *capias* upon an affidavit of the respondent, alleging that the respondent had reason to believe and verily believes that the appellant was about immediately to leave the Province of Canada with intent to defraud his creditors in general, and the respondent in particular, and that the departure of the appellant would deprive the respondent of his recourse. In the affidavit were given the reasons for the belief of the said respondent, and also in the said affidavit the respondent swore that the said appellant had secreted and made away with, and was about immediately to secrete and make way with his property and effects and the effects of the firm of Sharpe and Mackinnon, with intent to defraud his creditors in general and the respondent in particular.

The appellant fyled a petition to be discharged from arrest under said *capias*, in which he denied the allegations of the affidavit, also alleging in the said petition that the notes mentioned in the affidavit, were the property of third parties to whom respondent had sold and transferred them, and that respondent had no interest in the present suit, but was merely lending his name to third parties.

To this petition a general answer was fyled and the parties went to proof.

At the trial it was proved that the promissory notes sued upon had been given for value but had been

endorsed and discounted by respondent at different banks in the city of Montreal at the time he made the affidavit for capias. These notes were however subsequently filed in the record.

The facts relied on by the learned judge at the trial for his finding that the appellant had been fraudently dealing with his assets with a view of defrauding his creditors are as follows :—

That in May, 1886, Sharpe & Mackinnon gave to the Bank of Commerce, one of their creditors, a statement of their affairs up to the 31st December, 1885, representing that they had a surplus of $36,439.24 which statement was false and fraudulent.

That in July, 1886, they had to borrow money to pay their workmen and were on the eve of having to suspend.

In the months of August, September and October their affairs went on getting worse, until the 20th November, 1886, when they were obliged to assign.

That notwithstanding their insolvent condition being well known to them, they in the month of October 1886 sold goods to the amount of $43,393.74 on account of which they received a sum exceeding $20,000 which they applied to the payment of certain creditors by way of fraudulent preference and to the detriment of their other creditors including the respondent.

That Mackinnon had paid fraudulently and by preference to the respondent and to his other creditors, at a time when he knew he was insolvent, considerable sums of money to the firm of McIndoe & Vaughan, to Northey & Co. and other creditors.

That on the last day that the firm of Sharpe & Mackinnon ran their business, the bookkeeper Dennis and each of the partners took some goods and realized on them, and each one appropriated two hundred and twenty dollars a piece.

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Greenshields for respondent moved to dismiss appeal for want of jurisdiction, the appeal only relating to the writ of *capias* and not finally disposing of the suit. Citing arts. 1797–8 C. C. P. *Blanckensee* v. *Sharpley* (1); *Carter* v. *Molson*(2); *Stanton* v. *Canada Atlantic Ry. Co.*(3).

McMaster Q.C. and *Hutchinson* contra referred to Arts. 819, 820, 821 C. C. *Goldring* v. *Hochelaga Bank* (4); *Phillips* v. *Sutherland* (5); *Shaw* v. *St. Louis* (6).

The court decided to hear the appeal and reserve the objection.

McMaster, Q.C., and *Hutchinson* for the appellant. The writ of *capias* was asked for on two grounds: First, that McKinnon was about to leave the country: Secondly that he was secreting his property in order to defraud his creditors. See Arts. 796–7–8 C. C. P.

The writ of *capias* must contain a special prayer which, in this case, was for a money condemnation and that the debtor be imprisoned.

Arts. 819, 820, 821 C. C. P. provide for the discharge of a prisoner under a writ of *capias*.

Keroack does not swear that he was the holder of the notes, which had been discounted in three several banks. See Daniel on Negotiable Inst. (7); Byles on Bills (8).

As to the secretion see *Gault* v. *Donnelly* (9); *Reg.* v. *Wynn* (10); *Emmanuel* v. *Hagens* (11); *Quebec Bank* v. *Steers* (12); *Warren* v. *Morgan* (13).

Gault v. *Dussault* (14) relied on by the respondent, is not applicable. The facts in this case show a perfect swindle from beginning to end.

(1) 3 L. C. J. 292.
(2) 25 L. C. Jur. 65.
(3) Cassels's Digest 249.
(4) 5 App. Cas. 371.
(5) 19 L. C. J. 131.
(6) 8 Can. S. C. R. 391.
(7) P. 238 s. 1234.
(8) 14 Ed. p. 408.
(9) 1 L. C. L. J. 119; S. C. in appeal 3 L. C. L. J. 56.
(10) 13 Jur 1087.
(11) 6 Rev. Leg. 209.
(12) 15 L. C. J. 155.
(13) 9 L. C. R. 305.
(14) 4 L. N. 321.

Greenshields for the respondent, cited Dalloz vo. Mandat (1), as to the right of a *prête-nom* to sue in his own name for the benefit of a third party. Also Pothier on Obligations (2), and relied on *Gault* v. *Dussault* (3) and *Molson's Bank* v. *Leslie* (4) as applicable to the facts of this case.

Sir W. J. RITCHIE C. J.—Assuming this is an appealable matter I cannot say the findings of the two courts on the question of fraudulent dealing by defendant with his goods with a view of defrauding his creditors is not fully sustained by the evidence; the question then simply resolves itself into this: Is such a fraudulent dealing and preference a secretion or making away with the goods as the code contemplates? The only question therefore it appears to me we are called upon to decide is as to the correctness of the decision of the Court of Queen's Bench in holding that a fraudulent preference comes within the meaning of the terms "secreting or making away with," leaving the other questions raised to be be tried out in due course in the courts below.

In the Province of Quebec it appears to be well established, that, so soon as a debtor finds himself insolvent and unable to meet the demands of his creditors, the general body of his creditors become entitled to an equal and just distribution of his assets, and he ceases to have any legal right to deal with or distribute his property otherwise, than the law directs, either for his own benefit or for the benefit of any other party creditor or otherwise whereby such an equal distribution is hindered, and the intent and object of the code was, no doubt, to prevent any fraudulent making away by an insolvent with his property with an intent to render a just and equitable distribution of his property

(1) Vol. 30, p. 631.
(2) Vol. 2, sec. 75.
(3) 4 L. N. 321.
(4) 8 L. C. J. 8.

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rateably among all his creditors impossible. Article 1036 of the civil code, declares that every payment by an insolvent to a creditor knowing his insolvency is deemed to be made with intent to defraud. I cannot but think that a disposition by a creditor of his property in fraud of his general creditors, or the individual creditor in the proceedings, whereby such an equitable distribution becomes impossible, is such a making away with his property as it was the object of the code to prevent by this article. If then the intention and object of this provision of the law was to prevent an insolvent debtor from secreting or making way with his property with intent to defraud his creditors in general or the individual creditor, how could this making away be better accomplished than by transferring his property with the intent indicated, in other words, fraudulently making away with his property to one creditor in fraud of his other creditors? What could the object of the article of the code be if it was not to prevent debtors from so dealing with their property as to put it beyond the reach of their creditors? I do not think "secreting" and "making away with" can be considered or dealt with as equivalent terms, but I can readily conceive that there may be a fraudulent making away with without secretion.

I am at a loss to understand what other construction can be put on the words "*ou soustrait*" "or make away with," if it was not intended that they were to include and cover fraudulent dispositions by the debtor of his property, that the limited primary meaning of the words "*cacher*" or "secrete" might leave doubtful; or in other words, if the legislature had intended that the primary meaning of the words in the English version "has secreted or is "about immediately to secrete" or in the French version "a *caché ou soustrait ou est sur le point de cacher*"

were to govern the construction of the sentence and be limited to hiding or concealing, why should in the English version "or make away with" or in the French version "*ou soustrait*" have been used, and having been used what right have we to eliminate these words?

I find in a French dictionary of high repute "*soustraire*, means *ôter quelque chose à quelqu'un, le priver de certaines choses par addresse ou par fraude, deduire, diminuer, retenir, retrancher, ôter, détourner, receler, enlever, écarter*," and in the Imperial dictionary we find "to make away" signifies "to alienate, to transfer as to make away property;" and "to make away with" signifies "to put out of the way to remove."

If a debtor, knowing himself insolvent, secretes or makes away with his property when he has no right to do so in fraud of his creditors, what possible difference can it make in the eye of the law whether he secretes or makes away with the property for the benefit of himself individually or any member of his family or a stranger, whether a creditor or not having a right to the property, with intent in law to defraud his creditors generally or the plaintiff in particular? What can be a greater secreting or making away with property under the code than, with intent to defraud his creditors in general or the plaintiff in particular, to illegally transfer or hand it over to a person not entitled to receive it to be by him appropriated and dealt with for his own use? If this is not illegally making away with property I am at a loss to conceive what is: for so soon as the debtor became aware of his insolvency all payments made to a creditor are deemed to be made with intent to defraud, and the debtor has no right to deal with his property, or put it in a position, where it would be inaccessible to all his creditors.

In *Gault et al.* v. *Dussault* (1) the head note is as follows:—

(1) 4 Legal News, 321.

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Fraudulent preference, by which assets which should be available to the creditors generally, are given to one or more, is equivalent to secreting.

Dorion C.J. is reported as follows:—

The Chief Justice commented on the facts as established by the evidence, (which appear in the judgment below) and held that it was a clear case of fraudulent preference, amounting to secreting. His honor could not understand the attempt to make a distinction between secreting and fraudulent preference. The French version used the words *cacher ou soustraire.* This was the same as *recéler*, which was *détourner*, *distraire*, *divertir*, the effects which should be available to the creditors generally, and there could be no doubt that the acts of the respondent were equivalent to a recel.

There has been, no doubt, some conflict of opinion in the courts of Quebec on this point, but I think the weight of authority and the reasoning is in favor of a conclusion at which I have arrived, and Ramsay J. in *Gault* v. *Dussault*, intimates that the Privy Council in *Molson* v. *Carter* (1) concurred in this view he says:

Ramsay J.—* * * but if a preference or any other disposal amounts to a fraud, it appears to me to be secreting within the meaning of the act. Secreting does not mean hiding alone, but as the article says, any "making away" with property which shall put it unlawfully out of the creditors' reach. Thus one may secrete or make away with property by putting legal impediments in the way of the creditor, by which he is prevented from getting possession of it in order to be paid. I expressed this opinion in the case of *Molson* v. *Carter*, and I understand the Privy Council concurred in it. Indeed, it is difficult to understand that the legislature could have intended it should be otherwise. I am at a loss to conceive why courts should use so much ingenuity to put a strained interpretation on the law to defeat its manifest object.

In *Gault et al* and *Donnelly*, Sep. 9th 1887 (2), although it was held, that an undue preference given by an insolvent to one of his creditors, by selling him goods in payment of his claim, is not a "secreting with intent to defraud," and does not justify the issue of a *capias ad respondendum*,

Duval, C.J., dissenting says:

In this case a *capias* issued against the defendant but was set aside in the court below on the ground that there was no proof of

(1) 3 Legal News 261. (2) 3 L. C. L. J. 56.

fraudulent secretion by the defendant. The majority of the court think that this judgment should be confirmed, but I am of a different opinion. The whole case turns upon the interpretation to be put upon the word "secreting." The facts of the case are that the defendant being the plaintiff's debtor and being insolvent, made over a portion of his property to Mr. Walsh, another of his creditors.

It is contended that this was only an undue preference, and does not amount to a fraudulent secretion. But what meaning can be given to the term of secreting, if it be not a secreting to put property beyond the reach of the creditors, as was done in this case.

I am of opinion, whenever, by any improper means, a creditor is deprived by his debtor, of the means of getting his just claims, that such act is a secreting.

No remarks were made by Drummond, Mondelet and Johnson, JJ. who concurred in confirming the judgment.

And in *Molson* v. *Carter*, Sir A. A. Dorion C.J. says (1):

If a man, being indebted to his father, or to his wife, or to his family, knowing that he is insolvent, goes and pays them, so that the money cannot be reached by the creditors, he is guilty of secretion. Secretion, in the eye of the law, is putting property beyond the reach of the creditors.

Even if this case was open to doubt I think article 12 of the civil code might be invoked with effect viz: that where a law is doubtful or ambiguous it is to be interpreted so as to fulfil the intention of the legislature and to obtain the object for which it was passed; which, in my opinion, can only be done by giving the article the construction placed on it by Chief Justices Duval and Dorion.

STRONG J.—1o. On the motion, I am of opinion that it should be refused, the case being appealable on the authority of *Chevalier* v. *Cuvillier* (2); and *Shields* v. *Peak* (3).

2o On the merits I am for allowing the appeal adopting the reasons of Cross J. that fraudulent preference is not concealing or making away with property. The weight of jurisprudence is in this sense.

(1) 3 Legal News, p. 261. (2) 4 Can. S. C. R. 605.
(3) 8 Can. S. C. R. 579.

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3o. Further it is shewn not only that the notes were not due at the time of the arrest, but it is also proved that they were all outstanding in the hands of three banks who were holders for value. Granting that the non-maturity of the notes by itself would have been no objection to the arrest in case of notorious insolvency, yet we have here the additional circumstance that they were outstanding in the hands of *bonâ fide* holders for value. Keroack was therefore not a creditor in respect of the notes which he did not hold, and he was not a creditor in respect of the original debt for which the notes were taken, for the English law that where notes are taken for a debt and the creditor endorses the note over, the right to sue on the original debt is suspended, is the general commercial law.

FOURNIER J.—L'action de l'intimé, accompagnée d'un bref de *capias ad respondendum*, était pour $29,68,09. L'appelant a demandé par requête l'annulation du bref de *capias*. L'affidavit donné pour l'obtenir alléguait 1° que l'appelant était immédiatement sur le point de laisser la province du Canada avec l'intention de frauder ses créanciers en général et l'intimé en particulier, 2° que l'appelant :—

Has secreted and made away with and was about immediately to secrete and make away with his property and effects of his firm of Sharpe & MacKinnon, with intent to defraud his creditors in general and the respondent in particular.

L'action est basée sur vingt-et-un billets promissoires décrits dans la déclaration.

Par sa requête l'appelant nie les allégations de l'affidavit et allègue que les billets y mentionnés sont la propriété de tierces parties auxquelles l'intimé les a cédés et transportés, qu'il n'a aucun intérêt dans l'action et n'est qu'un prête-nom.

La contestation liée, un grand nombre de témoins ont été entendus.

Le premier moyen—l'intention de laisser la province du Canada a été rejeté par la Cour Supérieure, faute de preuve—et formellement abandonné lors de l'argument devant cette cour. Il ne reste que le second qui a été admis par la Cour Supérieure dont le jugement a été confirmé par celle du Banc de la Reine en appel.

Lors des plaidoiries orales devant cette cour, il a été prétendu que le jugement dont il s'agit n'était pas appelable. C'est sans doute en ne considérant que comme interlocutoire le jugement rendu sur cette requête que l'on se fonde pour soutenir que l'appel ne pouvait avoir lieu que sur le jugement au mérite. Ce jugement ne peut être assimilé à celui rendu par cette cour dans la cause de *Stanton* v. *The Canada Atlantic Ry. Co.* Là, il ne s'agissait que d'un ordre rendu sur une demande d'injonction ne devant avoir d'effet que jusqu'à ce qu'il en eût été ordonné autrement par la cour ou un juge. Cet ordre était évidemment d'un caractère interlocutoire et n'avait aucune finalité. Le refus du Conseil privé d'entretenir l'appel dans des causes où il s'agissait de jugements interlocutoires ne peut être invoqué ici contre l'appel à cette cour. Ces jugements n'ont pas d'application dans la présente cause, le code de procédure civile ayant établi des dispositions spéciales pour la décision des contestations sur *capias*. L'article 821 déclare que si la contestation n'a lieu que sur la suffisance des allégations de l'affidavit, la cour ou le juge pourra en disposer sur audition ; mais si la contestation est fondée sur la fausseté des allégations de l'affidavit, la contestation doit être liée sur la requête du défendeur, suivant le cours ordinaire et indépendamment de la contestation sur la demande principale, à moins que l'exigibilité de la dette ne dépande de la vérité des allégations dé l'affidavit, dans lequel cas le bref peut être contesté en même temps que le mérite de la cause.

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Comme on le voit, cet article fait de la contestation du *capias*, lorsqu'elle repose sur la vérité des faits de l'affidavit, une contestation séparée et indépendante de l'action principale et qui doit suivre le cours ordinaire de la procédure.

Dans le cas seulement où l'exigibilité de la dette est contestée, il est loisible aux parties de contester en même temps le bref et le mérite de la cause. La première partie du 2e paragraphe de cet article rend obligatoire une contestation séparée lorsqu'il s'agit de la vérité des faits de l'affidavit—la 2e ne donne que la faculté, au cas où la dette est contestée, de joindre le mérite à la contestation du bref.

Les parties n'ont pas voulu se prévaloir de cette dernière faculté, elles n'ont pas jugé à propos de joindre les deux contestations. La cour n'est pas intervenue pour les y contraindre. Elles ont procédé, comme cet l'article leur en donne le droit, de même que dans une contestation indépendante du mérite. Le jugement qui s'en suit n'est donc pas interlocutoire. On ne peut donner une meilleure preuve qu'il doit être considéré comme final, que le fait que l'art. 822 C. de P. C. donne au défendeur dont la demande a été rejetée le droit d'en appeler, sans se conformer aux dispositions du code de P. C., concernant l'appel des jugements interlocutoires. Je suis d'avis que le jugement dont il s'agit est appelable à cette cour en vertu des dispositions de l'acte de la Cour Supreme et de ses amendements qui règlent le droit d'appel à cette cour.

Quant au mérite j'ai déjà dit que le premier moyen donné pour obtenir le *capias* avait été abandonné. Il ne reste que la question du *secreting*.

Je ne crois pas devoir répéter l'histoire des transactions de la société dont l'appelant faisait partie et qui ont été alléguées et prouvées pour établir la vérité du

fait qu'il soustrayait ses biens dans la vue de frauder ses créanciers. Après examen de la preuve, je suis venu à la conclusion que le fait de cacher ou soustraire, suivant l'intention de l'art. 797, ses effets ou plutôt ceux de la société, a été amplement prouvé.

Pour enlever à ces faits prouvés et rapportés dans le jugement de la Cour Supérieure, leurs conséquences juridiques comme établissant le fait d'avoir caché ou soustrait ses effets, on a prétendu qu'ils ne constituaient qu'une préférence frauduleuse qui ne pouvait être un motif suffisant pour obtenir un *capias*. En effet il a été soutenu déjà qu'une préférence frauduleuse n'était pas suffisante. C'est la proposition développée par l'honorable juge Cross dans son dissentement en cette cause, fondée sur les mêmes raisons qu'il avait déjà données dans la cause de *Molson* v. *Carter* (1). Avec tout le respect que j'ai pour l'opinion du savant juge, je ne puis croire que des faits que l'on qualifie de préférence frauduleuse, ne puissent être tout à la fois une préférence frauduleuse pour le créancier qui en profite, et en même temps une soustraction frauduleuse à l'égard de la victime, à l'insu de laquelle ces préférences sont pratiquées. Pour la victime c'est évidemment une soustraction frauduleuse. Je citerai à cet égard les opinions de Sir A. A. Dorion, juge en chef, dans la cause de *Gault et al* v. *Dussault* (1), et de feu l'honorable juge Ramsay dans la même cause.

Chief Justice Dorion said :—

It had been decided over and over again by the Court as now constituted, that the remedy by *capias* subsisted concurrently with the Insolvent Act. He was not therefore prepared to hear the question raised in this case. The Chief Justice commented on the fact as established by the evidence which appear in the judgment of the Court below, and held that it was a clear case of fraudulent preference, amounting to secreting. His Honor could not understand the attempt to make a distinction between secreting and fraudulent

(1). 4 Legal News p. 321.

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preference. The French version used the words *cacher ou soustraire.* This was the same as *receler* which was *détourner, détruire,* diverting the effects which should be available to the creditors generally and there could be no doubt that the acts of the Respondent were equivalent to a *recel:*

Ramsay J. :—

I concur so fully in which has fallen from the learned Chief Justice, in delivering the judgment of the Court, that I should have thought it unnecessary to add any remarks of my own were it not that I consider it important that there should be no doubt as to individual opinions of the Judge in this important matter. The question is simply as to the meaning of art. 721 of the Code of Procedure. As the Chief Justice has said over and over again we have decided that proceeding in insolvency did not deprive the creditor of the right to take out a *capias.* Again there is no doubt as to the proceeding being fraudulent. We are all agreed there was fraud. The effect of the transaction complained of appears to have been to reduce the available assets from 75 cents in the dollar to about 12 cents. The argument which has been pointedly stated by one of the learned judges who dissents, is that there may be a fraudulent disposal, which does not amount to secreting, and that an instance of this is a fraudulent preference. I believe there is some authority for this view, but I confess I am unable to understand. I can conceive a payment being so trifling that it could not be considered fraudulent, but if a preference or other disposal amounts to a fraud, it appears to me to be secreting within the meaning of the Act. Secreting does not mean hiding alone, but as the article says, any making away with property which shall put it unlawfully out of the way of the creditor's reach. This one may secrete or make away with property by putting legal impediments in the way of the creditor, by which he is prevented from getting possession of it in order to be paid. I expressed this opinion in the case of *Molson* v. *Carter,* and I understand the Privy Council concurred in it. Indeed it is difficult to understand that the legislature could have intended it to be otherwise. I am at a loss to conceive why courts should use so much ingenuity to put a strained interpretation on the law to defeat its manifest object. If it be said that it is figurative to call it secreting to pass a fraudulent deed to shield property from seizure, I admit it, but I am not aware that in the interpretation of statutes it is necessary always to adopt the first meaning of the terms used. Dorion, Ramsey and Baby—Dis. Monk and Cross.

Dans la cause de *Molson* v. *Carter* (1) Sir Aimé Dorion dit :—

(1) 25 L. C. J. 65.

It is secreting, in the eyes of the law, when a debtor, unable to meet his liabilities, fraudulently puts his property, or any appreciable portion of it, beyond the reach of his creditors.

L'opinion de ces honorables juges fut soutenue par la majorité de la cour.

La jurisprudence sur cette question semble avoir été fixée par ces deux décisions. Je la crois conforme à une saine interprétation de notre loi et à une juste appréciation des faits. Je ne puis m'empêcher de regretter que cette jurisprudence soit mise de côté, parce que les résultats ne pourront manquer de favoriser les transactions frauduleuses déjà trop nombreuses dans les affaires commerciales.

L'appelant a aussi prétendu que les billets promissoires ayant été escomptés par diverses banques, l'intimé n'avait pas droit d'action contre lui. Cela serait vrai si la faillite de l'appelant n'avait pas mis fin aux délais accordés par ces billets. Ils sont devenus exigibles de ce moment et l'intimé (art. 1953 C. C.), même avant d'avoir payé, avait droit d'agir contre l'appelant pour s'en faire indemniser. Ce droit de se faire indemniser constitue en sa faveur une action personnelle qu'il a droit de faire valoir par tous les moyens légaux. Il a tous les recours ordinaires et le droit d'employer les moyens conservatoires pour assurer sa créance. Il ne lui en est interdit aucun. Le recours au *capias* lui était ouvert comme les autres.

L'objection fondée sur le fait que les billets n'étaient pas en possession de l'appelant au moment où il a donné son affidavit n'est pas sérieuse. Son droit d'action existait du moment de la faillite et le fait qu'il ne les avait pas alors ne pouvait l'empêcher d'agir comme caution, parce que son action est fondée sur la faillite et l'obligation légale qui en résulte, dans ce cas, d'indemniser la caution.

D'ailleurs les billets promissoires ont été produits et sont au pouvoir de l'intimé qui est prêt à les remettre

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à l'appelant si celui-ci veut les payer. Même si l'intimé n'était qu'un prête-nom il aurait encore le droit d'action en les produisant comme preuve de son autorisation de poursuivre.

Pour ces raisons je suis d'opinion que le jugement de la Cour du Banc de la Reine devrait être confirmé et l'appel renvoyé avec dépens.

HENRY J.—Two questions for decision are open in this case. The first is raised by a motion on the part of the respondent to dismiss the appeal on the ground that it was not an appealable case. I have considered the matter, and have arrived at the conclusion that the appeal was regular, and having had the privilege of reading a judgment prepared herein by my brother Gwynne, refer to it for the reasons that have influenced my conclusion. The other question is as to the claim of the appellant to have a writ of *capias* under which he was arrested set aside and his bailbond given up to be cancelled. The affidavit of the respondent upon which the *capias* in question was issued and attested to on the 20th day of November, 1886, sets out that the appellant is indebted to the respondent in the sum of $29,686.09, and that he " has reason to believe and verily believes that the defendant James B. Mackinnon is about to leave immediately the Province of Canada, to wit, the now Provinces of Quebec and Ontario with intent to defraud his creditors in general and the plaintiff in particular and that such departure will deprive the plaintiff of his recourse against the defendant."

"That my reasons for so swearing that the defendant is about immediately to leave the Province of Canada, are that I was informed yesterday by one Galibert of the city of Montreal, that the said James B. Mackinnon had told him, said Galibert, that he

was about immediately to leave the Dominion of Canada and go to the United States of America to reside there permanently."

The affidavit goes on to allege that the said indebtedness was as and for the amount of certain promissory notes to wit the following notes. The notes are then dercribed as made payable to the order of respondent and alleged to have been made by the firm of Sharpe and Mackinnon the appellant, and amounting to the number of twenty-one in all. It is shown that of that number but four had matured.

The affidavit then alleges the insolvency of the appellant and that of his firm, and "That the defendant "has secreted and made away with and is about im-"mediately to secrete and make away with his property "and effects and the property and effects of the said "firm of Sharpe & Mackinnon with intent to defraud "his creditors in general, and the plaintiff in particu-"lar," and "that without the benefit of a writ of *capias* "*ad respondendum* against the body of the said defendant "the plaintiff, myself, will lose his debt and sustain "damages."

Upon the above allegations and statements, if true the respondent was justified in having recourse to the writ of *capias*.

It was necessary, however, that the allegation of indebtedness to the respondent should be true at the time he made the affidavit in question and the writ issued. If the appellant was not legally indebted in any sum whatever to the respondent the foundation of his right to make the affidavit and to have the *capias* issued was wholly wanting.

It was shown by his own evidence that at the time of the making of the affidavit and the issue of the *capias* the respondent was not the holder of any one of the notes in question—that he had endorsed them all

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and that when he made affidavit the Bank of Commerce and other banks were the holders for value of the said notes. The indebtedness was then to the banks and not to the respondent. He was then not the creditor but the guarantor only of the appellant. I will deal with that subject further on. The appellant in his petition denies all the allegations in the respondent's affidavit as therein contained. The respondent by his answer to the petition after alleging that the statements in his affidavit were true and that the statements in the petition were false alleges as follows :—

"That the said petitioner at the date of the issuing "of the said *capias* was about immediately to abscond "from the Province of Canada, present Provinces of "Quebec and Ontario and had secreted and was imme-"diately about to secrete his property and effects with "the intent as set forth in the said affidavit."

By the petition and the answer then, two and only two issues are raised, that is to say :

1st. Was the appellant about to abscond, and

2nd. Was he guilty of the charge of secreting his property and effects with the intent before stated.

As to the first it is only necessary to say that the charge was not only unsustained but disproved, and it was so so found by the court below.

The second requires to be fully considered in the light of the evidence adduced ; and it is necessary to see what the real issue is and how it is provided to be disposed of. Article 819 of the code of civil procedure provides for the presentation of the petition. Article "821 provides "But if the contestation is founded on "the falsity of the allegations, issue must be joined on "the petition of the defendant in the ordinary course, "&c."

It is shown above that such issue has been joined and by it we have but to determine if the respondent

has shown that the appellant was guilty of the concealment or that he was about immediately to be so guilty. That being the only issue raised we can consider no other. The statement in the affidavit is that he had secreted and made away with, &c. The latter three words are not in the answer of the respondent and are therefore no part of the issue, but if they were I do not think the fact would vary it so far, at all events, as this case is concerned.

Article 2277 C. C. provides that the arrest of a debtor by a writ of *capias ad respondendum* shall be according to the provisions of chap. 87 of the consolidated statutes of Lower Canada and in the manner and form specified in the code of civil procedure.

The 1st. section of that act in the English version provides for such arrest on an affidavit setting out, among other things, " that the defendant hath secreted " or is about to secret his property, &c."

The corresponding section in the French version is " Ou que le defendeur a caché ou est sur le point de cacher ses biens et effets, &c."

We look in vain in the one for the word " soustrait" and in the other for the words " make away with, &c."

Article 797 of the civil code of procedure in the English version provides for the issuing of a *capias* against a defendant " if the latter is about to leave " immediately the Province of Canada, or if he secretes " his property with intent to defraud his creditors." The latter provision in the French version is " si ce " dernier est sur le point de quitter immediatement la " Province du Canada ou s'il soustrait ou cache ses " biens, dans la vue de frauder ses creanciers." The statute and the code of procedure are provided by the civil code as our guides to determine as to the right to issue the *capias*. Both versions of the statute limit it to the fact of secreting and the English version of the

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code of procedure does the same. What then is the reasonable conclusion? It is that the use of the word "soustrait" in the French version of the latter was not intended to provide another and different cause for an arrest; but was merely intended to express the views of the legislature by the use of two words instead of one. Besides, what is the legitimate meaning of "soustrait." The verb soustraire means, "to take," "to take away," "to preserve," "to save," "to secure," "to shelter," "to screen" "to subtract." The term, therefore, as embodied in the code of procedure must refer to something alleged to have been done with his property, and selecting the words "to shelter" or "screen" as being the most appropriate I would construe the provision simply to mean a sheltering, screening or secreting of his property.

I therefore think that in constructing the French version referred to we must limit the provision to "secreting." I have read the evidence bearing on this issue and cannot find anything approaching to the establishment of the allegation of secreting. The respondent admits in his evidence that he had no personal knowledge of any such thing, and no one of his witnesses proved anything more. Instead of any such secreting the negative was most fully proved by a number of witnesses. Much stress has been laid on the fact that in the month of May previous, the appellant's firm exhibited a statement (not to the respondent but to other parties with whom they were dealing) showing a balance of about $30,000 of assets over liabilities, and as in November following they were deficient to meet their liabilities they must have secreted. To say the least this under any circumstances could only be received as very weak evidence, and of but an inferential character. The matter was, however, very fully, and to my mind, satisfactorily explained by the appellant's

book-keeper who, says that the statement was wholly made up by him and that he did it in good faith and without any suggestions from his principals or either of them, but that he had not reliable data from one of the manufacturing establishments, and had to estimate largely as to it; and that he made a large error in the statement. He, however, and those having charge of different branches of the business, establish by their testimony that no secreting or improper handling of any of the assets took place, and give evidence that shows that none could have taken place.

I will now deal with the objection that the respondent was not the creditor of the appellant when the *capias* was issued.

Mr. Justice Tessier in his judgment for the majority of the court lays down the legal proposition that the respondent as endorser, but not the holder of the notes, can by action recover the amount of them. He says:

La première objection de l'appellant est que l'Intimé n'est pas le véritable créancier et ne peut poursuivre en son nom "qu'il n'a aucun intérêt dans cette poursuite "et qu'il ne fait que prêter son nom à d'autres parties."

Il faut observer que la demande est fondée sur des billets promissoires sur lesquels Mackinnon est prometteur avec Sharpe son ci-devant associé, donnés à Keroack qui les a endossées et fait escompter, dans certaines Banques.

Il s'en suit que quoique les Banques soient créancières des billets contre les prometteurs il a intérêt que ces billets soient payés par les prometteurs.

En poursuivant en son nom il suffit qu'il soit capable de remettre les billets aux prometteurs sur paiement par eux; c'est le seul intérêt que le prometteur Mackinnon peut invoquer.

Or il est en preuve que Keroack a produit les billets dans la cause, et que Mackinnon peut les obtenir de suite sur paiement. Keroack est créancier de ces billets, a pris arrangement avec les Banques, il en est le porteur et tout au plus il serait *procurator in rem suam* ce qui est un intérêt suffisant pour lui donner droit de poursuite en son nom.

The learned judge after stating that the claim of the respondent rested upon promissory notes of McKinnon

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& Sharpe, made to the respondent and by him indorsed and discounted in certain banks, says that the banks were creditors thereby of the makers and indorser, and that the indorser is also creditor of the makers and has an interest that the notes should be paid by the makers. He adds, in suing in his own name it is sufficient that he should be able to give up the notes to the makers upon payment by them, and cites Daniel on Negotiable Instruments as authority for the proposition that "The production of the instrument in its possession is sufficient *primâ facie* evidence to sustain its suit."

I do not think it necessary to accept the law as so laid down, and it the respondent had possession of the notes as a holder when he made the affidavit for the *capias*, the mere production of them would have been good *primâ facie* evidence that he was such holder, and in that case he would be the creditor of the respondent. It is in evidence, however, by his own witnesses that he only got the mere possession of them on the morning of the day when the issues herein were tried; and the evidence further shows that he did not obtain such possession as a holder of them—that at that time they were proved to be the property of the several banks, and it is not shown how he obtained such possession or upon what terms, or that he had any authority to deal with the appellant concerning them. I, however, do not consider that such a consideration is material. A man cannot be permitted to arrest another for a debt not due to him but to a third party, and when the legality of the arrest is questioned to purchase the debt from the other party and get an assignment of it. We can only look at the position of the case when the affidavits for the arrest were made. It was either right or wrong, regular or irregular, then; and if not right or regular then nothing done afterwards can be

admitted to make the wrong right or the irregular regular. At the time of the making of the affidavits the creditors of the appellant thought the notes in question were the banks, and it cannot be contended he at the same time owed the same debt also to the respondent. Payment to the respondent when the affidavit was made would have been no bar to the claims of the banks as holders and they, disregarding the proceedings of the respondent against the appellant, might, if otherwise justified, have each issued a *capias* against the appellant.

The right to issue a *capias ad respondendum* is wholly founded on the statute and the two codes before referred to; and no one has the right to cause an arrest unless under the conditions therein specified.

Sec. 1 of the statute requires that the affidavit must be made by the plaintiff or his book-keeper, "clerk or legal attorney that the defendant is personally indebted to the plaintiff, &c."

The legal interpretation of the term "indebted" is well known and appreciated. That the appellant at the time in question was indebted to the banks cannot be contested. That he was indebted to the respondent I cannot admit, and if not so indebted he had no right to swear he was and have the *capias* issued and executed by causing his arrest. Article 2314 C. C. prescribes the act of an indorser to entitle him to recover against either an acceptor or drawer of a bill as follows:—"Payment by an indorser entitles him to recover from "the acceptor and drawer and all the indorsers prior "to himself." The respondent is not shown to have paid any of the bills when he made the affidavit, and therefore he had no right of action against the appellant. Besides seventeen of the bills had not matured; and therefore at the time no cause of action existed in either the banks, the holders, or in the respondent.

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Here is an action brought on bills of which the banks are the holders and to whom the amount of them is due. If the respondent is allowed to proceed to judgment he would recover upon notes, seventeen of which were not due and the remaining four held by and due to the banks. On the latter four the banks could proceed to judgment immediately, and on maturity of the others could do the same as they each fell due. In the meantime if the respondent obtained judgment he could levy for the amount of it and take the appellant's property from the control of the banks. I am free to admit that had he taken the proceedings in question as the duly authorized agent or *prête-nom* of the banks each could no doubt have taken measures to realize what was due to each separately out of the judgment, if the means of doing so were available, but there is no evidence of such agency or of his authority as such *prête-nom*. His proceeding was not adopted by the banks when the *capias* was issued nor was it even at the trial. It was proved by the managers of the banks that the notes were at the time of the trial the property of the banks, and no evidence was given that the respondent had any authority to take the proceedings he did. All then that the banks could do was to look to the respondent as the indorser of the notes. The result too of the respondent's obtaining judgment would be to enable him to recover and enforce the payment of the seventeen notes not yet due, months before the respondent promised to pay them, and thus obtain a position which the holders could not obtain. This view is of course independent of the provision that when bankruptcy takes place notes and bills running become due but they would become due only to the legal holders.

The remaining point to be disposed of is as to the allegation of secretion. There is no evidence

whatever that the appellant or his firm directly secreted any of his property, but it is claimed that their dealing with their property after the month of May before his arrest was fraudulent, and that being so, it amounted to a secreting within the meaning of the statute and the codes referred to. I have read and considered the evidence very carefully and have failed to see in it anything to sustain the charge.

The evidence shows that after the statement was made up in May the appellant's firm, continuing their large manufacturing business with means and with aid derived from several parties, made payments to them in the ordinary way of business, and to some in larger proportions than to others. During the period in question they purchased largely from the respondent, giving the notes of the firm to the amount stated in his affidavit,—but four only of which were due when it was made and they only for a few days—and the amount of them was about $4000. The payments made to the other creditors of which the respondent complains were made before the four notes fell due, and as far as I can see were made for debts previously due and for advances in cash. The payments so made cannot be called fraudulent and were made before the respondent's notes had matured. I am not now dealing with the question of unjust preference, as that question does not arise under the issue, but if it did, I should be slow to say that even within the provisions of the bankrupt act there was evidence to sustain such a charge. I am therefore of opinion that in this case the charge of fraudulently dealing with their property is not sustained by evidence.

If, however, such had been established, I am of opinion it would not have authorized the arrest of the appellant. There was no secreting of the property shown, and without evidence of it I cannot add to the

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provisions of the statute and codes, but feel it my duty to decide that all that was proved instead of sustaining the charge of secrecy most fully rebuts it. By the law in Quebec a man finding himself unable to meet the demands of his creditors is authorized to make an assignment of his estate in trust for the benefit of all his creditors without preference. This the appellant and his firm did on the day the affidavit of the respondent was made and the latter was by it made the trustee. No creditor could complain of such an assignment and none would be hardy enough to say that the execution of such an assignment should be called a "secreting." I have read the cases in Quebec bearing on this question but they run in both directions. Some of them go so far as to say that a man making preferential payments to some of his creditors becomes amenable to arrest. I cannot sustain such a doctrine. I maintain that it becomes "secreting" when a party disposes of his property so far as to secrete it from his creditors for his own benefit or at all events hides or conceals it in such a way that his creditors may not be able to find it. Such and such only is, in my judgment, the case intended to be provided for, and the arrest is provided for to enable creditors, as far as possible, to recover possession of or control over the property secreted. To say that making preferential payments to one or more of a man's creditors means a secreting of his property is to my mind a perversion of language. Statutes abridging the liberty of a man or limiting his common law rights are properly held to be construed strictly. If so what right has any court to say in such a case as the present that the legislature meant more than it has said? I make no apology if I express views on this question different from those of the learned judges in Quebec as given in some of the later cases The learned judges of those courts may feel

bound to adopt decisions previously made but it is the privilege as well as the duty of this court to declare the law. If, indeed, the legislature recognized the validity of such decisions the case would be very different. To sustain the judgment in this case would be, in my opinion, usurping by this court the power of the legislature.

I am of opinion, for reasons given, and for those contained in the judgment of Mr. Justice Cross, that the appeal should be allowed with costs and the bond in question ordered to be cancelled.

TASCHEREAU.—I am of opinion that this appeal should be quashed for want of jurisdiction. But as the majority hold the cause appealable, I am of opinion that the appeal should be dismissed.

GWYNNE J.—In my opinion this case is appealable and is not governed by *Stanton* v. *The Canada Atlantic Railway Company* (1), the circumstances of which case were quite dissimilar to those of the present case. In that case Mr. Justice Torrance had ordered the issue of a writ of injunction enjoining the respondents and certain other persons named therein from issuing or dealing with certain bonds until otherwise ordered by the court or a judge thereof. Upon a motion subsequently made before Mr. Justice Mathieu that learned judge suspended the writ until the final adjudication of the action on the merits. This decision of Mr. Justice Mathieu had the same effect, in subtsance, as if the temporary injunction which had been granted by Mr. Justice Torrance had never been granted. Now it is to be observed, first, that the application for the injunction was made to the discretion of the judge, it was not a matter of right. The object the plaintiff had in applying for it, was to deal temporarily with what

(1) Cassels's Digest 249.

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was the very gist of the action upon the merits, and its effect would have been to secure to the plaintiff until the hearing of the cause upon the merits, or until the court or a judge should make further order to the contrary, the benefit which the plaintiff sought to obtain permanently at the final hearing upon the merits. A decision granting or refusing the injunction was therefore purely of an interlocutory character not having any finality in it.

But in the case of an arrest the law authorises, before the trial of the action, a contestation with the same formality as that attending the trial of the action upon the falsity of the allegations in the affidavit upon which the writ of *capias* is founded. These allegations are that the defendant is personally indebted to the plaintiff in a sum amounting to or exceeding forty dollars upon a certain cause or certain causes of action set out in the affidavit, and, that the deponent has reason to believe and verily believes, for reasons specially stated in the affidavit, that the defendant is about to leave immediately the Province of Canada, with intent to defraud his creditors in general, or the plaintiff in particular, and that such departure will deprive the plaintiff of his recourse against the defendant: or, besides the existence of the debt as above mentioned, that the defendant has secreted or made away with, or is about to secrete or make away with, his property and effects with such intent.

One of these last mentioned acts committed or intended to be committed with intent to defraud must co-exist with the debt to the plaintiff to justify the arrest of the defendant.

Now by the 821st article of the C. C. P. it is provided that if a contestation is founded upon the falsity of the allegations in the affidavit, issue must be joined upon the petition of the defendant in the ordinary

course and independently of the contestation upon the principal demand, unless the exigibility of the debt depends upon the truth of the allegations of the affidavit in which case the writ may be contested together with the merits of the case.

If the existence of the debt alone, without more, was what the defendant had put in contestation by his petition, it might be very proper that the contestation as to the legality of the arrest should take place together with the contestation upon the merits of the action. But when the existence of the debt and the truth of the other allegations, necessary to be established to justify the arrest, are all contested, as these latter allegations are not matters issuable in the action the defendant seems to have a right under this article to have the whole matter tried at once upon petition in advance of, and wholly independently of, the trial of the action upon its merits. That was what in point of fact did take place in the present case.

The affidavit upon which the writ of capias was founded was made by the plaintiff and it alleged that the defendant was personally indebted to the plaintiff upon 21 promissory notes set out in the affidavit, four of which were overdue, and the residue not yet due and payable according to their tenor, but it alleged that the defendant had become insolvent; it also alleged that the plaintiff had reason to believe for a cause therein stated that the defendant was about to leave Canada with intent to defraud his creditors, and that the defendant has secreted and made away with and is about to secrete and make away with, his property and effects and the property and effects of a firm of Sharpe & McKinnon of which the defendant was a member, with intent to defraud his creditors generally and the plaintiff in particular.

The defendant by his petition contested every one of these allegations, and the court, being of opinion

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that the allegation of the intent to leave Canada with intent to defraud had not been established, but that the existence of the debt and the secreting of his property and effects by the defendant with intent to defraud had been, delivered judgment maintaining the validity and legality of the arrest.

Now, although the existence of the debt is a matter inquireable in the action when tried upon its merits, still the allegation of fraudulently secreting his property by the defendant is not; that is a matter wholly collateral to, and independent of, the matters which are issuable in the action, and the co-existence of this fraud with the debt is absolutely necessary to sustain the judgment of the court; the point adjudicated by the judgment is a point wholly independent of the matters which are issuable in the action, and for the trial of which the law has provided an independent procedure; the judgment of the court is conclusive upon the only matter which is adjudicated by it, namely, the validity of the *capias* and the arrest, and is therefore a final judgment upon a matter or judicial proceeding within the clause of the statutes regulating appeals to this court; and being appealable the whole of the matters contested by the issues joined upon the defendant's petition are now open before this court.

Upon the merits of the appeal I am of opinion that the evidence clearly shows that at the time the plaintiff made the affidavit upon which the writ of *capias* issued under which the defendant was arrested he was not the holder of any of the promissory notes in his affidavit mentioned, as constituting the debt then alleged to have been due from the defendant to him, but on the contrary these notes were, some of them the property of the Molson's Bank, some the property of the National Bank, and the residue the property of the Merchants' Bank, who were the holders thereof respectively and

entitled to receive payment thereof. Four of them only were over due; the remaining 17 had not yet became due according to their tenor; but it was contended that in virtue of article 1092 C. C. the respondent having become insolvent he could not set up that the time of payment mentioned in the notes had not yet arrived. This article, in my opinion, enured to the benefit of the respective banks, who were then the holders of the notes and to whom they were payable, and had not the effect of altering in any respect the relation which the plaintiff then bore to the defendant, which was that of surety only as indorser to the several banks who were the holders of the notes, and, as such, the creditors to whom the defendant owed the sums secured by the respective notes. The evidence also established that on the 20th November the defendant, on the application and demand of a creditor, made an abandonment of all his property and effects, and that he and his brother made an abandonment of all the property and effects of the firm for the benefit of their creditors as required by the civil code of the Province of Quebec, and the plaintiff was made provisional guardian of the insolvent estate, and that such abandonment had been lodged in the prothonotary's office before the defendant was arrested under the writ of *capias*.

In the judgment of the Superior Court, which has been maintained by the Court of Queen's Bench in appeal, the right of the plaintiff to have arrested the defendant as he did is rested upon three grounds:

1. That the plaintiff, as endorser upon the notes of which the banks were the holders, and as surety to the banks for the payment of the notes by the defendant, had the right under article 1953 C. C. to proceed against the defendant to be indemnified before paying or becoming the holder of the notes which had been transferred by him to the banks, and that having such

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right he had the right also to arrest the defendant as his, the plaintiff's, debtor, to the amounts of the notes before the plaintiff should pay them or become the holder of them;

2. That certified copies of the notes having been produced in conformity with article 101 C. C. P. at the return of the suit and the originals themselves having been placed in the record by the plaintiff upon the 6th December, 1886, it results as a consequence from these two facts that the plaintiff had been authorized by the holders of the notes to use them for his own benefit and advantage, and that the defendant as debtor upon the notes could not contest the right of his creditor, the plaintiff, to demand payment of them in his own name; and

3. That the appropriation by an insolvent debtor of any portion of his property or effects by way of payment to one or more creditor or creditors in preference to another or others is a secreting of his property with intent to defraud his creditors within the meaning of the statute authorising imprisonment for debt.

Now with respect to the first of the above grounds, the article 1953 C. C. only authorises the surety to take proceedings against his principal to obtain indemnity against his suffering loss at suit of the creditor of the person for whose debt he is surety. The article does not alter the condition of the surety, or the relation which he bears to his principal. It does not convert the surety into the creditor of his principal or make the latter his debtor for the amount personally due to a third person; the payment of which amount the surety has guaranteed. The position of a creditor entitled to arrest his debtor is very different from the position of a surety entitled to call upon his principal for indemnity against loss by reason of default of the principal to pay the debt due to his creditor. The rights and remedies of the two are wholly different, a

surety to a third person for the payment of a sum of money due to such third person by another is not competent in my opinion to arrest such other on his committing default in payment of his debt due to such third person, or upon his becoming insolvent: he cannot make the affidavit necessary to be made to support the issuing of a writ of *capias* at his suit.

As to the second of the above grounds, it proceeds upon a legal inference which is drawn by the court from two facts stated, one of which, as appears in the considérant, occurred on the 6th December, sixteen days after the arrest which is complained of was made. The inference which is drawn from the facts stated is one which cannot be deduced from the facts which are relied upon as justifying it, and further the inference drawn is directly at variance with the evidence. The evidence shows that the arrangement upon which the plaintiff became possessed of the notes from the banks, who were the holders thereof and entitled thereto, was not made until after the arrest of the defendant, nor until the examination of witnesses upon the defendant's petition to quash the writ of *capias* was in progress, so that whatever authority from the holders of the notes which, if any, the plaintiff may have acquired, in virtue of that arrangement of proceeding to judgment in an action commenced by him as holder of the notes at a time when he was not the holder of any of them, the arrangement cannot be invoked to support a *capias* and arrest made thereunder at a time when the plaintiff had no such authority from the holders of the notes and had not possession of them. Even if the plaintiff had paid notes in full to the holders thereof and had thus become legal holder of them after he had arrested the defendant, he could not sustain an arrest made by him in an action which he had commenced as holders of the notes when in point of fact he was

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not the holder of them—*a fortiori* he could not sustain the writ of *capias* issued in the present case, and the arrest made thereunder by force of any authority derived from the holders of the notes subsequently to the arrest. The validity of the *capias* must depend upon the right of the plaintiff to issue it at the time when it was issued.

As to the 3rd ground upon which the courts below proceeded, I am of opinion that a payment to one or more creditors of a debtor although he be in insolvent circumstances in preference to another or others is not a secreting of the debtor's property with intent to defraud within the meaning of the act authorising imprisonment for debt. Upon this point I need only say that I entirely concur with the dissentient judgment of Mr. Justice Cross in the Court of Queen's Bench in appeal.

I am of opinion therefore that this appeal should be allowed with costs, and that the arrest should be set aside and the writ of *capias* quashed with costs.

Appeal dismissed without costs.

Solicitors for appellants: *MacMaster, Hutchison, Weir & MacLennan.*

Solicitors for respondent: *Greenshields, Guerin & Greenshields.*

THE CANADA ATLANTIC RAILWAY COMPANY (DEFENDANTS) } APPELLANTS ; 1887 Nov. 24.

AND

JAMES TEMPLETON MOXLEY (PLAINTIFF)..... } RESPONDENT. 1888 March 15.

THE CANADA ATLANTIC RAILWAY COMPANY (DEFENDANTS). } APPELLANTS ;

AND

RICHARD MOXLEY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Company—Sparks from engine—Lapse of time before discovery of fire—Presumption as to cause of fire—Defective engine—Negligence—Examination for discovery—Officers of Corporation—R. S. O. (1877) *c.* 50 *s.* 136.

A train of the Canada Atlantic Railway Company passed the plaintiff's farm about 10.30 a. m. and another train passed about noon. Some time after the second train passed it was discovered that the timber and wood on plaintiff's land was on fire, which fire spread rapidly after being discovered and destroyed a quantity of the standing wood timber on said land.

In an action against the company it was shown that the engine which passed at 10:30 was in a defective state, and likely to throw dangerous sparks, while the other engine was in good repair and provided with all necessary appliances for protection against fire. The jury found, on questions submitted, that the fire came from the engine first passing, that it arose through negligence on the part of the company, and that such negligence consisted in running the engine when she was a bad fire thrower and dangerous.

Held, affirming the judgment of the Court of Appeal, that there being sufficient evidence to justify the jury in finding that the engine which passed first was out of order, and it being admitted that the second engine was in good repair, the fair inference, in the absence of any evidence that the fire came from the latter, was that it came from the engine out of order, and the verdict should not be disturbed.

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

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Held also, Henry J. dissenting, that the locomotive superintendent and locomotive foreman of a railway company are "officers of the corporation" who may be examined as provided in R. S. O. (1877) c. 50 s. 136 (1) and the evidence of such officers as to the conditions of the respective engines and the difference as to danger from fire between a wood burning and a coal burning engine, taken under said section, was properly admitted on the trial of this cause; and certain books of the company containing statements of repairs required, on these engines among others, were also properly admitted in evidence without calling the persons by whom the entries were made.

APPEAL from a decision of the Court of Appeal for Ontario (2) affirming the judgment of the Divisional Court by which the defendant's rule *nisi* for a new trial was discharged.

These are actions against the Canada Atlantic Railway Company for damages by fire to the land of the respective plaintiffs, caused by sparks from an engine of the company which passed such lands on August 19th, 1884.

The pleadings in the actions were similar and were as follows:—

STATEMENT OF CLAIM.

1. While the plaintiff was possessed of certain growing wood, timber, cordwood, fences, meadow, pasture and surface soil in and upon the plaintiff's land near to the defendants' railway and the defendants were possessed of a certain locomotive engine containing fire and burning matter which engine was being driven along the said railway near to the plaintiffs' said land under the management of the defendants the defendants so negligently and unskilfully managed the said engine and the fire and burning matter there-

(1) R. S. O. (1877) c. 50 s. 136. Any party to an action at law, whether plaintiff or defendant, may at any time after such action is at issue obtain an order for the oral examination * * * * in case of a body corporate, of any of the officers of such body corporate touching the matters in question in the action.

(2) 14 Ont. App. R. 309.

in contained, and the said engine was so insufficiently and improperly constructed that sparks from the said fire and portions of the said burning matter escaped from the said engine by and upon the plaintiff's land thereby setting on fire and destroying the said growing wood, timber, cordwood, fences, meadow, pasture and surface soil, and the plaintiff lost the use and enjoyment of the same.

The plaintiff claims $1,000 damages.

The following are the particulars under the plaintiff's statement of claim :—

1. The damage occurred upon Lot number 15, in the 5th Concession, Ottawa Front, of the Township of Gloucester, in the County of Carleton.

2. The setting on fire took place on or about the 19th day of August ultimo, A.D. 1884, between the hours of eleven o'clock in the forenoon and twelve o'clock noon, or thereabout.

3. The locomotive engine, at the time of such damage, was proceeding toward the city of Ottawa.

STATEMENT OF DEFFNCE.

1. The defendants say that they are not guilty by statute 31 Vic., c. 68, s. 21 D.; 34 Vic., c. 47, D.; 42 Vic., c. 9, s. 27 D.; 42 Vic., c. 57, D.

JOINDER OF ISSUE.

The plaintiff joins issue upon the defendants' statement of defence.

Delivered the 8th of October, 1884.

On the day in question two trains of the company passed the place where the fire occurred and the fire was not discovered for some twenty minutes or more after the last train passed. The evidence given at the trial showed that the last train that passed was in good order and that the other was defective, and that there was an interval of an hour and a half between them. The plaintiff claimed that the first engine was the cause

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of the fire, which smouldered until it broke out as discovered, and the jury so found. The company say that if either engine caused the fire it was the last and that as the origin of the fire was largely speculative there was no evidence to warrant the verdict. It was also claimed that certain evidence of employees of the road was improperly admitted.

The Divisional Court upheld the verdict and refused a new trial and their decision was affirmed by the Court of Appeal. The company then appealed to the Supreme Court of Canada.

Chrysler for the appellants.

It is incumbent on the plaintiffs to prove the origin of the fire, which has not been satisfactorily done. The authorities show that there can be no presumption against the company when such a length of time has elapsed between the passing of the train and the discovery of the fire. *McGibbon* v. *Northern and North Western Ry. Co.* (1) ; *Canada Central* v. *McLaren* (2) ; *N. B. Ry. Co.* v. *Robinson* (3) ; *Smith* v. *London and S. W. Ry. Co.* (4) ; *Jaffrey* v. *Toronto, Grey and Bruce Ry. Co* (5).

Certain employees of the company were examined for purposes of discovery under R. S. O. ch. 50, sec. 156. The reception of their depositions was objected to at the trial. and should not have been received. A portion of the depositions contained expressions of opinion by the deponents and such evidence is not contemplated by the statute. *Goring* v. *London Mutual Fire Ins. Co.* (6).

It is said that we cannot object to this evidence as we allowed the witnesses to be examined. That is not so. *De Brito* v. *Hillel* (7) , *Fleet* v. *Perrins* (8).

(1) 11 O. R. 307; 14 Ont. App. R. 91.
(2) 8 Ont. App. R. 564.
(3) 11 Can. S. C. R. 688.
(4) L. R. 5 C. P. 100.
(5) 23 U. C. C. P. 553.
(6) 10 P. R. (Ont.) 642.
(7) L. R. 15 Eq. 213.
(8) L. R. 3 Q. B. 536.

The admissibility of such evidence is also dealt with in the following cases: *Moore* v. *Boyd* (1); *Court* v. *Holland* (2); *Proctor* v. *Grant* (3); *Douglass* v. *Ward* (4).

McCarthy Q.C. and *Mahon* for the respondents. As to the claim that the verdict is against the weight of evidence we can only repeat what has been said in two previous cases in this term, that a second appellate court will not reverse the findings of the jury, affirmed by the Divisional Court and the Court of Appeal.

On the general question of the liability of railway companies for negligence under circumstances such as the present and where the onus lies to prove such negligence see *Vaughan* v. *Taff Vale Ry. Co.* (5); *Pigott* v. *Eastern Counties Railway Co.* (6); *Fletcher* v. *Rylands* (7); Pollock on Torts (8); Addison on Torts (9); *Freemantle* v. *London & North Western Ry. Co.* (10); *Dimmock* v. *North Staffordshire Ry. Co.* (11); Cooley on Torts (12); *Canada Central* v. *McLaren* (13).

At the trial the depositions of the employees were objected to as a whole but no objection was taken to the particular portions which might be considered inadmissible. This practice is dealt with in MacLennan's Judicature Act (14); And see *Mathers* v. *Short* (15).

SIR W. J. RITCHIE C.J.—(His Lordship read the pleadings in the case and continued:)

These are appeals from the judgment of the Court of Appeal. The actions are to recover damages to the crops, timber and soil of two farms adjoining one

(1) 8 P. R. (Ont). 413.
(2) 8 P. R. (Ont.) 221.
(3) 9 Gr. 26.
(4) 11 Gr. 39.
(5) 5 H. & N. 679.
(6) 3 C. B. 229.
(7) L. R. 1 Ex. 265; L. R. 3 H. L. 330.
(8) P. 403.
(9) 6 Ed. p. 45.
(10) 10 C. B. N. S. 89.
(11) 4 F. & F. 1058.
(12) P. 661.
(13) 8 Ont. App. R. 564.
(14) 2 Ed. p. 353.
(15) 14 Gr. 254.

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another, occasioned by a fire which the respondent alleges occurred through the negligence of the defendants in the management of one of their locomotive engines, passing along the defendants' railway adjoining the land in question. The actions were tried together by consent; the amount of damages was agreed on in the event of the defendants' liability being established.

The question submitted to the jury was: Did the fire arise from any negligence on the part of the company? And the jury found that it did. This verdict was sustained by the Queen's Bench and Common Pleas Divisional Courts and by the Court of Appeal, Mr. Justice Burton alone dissenting.

The contention of the plaintiffs is that No. 4 engine which passed was defective, out of order and threw dangerous fire; that in passing along the track at the place in question fire was thrown from the engine, caught, smouldered, was blown into a flame and did the damage. The company say the evidence offered was insufficient to establish that fact, and that after No. 4 passed, and before the fire was discovered, another engine had passed by, about noon, and so long a time after No 4 had passed that the jury would not be justified in saying that the fire escaped from No. 4 which caused the damage. It was assumed, on the trial and on the argument, that this latter engine was in good repair and in proper working order; at any rate no evidence to the contrary was adduced. On the other hand, all the judges of all the courts agreed, that there was sufficient evidence to justify the jury in finding that No. 4 engine was out of order.

The regular time for passing Eastman station, near the farms of the plaintiffs, for the freight train was 11.30 a.m. and for the passenger train 12.01 p. m. On the 19th of August, 1884, the trains passed at or about

the regular times, and some short time after the passenger train passed the fire was seen bursting up. Is it to be assumed as an incontrovertible fact that another train having passed, and the fire not having been discovered until an hour after when it appeared in full blaze, entirely rebuts any inference that the fire could have been caused by the first train? If No. 4 only had passed, in an improper condition with respect to fire throwing, and no other train had passed before the fire was discovered, could any reasonable jury have come to any other conclusion than that the fire, though not discovered for an hour, was caused by sparks from this improperly conditioned engine? It appears to me this would have been an almost irresistible inference of fact. How, then, is this met by showing that a train in perfect order passed about an hour afterwards and some quarter or half an hour after that the fire was seen blazing up?

Mr. Justice Burton, the only dissentient judge, was of opinion that there was no evidence to go to the jury, and that the learned judge should have non-suited the plaintiffs. He does "not question that there was evidence of the alleged faulty construction of engine No. 4 which could not have been withdrawn from the jury"; "but," he says:

There is not a particle of direct evidence to show what caused the fire. No doubt, if the fire had broken out shortly after the passing of engine No. 4, no other cause for the fire being shown, the jury might properly enough have been asked to draw the inference that sparks from that engine had caused the fire. But I entertain a very strong opinion that no such inference should or ought to be drawn when it was shown that no trace of fire was seen until after the passing of the second engine, upwards of an hour subsequently, in an exceptionally dry season, and that it was discovered some 10 or 15 minutes after the passing of that second engine, it being common knowledge that all engines do emit sparks and cinders which might have caused the injury, notwithstanding that they are of the best construction and are worked without negligence.

And he was compelled to hold that it was a pure

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question for the judge.

On the contrary, I think the evidence in this case could not properly have been withdrawn from the jury, being of opinion there was evidence to go to the jury in support of the respondents' case. I cannot look upon it as a mere matter of speculation as to which engine the fire came from, but a fact to be determined, resulting from the direct evidence and the fair and reasonable inferences to be drawn therefrom. The jury being justified in finding No. 4 out of order and throwing fire badly, and it being assumed on both sides that the engine of the regular train was in order, I think the fair inference, in the absence of any evidence that the fire came from the regular train, would naturally be that it came from the engine out of order rather than from the one in order.

But Mr. Justice Burton seems to think that the time between the passing of No. 4 and the passing of the regular train admitted to be in good order, and the discovery of the fire after the passing of the latter, was an answer in law to the plaintiffs' case, thus turning what should, in my humble opinion, in view of all the surrounding circumstances, be a presumption or inference of fact into a proposition of law. The defective state of engine No. 4 and it being a wood burning engine and its cinders more likely to do damage than a coal burner; the perfect state of the engine on the regular train and it being a coal burner and its cinders less likely to do damage; the length of time between the passing of the respective trains and the time the fire was discovered; the condition in which it was first seen; the state of the wind; the nature and character of the ground on which the fire broke out; and the reasonable probability of it smouldering, were all, in my opinion, matters for the jury and could not be withdrawn from their consideration; for who,

as the judge suggested, bringing their common knowledge to their assistance in relation to such affairs, could be so capable of arriving at a correct conclusion as to whether the fire was caused by one or the other of the engines and, if so, by No. 4, a conclusion to be arrived at dependent as well on direct evidence as on presumptions or inferences of fact, and, therefore, the learned judge was, in my opinion, right in refusing to non-suit, and the jury having found in favor of the plaintiffs I think the verdict should not be disturbed.

I think the evidence of extracts from the repair book kept in the appellants' offices of entries of repairs required by engine No. 4, which is alleged to have caused the damage, were admissible in evidence. I was a little doubtful as to the admissibility of Donaldson's deposition but I cannot say that any wrong or miscarriage has been caused thereby. I cannot think the verdict would have been at all affected by the rejection of this evidence.

STRONG J.—Concurred in the judgment of Mr. Justice Gwynne.

FOURNIER J.—Concurred in dismissing the appeal.

HENRY J.—I have had a good deal of difficulty about this case in more respects than one. The plaintiff in all actions for negligence in which damages have resulted to him is required to prove the negligence. Now we all know that in running railways through this country in dry seasons sparks will come, and we know they will be carried to another portion of the country and remain lighted for a long time and when falling to the ground set fire to combustible substances. There is this difficulty here. There is no evidence at all that the fire was there when engine No. 4 passed. That is the engine that has the bad charac-

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ter. And there is no evidence that any sparks from that engine caused the fire. The engine that passed an hour afterwards might possibly have emitted sparks which caused the damage. If so the company would not be liable as that engine was provided with the necessary appliances for protection from fire.

We have to assume a good deal in this case. We must assume that the fire was there when the second engine passed, and had been smoldering there for over an hour.

I think that in a case of this kind, depending on circumstantial evidence, the rule is that the plaintiff is bound to prove the reasonable absence of any other cause. I am not going so far as to say that the plaintiff has not done that in this case, and am not in favor of reversing the judgment and setting aside the verdict of the jury, but I feel bound to express the difficulty I have had in arriving at a conclusion.

As to the engine No. 4 there is a difference between the evidence for the plaintiff and that for the respondents. That is a matter for the jury and no court will set aside their finding. But there was evidence admitted which I think should not have been received. The depositions of parties on matters of opinion were improperly received. It is hard to say what effect an affidavit such as Donaldson's would have on the jury, or whether it did not influence their verdict. If improper evidence has been received which might have influenced the jury, and there was not sufficient evidence independent of it, the verdict should be set aside. I have looked into the case and think there was sufficient evidence without this deposition. While expressing this doubt still I concur with the majority of the court.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed. I have read the judgment pre-

pared by Mr. Justice Gwynne and concur in the views expressed by him.

GWYNNE J.—By the rules *nisi* issued at the instance of the defendants in the Divisional Courts of the High Court of Justice for Ontario in which the above actions were respectively brought, the discharge of which rules is the subject of the present appeals, it was ordered that the respective plaintiffs should show cause why the verdict and judgment for the plaintiff obtained in the said respective actions should not be set aside and judgment entered for the defendants or a new trial had between the parties on the grounds following :

1. That the verdict is contrary to law and evidence and the weight of evidence.

2. That there was no evidence to go to the jury in support of the plaintiffs' claim.

3. That there was no sufficient evidence that the fire which ignited the plaintiffs' property came from the defendants' locomotive number four.

4. That there was no evidence of negligence on the part of the defendants either in the construction or management of the said locomotive.

5. And on the ground of the improper reception of evidence of the depositions of Moxley, Donaldson and James Ogilvie and of entries in the books of the defendants made subsequent to the fire, and of entries in the said books before and after the said fire, without calling the persons who made the said entries or proving their authenticity, and upon the grounds that the said entries are not evidence against the defendants of the facts alleged therein.

The verdicts and judgments in favor of the plaintiffs had been rendered upon the answers of the jury to three questions submitted to them, which questions

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and answers were as follows:—

QUESTIONS.

1. What was the cause of the fire?

2. Did the fire arise through any negligence on the part of the company?

3. If you say yes state what, in your opinion, was the act of negligence?

ANSWERS OF THE JURY.

To the first of the above questions they answer

We agree in the belief that the fire came from engine No. 4.

To the 2nd question they answer

We believe it did.

And to the third they say

The act of negligence on the part of the company consists in running engine No. 4 when, according to their own reports, she was a bad fire thrower and dangerous.

Now as to entering a non-suit or a judgment for the defendants it is quite impossible that the contention of the defendants should have prevailed. There was evidence that the fire took place within an hour and a half after a locomotive engine of the defendants, which was a wood burner and known as engine No. 4—and within 30 or 40 minutes after another engine of the defendants which was a coal burner and known as engine No 406—had passed the place where the fire originated; the evidence also showed that it originated on the defendants' property and within the distance of about 20 feet from the railway track—that there was no apparent cause from which the fire might have originated other than those locomotives—that in the same month in which this fire occurred, and previously thereto, fire had taken place frequently along the track after the defendants' cars had passed, which the witness who testified thereto had himself put out. It was also proved that engine No. 4 had been repeatedly reported between the 1st of June and the 19th of August, on which latter day the fire occurred, by the engine driver, whose duty it was to cause such report

to be entered in a book of the defendants kept for the purpose, as wanting repairs. On the 14th June she was thus reported:

Smoke stack netting wants examining. Elbow on R. H. flue pipe leaking. Side-rod brasses want reducing on R. S. on back crank pin.

and on the 22nd July, thus:

Netting on smoke stack wants examining, throws fire bad. Whistle pipe that screws into dome leaking. Boiler wants washing out.

There was evidence that in consequence of this latter report some repairs were done to the netting, but the engine, which was an old one, was again reported in like manner on the 1st, 8th, 21st and 23rd of August as requiring divers repairs, not, it is true, pointing to the smoke stack netting, but on the 28th August she was reported again as follows:—

Big and little end brasses on left hand side wants reducing and lining up. Bonnet on top of smoke stack wants examining—throws fire bad.

The depositions of the defendants' locomotive foreman taken before the trial under an order in that behalf made pursuant to section 156 of ch. 50 R. S. O. were also read in evidence. In those depositions he had deposed among other things that:—

There is a cone 24 inches in diameter in engine No. 4. Pieces of charcoal may be forced into the bonnet and after striking the cone and rebounding may wear holes in the netting. The wearing away of the netting is commoner in a coal burner than in a wood burner. A larger quantity of fire will escape from a wood-burner than from a coal burner. If in proper order the wood-burner is as safe as a coal-burner. If a wood-burner is kept in good order it should not throw dangerous sparks. The cylinder in No. 4 is 15¼ inches in diameter by 26 inch stroke. The diameter was increased ¼ of an inch when repaired—when new it was 15 inches—there are two exhaust nozzles of 2⅝ inch diameter—that is the inside diameter of the outlet. We vary the size of the exhaust nozzle. The exhaust nozzle of No. 4 has not been varied. By making the exhaust nozzle smaller you create a greater vacuum in the smoke box and you increase the draught on the fire. If the exhaust nozzle of the engine is too small it will cause a back pressure on the engine. You have to be particular to the one-eighth of an inch in the exhaust nozzle.

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If the nozzle is smaller than it should be a pressure will be created and a stronger draught on the fire tubes, and the air of the fire tubes stronger and the lip of the fire particles greater and the tendency will be to throw more unburned fuel into the smoke stack.

This witness being called by the defendants at the trial testified, among other things on his cross-examination, that a perforated cone which this engine No. 4 had was harder on the netting than a solid cone—that this netting would wear out sooner over the perforated cône than over the solid one; and being asked what was the effect of enlarging the cylinder and leaving the exhaust pipe the same size it had been before the enlargement of the cylinder, he said that the effect was to make the engine steam freer, but that it would give more forcible draught up the petticoat pipe and would have the tendency to throw the sparks with more force against the bonnet.

Now, it is impossible for us to hold that this evidence, assuming it to have been properly received, was wholly insufficient to warrant the case being submitted to the jury, and that therefore the plaintiff should have been non-suited; it is equally impossible to hold that upon the findings of the jury in answer to the questions submitted to them judgment should be entered for the defendants. So likewise is it impossible for us to interfere with the findings of jury as against the weight of the evidence. Unless we could say that it was impossible for the fire to smoulder for the space of about an hour and a-half before it was observed, as it was, we cannot say that the jury have arrived at a wrong conclusion in attributing the fire to the engine No. 4, which was proved upon more occasions then one to throw fire badly. Nor can we say that the jury were not justified in concluding that upon the 19th of August she may have been as defective in this particular as she appeared to be on the 22nd July, and on the 28th August notwithstanding the

repairs done on the 23rd of July. It is impossible to say that the evidence so strongly preponderates against the finding of the jury as to lead to the conclusion that they have either wilfully disregarded the evidence or failed to understand it.

The sole remaining question is as to the motion for a new trial on the ground of the reception of the evidence of the depositions of Moxley, Donaldson and James Ogilvie, officers of the defendant company taken under the order issued in pursuance of the 156 sec. of ch. 50 R. S. O., and of the entries in the defendants' books as to the condition of the smoke stack netting of the engine No. 4. As to the depositions the only objection taken was as to those of James Ogilvie for the reason, perhaps, that as Donaldson does not appear to have been examined as fully as was Ogilvie, his depositions were not deemed to be of much importance. The objection taken to Ogilvie's deposition being read was merely that a locomotive foreman, which Ogilvie was, does not occupy such a position as would make his evidence binding on his employers. The statute under which the depositions were taken enacts that:—

> Any party to an action at law whether plaintiff or defendant may at any time after such action is at issue, obtain an order for the oral examination upon oath before a judge or any other person specially named by the court or a judge of any party adverse in point of interest, or in the case of a body corporate of any of the officers of such body corporate touching the matters in question in the action.

The statute also provides that the officers of a body corporate so examined may be further examined on behalf of the body corporate of which he is an officer in relation to any matter respecting which he has been examined in chief, and that the depositions shall be taken down in writing by the examiner, and when completed shall be read over to the party examined and shall be signed by him in the presence of the parties, or of such of them as may think fit to attend, and that

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the depositions so taken, whether they be the depositions of a party to the action or of an officer or officers of a body corporate party to the action, who was or were examined in the place of and for the corporation, should be returned to and kept in the office of the court in which the proceedings are carried on, and that office copies of such depositions might be given out, and that the depositions certified under the hand of the judge or other officer or person taking the same, or a copy thereof certified under the hand of the clerk or deputy clerk of the crown or clerk of the county court, as the case might be, should without proof of signature be received and read in evidence saving all just exceptions. The only difference between this provision of our statute and that of the English Judicature Act in like case is that with us the examination takes place *vivâ voce*, in England upon interrogatories. The principle upon which the examination is authorized and the depositions taken upon it are received in evidence is thoroughly explained by Sir George Jessel, Master of the Rolls, in *Church* v. *Wilson* (1). The practice is there shown to have been adopted as a great improvement upon the old equity device for obtaining evidence to be used in a common law suit by a bill of discovery. He there says:—

The defect of the old common law system was that it did not allow you in an ordinary action at law to obtain discovery from your opponent, and equity therefore invented the bill of discovery in aid of the plaintiff in the action or of the defendant in the action and gave that discovery and, of course following its own rules as applied to actions at law, it gave a similar remedy where it was a suit in equity. Then came this difficulty, that a corporation, answering not on oath but under their common seal, you could not indict the corporation for perjury and you could not therefore have the usual remedy or sanction whiih enabled you to rely on the discovery, and so to avoid that, the courts of equity allowed you to add an officer of the corporation as defendant to make him answer on

(1) 9 Ch. D. 555.

oath, because according to the then procedure you could not interrogate him in any other way. In process of time the legislature thought fit to get rid of the necessity of resorting to courts of equity for discovery by empowering the courts of law to give discovery in common law actions. Then what did the legislature do? It did not adopt the method which was adopted by the courts of equity in suits in equity—that method was both cumbrous and expensive; what it did was this—by enacting the provisions of the 51st section of the Common Law Procedure Act of 1854, which is almost in the words of the provisions of order 31, rule 4: that is, recognizing the impropriety of making the officer a party to the action of common law it enabled the person requiring a right to discovery, to get an order to examine the proper officer on interrogatories. Then of course the parties to the action paid all the costs of the proceedings and the officer gave discovery and had nothing further to do with the action. When the legislature inaugurated a totally new system of pleading and established a new court of justice—for that is what the High Court is - the first question was, what system should they adopt in it, as there must be but one system for all kinds of action whether common law actions or equity actions, and they adopted the rule which had been adopted in common law actions, and that is the rule inserted in the schedule to the act.

Then again in the *Attorney General* v. *Gaskill* (1), the same learned judge says:—

One of the great objects of interrogatories when properly administered has always been to save evidence, that is, to diminish the burden of proof which was otherwise on the plaintiff. Their object is not merely to discover facts which will inform the plaintiff as to evidence to be obtained, but also to save the expense of proving a part of the case.

Then in *Berkeley* v. *Standard Discount Co.* (2); the same learned judge says:—

We have had a long experience under the Common Law Procedure Act of 1854. The only difference between the present rule and section 51 of the Common Law Procedure Act is that in addition to the word "officer" you have "member," but why should this make any difference? * * *
I am by no means disposed here to lay down any rules which will fetter the discretion of any other judge, but I will state that my own practice has been not to direct a "member" if it be shown there is an "officer" who could answer; that is, who had a competent knowledge of the facts. Secondly, I always require to

(1) 20 Ch. D. 528. (2) 13 Ch. D. 97.

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see that the interrogatories are not served on a person who has not the means of answering. But the fact is that the company is served with the application, and the company has as much interest as any body else in seeing that the proper man should answer, because the effect of the answer may be very serious as regards the position of the company. The ordinary practice, I believe, is for the company's solicitor to act for the officer or member, who is directed to answer and to prepare the answer for him, with the usual advantages which are possessed by the solicitor of the company, and to charge the company with the cost of so doing. I by no means desire to encourage the employment of a separate solicitor in such a case as this. The defendant here is the company and the person interrogated is making discovery on the part of the company.

It was, therefore, decided that the person interrogated who had been, but was no longer a director of the company, had no right to refuse to answer the interrogatories until he should be paid his costs of so doing.

In the same case Thesiger L.J. says:—

The rule upon which the question turns is nothing more or less than an extension of section 51 of the Common Law Procedure Act of 1854, and is, I think, intended to be worked in the same manner in which that action was worked. It is apparent, he says, that the examination by interrogatories which is to take place is not any examination distinct from the examination of a party to the action, but is, as was the case of the officer under the Common Law Procedure Act, an examination of some one who may be called upon to answer as an *alter ego* of the corporation inasmuch as the corporation cannot itself answer.

And again he says:—

Now in practice under the Common Law Procedure Act the application was made in chambers against the company, and if they had any objection to the interrogatories the company appeared by their solicitor, but the officer never appeared.

Now, that the locomotive superintendent and the locomotive foreman were the officers of the company most competent to speak to the condition of the locomotives of the company, and their ability to prevent the escape of fire, and therefore the fittest persons to have been submitted to examination under the statute upon a question of that character, cannot, I think, admit of a doubt; and if there were any it is removed by the fact that the defendants themselves called the locomo-

tive foreman and examined him largely upon the same question, and he was, in fact, the only witness whom they did examine upon that question. Then, as to the entries in the defendants' books as to the condition of engine No. 4, these entries, having been made in a book kept for the express purpose of calling the attention of the mechanical department to something required to be done and having been caused to be made in the book by the driver of the engine whose duty it was to make the entries or have them made, were admissible in evidence. The book in which the entries were made was one which the defendants were bound to produce, and consequently did produce upon an application for inspection of documents in the defendants' possession containing entries relating to the matter that was in issue. The point, however, of this objection was wholly removed by the defendants themselves having called the driver of the engine No 4, who, although he gave his evidence in a very unsatisfactory manner, a manner which showed the importance in the interest of justice of the entries being themselves received as sufficient evidence of the facts stated therein, could have left no doubt upon the minds of the jury that as he himself could not write he caused the entries to be made in the book for him by some other person or persons who could write, and the mechanical foreman testified that the entries were all seen by him at the respective times of their being made, and were attended to. It was for the jury to say with what effect, having heard all that he said upon the subject.

The appeal must, in my opinion, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Stewart, Chrysler & Godfrey.*

Solicitors for respondents: *Mahon & O'Meara.*

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*Nov. 2.
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*Mar. 15.

THE QUEBEC STREET RAILWAY COMPANY (DEFENDANT)..... } APPELLANT.

AND

THE CORPORATION OF THE CITY OF QUEBEC (PLAINTIFF)..... } RESPONDENT.

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

Street Railway—By-Law—Agreement—Construction of—Notice—Arbitrators—Appointment of by Court.

The Quebec Street Railway Company were authorised under a by-law passed by the Corporation of the City of Quebec and an agreement executed in pursuance thereof to construct and operate in certain streets of the city a street railway for a period of forty years, but it was also provided that at the expiration of twenty years (from the 9th February 1865) the corporation might, after a notice of six months to the said company, to be given within the twelve months immediately preceding the expiration of the said twenty years, assume the ownership of said railway upon payment, &c., of its value, to be determined by arbitration, together with ten per cent additional.

Held, reversing the judgments of the courts below, Fournier J. dissenting, that the company were entitled to a full six months notice prior to the 9th February, 1885, to be given within the twelve months preceding the 9th February, 1885, and therefore a notice given in November, 1884, to the company that the corporation would take possession of the railway in six months thereafter was bad.

Per Strong and Henry JJ.—That the court had no power to appoint an arbitrator or valuator to make the valuation provided for by the agreement after the refusal by the company to appoint their arbitrator. Fournier J. *contra.*

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal side) confirming the judgment of the Superior Court.

On the 18th November, 1864, the Corporation of the City of Quebec passed a by-law, under the authority

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

of 27 Vic. c. 61, intituled "A by-law allowing the Quebec Street Railway Company to construct a Railway in certain streets in the City of Quebec," by which powers were, subject to certain restrictions and conditions, conferred upon the company appellant, to build and operate a railway in the streets mentioned therein; and by the 25th section of the by-law, it was enacted:

The privilege hereby granted to the said Company shall extend over a period of forty years, from the date hereof, but at the expiration of twenty years, the said corporation may, after a notice of six months to the said Company, to be given within the twelve months immediately preceding the expiration of the said twenty years, assume the ownership of the said Railway, and of all real and personal property in connection with the working thereof, and on the payment of their value, to be determined by arbitration, together with ten per cent. over and above the value thereof.

And the 30th section provided:

This present by-law shall not come into force and effect until an agreement based upon the conditions and provisions herein mentioned, shall have been executed by a notarial deed entered into by and on the part of the said Company and the said corporation, on whose behalf the Mayor is hereby authorized to sign the said agreement.

On the 9th February, 1865, the Corporation of Quebec and the Quebec Street Railway Company executed a notarial agreement in accordance with the 30th section of the by-law, embodying such by-law and containing the above cited 25th section in these words:

That the privilege granted to the said Company by the said by-law and by the present deed, shall extend over a period of forty years from the date hereof, but at the expiration of twenty years, the said corporation may, after a notice of six months to the said Company, to be given within the twelve months immediately preceding the expiration of the said twenty years, assume the ownership of the said Railway, and of all real and personal property in connection with the working thereof, and on payment of their value to be determined by arbitration together with ten per cent. over and above the value thereof.

The rights and privileges of the company thus extended for forty years, from the 9th February, 1865,

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unless terminated in the manner provided by the by-law and agreement.

On the 9th January, 1884, the Corporation of the city of Quebec gave notice to the company that it intended to avail itself of the right stipulated in its favor by the by-law, to assume possession of the railway; but subsequently they gave a second notice on the 21st November, 1884, whereby it informed the company that the previous resolution and notice was annulled, and that after the 9th February, 1885, at the time and in the manner provided by the by-law, it would assume the possession and ownership of that part of the railway in question situate within the city limits, and of the real and personal property in connection with the working thereof, and would be prepared to pay the value thereof, together with ten per cent over and above, as established by arbitrators; and by the same notice the corporation notified the company of its nomination of F. X. Berlinguet as its arbitrator, and called upon it to name an arbitrator to value the property conjointly with Berlinguet: to this notification no attention was paid by the company, and on the 9th May, following, Berlinguet proceeded alone to value that part of the company's property situated within the limits of the City of Quebec, which he estimated at a sum of $23,806.30 and his award was deposited with a notary and signified to the appellants on the 18th May, 1885. Three days afterwards legal tender of this sum with ten per cent. added was made to the appellants and on its being refused an action was instituted, by which after reciting the several statutes, by-laws, contracts, tenders, &c., the corporation concluded that the tenders be declared good and valid; that it be adjudged that it had a right to take possession of the road, horses, harnesses, cars, &c., and that such judgment serve as a title hereto, in favor of the cor-

poration.

This action was dismissed by the Superior Court on the ground of insufficient notice.

The Court of Queen's Bench for Lower Canada (appeal side) confirmed this judgment on other grounds, but the majority of the court expressed the opinion that the notice was sufficient, the same having been given within the year but not within the first six months of the year in which the term of twenty years had expired; and the recourse of the city corporation was by the last mentioned judgment reserved.

The respondents then brought a second action, claiming that the appellant should be held bound to proceed with the arbitration; that in default of their naming an arbitrator, one should be named by the court on their behalf; and on an award being rendered, upon payment of the amount of the award and ten per cent. in addition, the respondents should be authorized to take possession of said railway and property of the appellant company situate within the limits of the City of Quebec, and that such judgment should operate a title in favor of said respondents.

To this second action, the appellants pleaded sub stantially as in the former action:

1. Want of sufficient notice.

2. That in connection with the railway they, the said company, owned a large amount of real and personal property, and that a large amount of their said property was without the city limits.

That if the City Corporation had a right to take the railway which was desired, they must take the whole railway and all the property in connection therewith.

3. That there was no power to force the Street Railway Company to name an arbitrator or to proceed with the arbitration.

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Upon these issues, Casault J. presiding in the Superior Court, whilst stating that his opinion as to the insufficiency of the notice remained the same as when he delivered the judgment in the first action, considered himself bound by the opinion of the Court of Queen's Bench and gave judgment in favor of the respondents. This judgment being confirmed by the Court of Queen's Bench for Lower Canada (Appeal side) the Quebec Street Railway Company appealed to the Supreme Court.

Irvine Q.C. and *Stuart* for the appellants contended:

1. That the notice could only be given in the first six months of the twentieth year, that is between the 9th February, 1884, and the 9th August, 1884, and must have been to the effect, that on the 9th February, 1885, the Corporation would assume the ownership. Conditional obligations, dependent upon the will of the person in whose favor the obligation is contracted, must always be performed *in formâ specificâ et indivisibiliter.* Larombière, Obligations (1).

2. The court had no power to force the company to appoint an arbitrator.—The condition of the contract between the parties, gives, upon fulfilment of its provisions, to the corporation the right to purchase the property of the appellants, at a premium of ten per cent. over the price fixed by arbitrators. No contract of sale is valid unless the price be fixed, or be susceptible of being established, by the joint consent of buyer and seller.

Troplong (2); Duranton (3); Delvincourt (4); Laurent (5); Duvergier (6); Marcadé, on C. N. Art. 1562 (7); Aubry & Rau (8).

The remedy of the corporation, if there has been

(1) 2 Vol. 91 on Art. 1175 C. N.
(2) 1 Vol. Vente Nos. 156-157.
(3) Nos. 108-112-114.
(4) P. 125, and notes.
(5) 24 Vol. Nos. 74-77.
(6) 1 Vol. No. 153.
(7) P. 178.
(8) 4 Vol. § 349, p. 337, No. 29.

a breach of contract on the part of the appellants, is in damages.

3. That the corporation was obliged to tender for all the real and personal property in connection with the working thereof, not for a part only.

Nothing was offered for a considerable part of the plant and the necessary buildings because situate outside of the city limits.

P. Pelletier Q.C. for respondents contended:

1. That the corporation could give the said notice at any time within the twelve months preceding the 9th February, 1885, but the possession of the railway could not be obtained by the corporation before the 9th February, 1885, and if the notice was given at a date not leaving six months up to the 9th February, 1885, then the full space of six months was to be allowed between the notice and the taking possession of the railway.

2. The appellants having agreed to settle their rights by way of arbitration, it was not competent for them to escape their obligation by refusing to appoint their own arbitrator. The jurisdiction of the Superior Court in the Province of Quebec is unlimited to enforce the contracts between the parties. Such jurisdiction is paramount to the obligations of the contracting parties. It is a remedial power even for cases not provided for.

3. As to tendering for property outside of the city limits the respondents could have no control and the portion to be taken possession of, contemplated by the by-law and contract, was the portion of the railway within the city limits.

Sir W. J. RITCHIE C.J.—To my mind it is clear that "after a notice of six months to the said company, to be given within the twelve months immediately

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Ritchie C.J.

preceding the expiration of the said twenty years," means that the company are entitled to a full six months notice before the expiration of the twenty years, and that such six months must be within the twelve months immediately preceding the expiration of the twenty years. In this case no such notice of six months was given within the twelve months, the notice given having been on the 21st November, 1884, which clearly was not a six months notice within the twelve months, the expiration of the twelve months being on the 9th February, 1885.

I think the judgment of the Superior Court in the first action, which held the notice insufficient, was clearly right and should be restored.

I think it very clear that the right to assume the road was to be at the expiration of twenty years and at no other time. It is a mistake to say the corporation have the whole year to give the notice: they are bound to give such a notice as will entitle them to assume the road at the expiration of twenty years; the express provision and privilege is, that at the expiration of twenty years the corporation may assume the ownership, but they cannot do this unless a notice of six months has been given within the twelve months immediately preceding the expiration of the said twenty years; if they fail to give such a notice the right to assume the ownership of the road at the expiration of twenty years ceases; so long as they give the six months notice within the twelve months they are all right, the six months having reference to the expiration of the twenty years; there was no other time contemplated or fixed for the termination of defendants', or the assumption of plaintiffs', rights in the road but the expiration of the twenty years.

The notice given was on the 21st November, 1884,

that they would on the 9th February, 1885, assume the possession and ownership, &c. How can this be a good notice in any view of the by-law? It is no notice of six months within the twelve months, nor any notice of six months at all. The notice of the 21st of November, 1884, that on the 9th of February, 1885, they would assume, &c., is only a notice of two months and nineteen days.

The only right the plaintiffs had was to put an end to the defendants' rights on the expiration of twenty years and from that date to assume the ownership, and if they failed to give the notice necessary to accomplish this they failed to avail themselves of the privilege accorded them by the agreement and by-law.

STRONG J.—Under the authority of an act of the Legislature of the late Province of Canada (27 Vic ch. 61) by which the present appellants (defendants in first instance) were incorporated, the City of Quebec passed a by-law, authorizing the company to lay down rails in the streets of Quebec and amongst other things providing as follows:—

The privilege hereby granted to the said company shall extend over a period of 40 years from the date hereof, but at the expiration of 20 years the said corporation may after a notice of six months to the said company to be given within the 12 months immediately preceding the expiration of the said 20 years assume the ownership of the said railway and of all real and personal property in connection with the working thereof and on the payment of their value to be determined by arbitration, together with ten per cent. over and above the value thereof.

This by-law further provided that the railway was not to go into operation until

An agreement based upon the conditions and provisions therein mentioned should have been executed by a notarial deed entered into by and on the part of the company and the said corporation on whose behalf the mayor was thereby authorized to sign the said agreement.

A notarial deed embodying an agreement of the

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same tenor and effect was accordingly duly passed on the 9th February, 1865. The 20 years therefore expired on the 9th February, 1885. On the 21st November, 1884, the respondents gave notice that they would take possession of the railway and its property under the expropriation clause mentioned on the 9th February, 1885, that is, within three months from the date of the notice, and by the same notice the corporation appointed Mr. F. X. Berlinguet as its arbitrator to value the property according to the provision of the by-law and called upon the company to name an arbitrator to make the valuation conjointly with Mr. Berlinguet. The company did not appoint any arbitrator and on the 9th May, 1885, Berlinguet proceeded alone to value that part of the company's property situated within the limits of the City of Quebec which he estimated at a sum of $23,806.30, and his valuation or award to that effect was deposited with a notary and signified to the appellants on the 18th May, 1885. Three days afterwards the respondents caused this amount of the valuation with 10 per cent. additional to be tendered to the appellants through the ministry of a notary. They then instituted an action offering to consign the amount of Berlinguet's valuation and the 10 per cent additional and concluding for a declaration of their title, and of the right to the possession of the property. To this action the appellants pleaded a defence in law (demurrer) and a perpetual exception and on the 8th February, 1886 the Superior Court, presided over by Mr. Justice Casault, rendered a judgment dismissing the action on the ground that no notice of six months within the twelve months immediately preceding the expiration of 20 years from the date at which the by-law came in force had been given according to the requirements of the by-law and the notarial deed executed pursuant to

its terms.

The corporation appealed to the Court of Queen's Bench which latter court affirmed the judgment of the Superior Court but upon other grounds from those which had formed the "considérants" of the judgment pronounced by Mr Justice Casault.

The respondents then instituted the present action in which they repeated the allegations of their former action and in addition the facts that the first action had been instituted and that the judgment already mentioned had been rendered therein and they concluded that the company be ordered to name an arbitrator to value jointly with the one named by the corporation the property of the company, situated within the city limits. and in default of its so doing that the court should itself name an arbitrator to act for the company and that upon the payment of the amount to be awarded and 10 per cent. in addition the corporation should be authorized to take possession of such property situate within the limits of the city of Quebec and that such judgment should be declared to operate as a title in favor of the corporation. To this action the appellants pleaded, (1) That the company had failed to give the six months notice required by the by-law and agreement; (2) that by the notice stated in the action the company only proposed to assume and pay for so much of the company's property as was comprised within the limits of the city of Quebec whilst the company had in accordance with its powers in that behalf extended its line beyond the city limits and had other property beyond the limits which the city if entitled at all were bound to include in any expropriation under the by-law and agreement. (3) The appellants pleaded a defence *en droit*, or demurrer, by which they denied the legal sufficiency of the notice set forth in the action, excepted to the power

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and jurisdiction of the court to appoint an arbitrator for them, and insisted that the acquisition of the railway and its works and property would be *ultra vires* of the corporation. Upon issues taken on these pleas and defences the parties went to trial before Mr. Justice Casault who, whilst stating that his opinion as to the insufficiency of the notice remained the same as when he rendered judgment in the first action, considered himself bound by the opinion of the Court of Queen's Bench and therefore rendered a judgment by which the company were ordered to appoint an arbitrator within 15 days. This judgment having been affirmed by the Court of Appeal, two judges (Mr. Justice Baby and Mr. Justice Church) dissenting, has now been appealed from to this court.

I am of opinion that the notice of the 21st November, 1885, was too late. The clause of the by-law and of the agreement executed in pursuance of it, already set forth, clearly contemplate that the assumption of ownership by the corporation shall be at the expiration of 20 years from the date at which the by-law took effect and not later. It is not disputed that the by-law came into force on 9th February, 1865, and that the 20 years consequently expired on the 9th February, 1885. The corporation being in law bound to the utmost exactitude as to time in executing this unilateral clause, were therefore bound to show that they were in a position by a strict and literal observance of all pre-requisite conditions to claim the right to assume the ownership on this 9th February, 1885. Then what were the pre-requisites? 1st. They were bound to show that that they had given a notice within twelve months immediately preceding the expiration of the 20 years. The only notice given within that period was the notice of the 21st November, 1884. 2ndly, they had to prove that at the time they claimed the

right to assume the ownership of the railway, at the end of the 20 years, they did so after having given to the company a notice of six months. Then, do they show that on the 9th February, 1885, they had given a six month's notice? The only available notice they show, that is the only notice given within the immediately preceding twelve months, is that of the 21st November, 1884. But this notice had not been given six months before the 9th February, 1885, and as no other notice is suggested to have been given within the twelve months the corporation wholly fail to establish that they have complied with these preliminary requirements and conditions upon which alone they could claim to exercise the unilateral right of pre-emption or expropriation conferred by the by-law and agreement.

That an option of purchase of the kind given to the corporation in the present case, being a condition potestative, must be executed literally and strictly as to all its terms and conditions, including time, appears well established both by French and English authorities; Pothier on Obligations (1); Demolombe on Contracts (2); Larombiere (3); Fry on Specific Performance (4); *Austin* v. *Tawney* (5); *Brooks* v. *Garrod* (6). Upon this ground alone the appellants are therefore entitled to succeed.

Further, it appears very clear that the great weight of French as well as English authority is against the respondents as regards the right of the court to appoint an arbitrator or valuator to make the valuation provided for by the agreement. It is universal and elementary law that the price is the very essence of the contract of sale and that no such contract can be

(1) Ed. Bugnet, No. 206.
(2) Tome 2, Nos. 330, et seq.
(3) 2 Vol. p. 91.
(4) 2nd Ed. p. 471 in note.
(5) 2 Ch. App. 143.
(6) 2 De G. & J. 62.

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considered as completed unless either directly or indirectly the parties are agreed as to the amount and terms of the price. A valuation by an arbitrator appointed by the corporation and one appointed of office by the court for the company after their refusal to appoint one for themselves would not involve any such agreement as to the price as the law absolutely requires. It is not therefore surprising to find the best commentators almost universally of accord against such a jurisdiction. The jurisprudence of the French courts is also the same way. I refer to the following authorities on this point: Troplong, Vente (1); Duranton (2); Delvincourt (3); Laurent (4); Zachariae par Massé & Vergé (5); Marcadé on art. 1592 (6); Aubry & Rau (7); Taulier (8); Alauzet, Code de Commerce (9); and the jurisprudence is to the same effect in Dalloz Jur. Gen. Vente, 380—D. P. 62 1-242 note; Limoges 4 April, 1826, Jur. Gen. Vo. Vente, 381-10; Toulouse, 7 March, 1827, Jur. Gen. Vente, 381-20; Paris 6 July, 1812, Jur. Gen. Vol. Vente, 382 (motifs); Montpellier, 13 February, 1828 ib., 195; Jur. Gen. Vente, 380, Trans-Hy., 94, 95, D.P. 62, 1, 242 notes; Jur. Gen. Vente, 378; Pau 30 November, 1859, D.P., 60, 2, 36. The English authorities are decisively to the same effect: *Milnes* v. *Gery* (10); *Derby* v. *Whittaker* (11); *Tillett* v. *Charing Cross Bridge Co.* (12).

The provisions in the English Common Law Procedure Act as to the appointment of arbitrators by the court in default of an appointment under a contract do not apply to mere valuers *Collins* v. *C.* (13); Fry on Specific Performance (14). The circumstance that art. 1592 C. N. has

(1) Nos. 156-157.
(2) Vol. 16 Nos. 108 & 112 to 114.
(3) P. 125 in note.
(4) Vol. 24 Nos. 74-77.
(5) Tome 4 p. 277.
(6) P. 178.
(7) Ed. 4, Tome 4 p. 337 sec. 349.
(8) Tome 6 pp. 27 and 28.
(9) Tome 1, No. 103.
(10) 14 Ves. 400.
(11) 4 Drew. 134.
(12) 26 Beav. 419.
(13) 26 Beav. 306.
(14) Ed. 2 p. 155.

not been textually re-reproduced in the C. C. of Quebec can make no difference. There is nothing in the code indicating that there was any intention to alter the law in such an important and radical particular as that which regards the price as an essential of the contract of sale, the rule which is the foundation of this objection. Therefore I think the appellants are entitled to have the judgment appealed against reversed upon this ground also.

The objections that the corporation do not propose to assume all the company's property, and that insisting that the by-law and agreement as regards the clause reserving an option of purchase was *ultra vires* of the corporation, need not be considered and I express no opinion on those points.

The appeal should be allowed with costs and the action dismissed with costs to appellants in both the courts below.

FOURNIER J.—Le 18 novembre 1864, la corporation de la cité de Québec a adopté un (*by-law*) règlement au sujet de la construction d'un *tramway* dans ses limites. Ce règlement est textuellement inséré au long dans le contrat notarié intervenu entre la cité d'une part et la compagnie appelante de l'autre, par laquelle cette dernière s'obligeait à construire le *tramway* dont il était fait mention dans le règlement et le contrat aux conditions et stipulations énoncées dans ces deux documents. Ces stipulations ont non-seulement la force d'un règlement municipal, mais elles ont de plus le caractère obligatoire d'un contrat passé en forme authentique.

La clause de ce règlement donnant lieu, pour la deuxième fois, à un litige entre les parties, sur les mêmes questions, est identiquement la même que celle contenue dans le contrat, et elle est conçue dans les

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termes suivants :—

Le privilège accordé par les présentes à la dite compagnie, (savoir : la dite compagnie du chemin de fer des rues de Québec) durera pendant quarante ans, mais au bout de vingt ans, la dite corporation aura le droit, après un avis de six mois donné à la dite compagnie dans les douze mois qui précéderont immédiatement l'expiration des dites années, de prendre et s'approprier le dit chemin de fer, ainsi que les biens, meubles et immeubles qui serviront à son exploitation, en en payant la valeur qui sera estimée par arbitrage, et, de plus, dix pour cent de la valeur ainsi estimée.

La corporation de la cité de Québec, après l'avis de six mois requis par le contrat et le règlement, intenta une première action fondée sur une sentence arbitrale rendue par l'arbitre nommé par la dite corporation, après le refus de l'appelante de nommer son arbitre pour procéder à l'arbitrage pourvu par le dit règlement. L'honorable juge Cross a, dans ses notes sur cette cause, donné l'historique de la première action, faisant voir pour quels motifs elle a été renvoyée par la Cour Supérieure, dont le jugement a été confirmé par celle du Banc de la Reine, à l'exception de la partie du dit jugement déclarant que l'avis donné n'était pas suffisant, la cour du Banc de la Reine déclarant, au contraire cet avis suffisant et réservant à la dite corporation son recours pour une autre action.

Par sa deuxième action la dite corporation désirant faire exécuter la convention au sujet de l'arbitrage demande qu'il soit ordonné à la dite appelante de nommer un arbitre, et qu'à son défaut de ce faire il en soit nommé un par la cour, etc. ; que sur paiement du montant qui serait accordé par la sentence arbitrale, avec dix par cent en outre de ce montant, la corporation serait autorisée à prendre possession du *tramway* et des autres propriétés en faisant partie, situés dans les limites de la cité et appartenant à la dite appelante et que le jugement vaudrait titre à la dite corporation.

La compagnie appelante a de nouveau plaidé, 1o l'insuffisance de l'avis donné ; 2o que la corporation de la

cité de Québec n'avait le droit de posséder ni d'exploiter un *tramway* comme propriétaire ; 3o qu'elle avait pour l'exploitation du *tramway* des propriétés mobilières et immobilières dont une grande partie était située en dehors des limites de la cité ; que si la dite cité voulait prendre possession du *tramway* elle devrait aussi prendre possession de toutes les autres propriétés qui en faisaient partie ; 4o que la dite compagie ne pouvait légalement être contrainte à nommer un arbitre ni à procèder à l'arbitrage.

La principale question est sans doute celle de la suffisance de l'avis requis pour mettre fin au bail fait par le règlement. La disposition du règlement à cet égard a donné lieu à une différence entre les deux cours appelées à juger cette cause. L'hon. juge Casault de la Cour Supérieure a maintenu que l'avis pour être légal devait être donné au moins six mois avant l'expiration des derniers douze mois de la 20me année. La majorité de la cour du Banc de la Reine a déclaré au contraire que l'avis tel que donné était suffisant. La clause du règlement dit: Mais au bout de vingt ans, la dite corporation aura le droit, après un avis de six mois donné à la dite compagnie dans les douze mois qui précèderont immédiatement l'expiration des dites années, de prendre, etc. Les premières 20 années du bail devant se terminer le 9 février 1885, l'avis fut donné le 21 novembre 1884, par conséquent avant l'expiration des derniers douze mois. Il n'y a qu'une condition d'imposée à la formalité de l'avis, c'est qu'il sera donné dans les derniers douze mois ; la partie obligée à le donner a donc jusqu'à la dernière minute des douze mois pour donner son avis, et pourvu qu'il soit signifié en dedans des douze mois il est légal. Le délai pour le donner n'est pas de douze mois, moins six mois, comme ce serait le cas si l'avis en question devait, comme on l'a prétendu,

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être signifié six mois entiers avant l'expiration des douze mois La clause ne contient aucune expression qui puisse justifier une interprétation qui réduit aux premiers six mois de la dernière année le délai pour donner avis. Il est clairement de douze mois. Il est vrai que dans le cas actuel l'avis étant donné le 21 novembre, les six mois de délai qu'il comporte n'expireront qu'après la 20e année écoulée. Mais ce sont les termes de la convention qui le veulent ainsi. Les parties ayant jugé à propos de la conclure de cette manière sans doute parcequ'elles ont prévu qu'il ne pouvait en résulter aucun inconvénient. La convention, fait remarquer l'honorable juge Cross, n'oblige pas à donner l'avis dans les premiers six mois :

On the contrary, it in effect says that it may be given at any time within the whole year, and, therefore, up to the last day of the year.

Les arguments faits par l'honorable juge Cross pour soutenir l'opinion du Banc de la Reine sur la suffisance de l'avis me paraissent tellement concluants que je crois devoir en citer la plus grande partie :—

It is not like the case of a lease, where the law provides for its continuance by regular stated annual terms, and in the absence of a specific agreement, requires as a condition precedent to the tenant's right to continue, a pure notice of a period whose limit is fixed by law, and in default whereof, the law prescribes as a penalty against the lessor and in favor of the lessee, that the lease shall continue for another year.

The parties in this instance had in view the termination of their relations at the end of twenty years; that was the main object of the stipulation but it did not necessarily follow that these relations should absolutely cease on the very day of the termination of the twenty years; on the contrary, much necessarily remained to be done after the expiry of the twenty years, in the valuation of the property, the payment of the price with its augmentation, and other like matters, before the relations established between the parties could effectually cease; and this especially required time on the part of the Street Railway company. Hence when the City Corporation had expressly the whole year in which to give the notice, the Street Railway Company could always claim the six months delay after the notice, although it may have carried them nearly six months into the following year. So that although the Street Railway

Company might have insisted on terminating their relations to the City Corporation on the exact expiry of the twenty years, yet they were not obliged to do so, but could insist on the full expiry of a six months notice given to them within the year before being obliged to take measures to relinquish their position; that is, the six months previous notice was stipulated for in their interest, in case they should require the whole of that time.

Ces motifs me paraissent suffisants pour soutenir la décision de la cour du Banc de la Reine à laquelle je crois devoir donner mon concours.

Quant à la question du pouvoir de la corporation de posséder et d'exploiter le *tramway* en question, il est tout-à-fait inutile de s'en occuper sur cette contestation, bien que l'acte 27 Vict., ch. 61, ne laisse guère de doute à ce sujet. Le droit de s'en faire mettre en possession est seul mis en contestation aujourd'hui. Lorsque la corporation voudra exploiter le dit tramway, il sera temps alors de s'occuper de l'étendue des pouvoirs que la loi lui a conférée à cet égard.

Quant à l'étendue des propriétés mobilières et immobilières qui devaient être comprises dans l'évaluation qui devait en être faite par l'arbitrage, elle est déterminée par l'acte notarié passé le 9 février 1865. Elle doit se limiter à cette partie du *tramway* qui est situé dans les limites de la cité. Ni le règlement ni le contrat ne donne à ce sujet aucun pouvoir à la corporation. Quant aux propriétés mobilières qui devaient être évaluées comme dépendances du *tramway*, cela doit être laissé à la décision des arbitres.

Sur la validité de la clause par laquelle les parties se sont engagées à référer à arbitres la question d'évaluation du *tramway* et des propriétés mobilières de la compagnie, la majorité de la cour du Banc de la Reine s'est formellement prononcée tout en admettant, comme l'a fait l'hon. juge Cross, qu'il y a divergence d'opinion parmi les auteurs. Mais comme le fait observer ce savant juge, la raison semble être tout-à-fait du côté de

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ceux qui maintiennent que cette clause peut être mise en force. Les autorités citées par l'appelante dans son factum pour prouver l'impossibilité de la mettre à exécution n'ont pas d'application au cas actuel. Elles ne concernent que le cas d'une vente dans laquelle un vendeur et un acheteur ayant promis de laisser la fixation du prix de vente à la décision d'un tiers, la question s'élève au sujet de la légalité du consentement indispensable à la validité de la vente. Il ne s'agit pas ici d'une vente, car la propriété (les rues de la cité) qui fait le sujet de la clause compromissoire est inaliénable. Il n'y a pas eu et il n'a pu y avoir vente par l'intimée des rues de la cité dont elle a permis l'usage à l'appelante pour un certain nombre d'années. Cette propriété est inaliénable de sa nature. La transaction dont il s'agit ne peut être tout au plus qu'un bail dont la considération reçue par la cité serait la facilité des communications offertes aux citoyens pour les transporter en ville. Il est pourvu qu'à son expiration la corporation reprendra possession du *tramway* et de ses dépendances en remboursant la compagnie appelante avec en outre dix pour cent. Ce n'est pas une vente, la rue n'a pas été vendue, c'est une simple résolution de la convention qui permet à l'intimée de rentrer dans sa propriété en indemnisant la partie dépossédée de ses frais de construction. La somme à payer n'est pas un prix de vente, puisque l'appelante prétend que l'intimée ne peut posséder le chemin en question. Ce n'est tout au plus qu'une indemnité pour les travaux de l'appelante. La propriété devant retourner à l'intimée, au bout de 20 ans, rien n'était plus rationnel et plus conforme aux usages judiciaires du pays que de convenir, comme on l'a fait dans le cas actuel que ce serait en en payant la valeur qui sera estimée par arbitrage, et, de plus, dix pour cent de la valeur ainsi estimée. Comme on le

voit il ne s'agit nullement de vente et les autorités citées par l'appelante portent à faux. Il s'agit ici seulement de la validité de la clause par laquelle les parties sont convenues que leur contestation au sujet de l'évaluation à faire serait jugée par des arbitres. Cette clause est-elle valable? Il y a divergence d'opinion à ce sujet entre les auteurs, comme l'a fait observer l'honorable juge Cross. Aussi, je ne me propose pas d'entrer dans la discussion des raisons données de part et d'autre—ce travail est déjà fait—je me contenterai de n'en citer que les parties qui font voir, comme l'a si bien dit l'honorable juge Cross, que la raison est du côté de ceux qui soutiennent la validité de cette clause. Voir Dalloz, Rep. de Jurisprudence (1).

Mais en supposant que la transaction puisse être considérée comme une vente dont le prix doit être laissé à l'arbitrage d'experts qui seront nommés ultérieurement, la clause est valable, comme le prouve Dalloz (2).

Je suis d'avis de confirmer le jugement, mais je suis seul de cet avis.

HENRY J.—By agreement and in virtue of a by-law the appellant company obtained the right to exercise the powers and privileges of a street railway company in the city of Quebec for a period of forty years, and upon one condition only could this right be put an end to, viz: "the privilege hereby granted to the said company shall extend over a period of forty years from the date hereof, but at the expiration of twenty years the said corporation may, after a notice of six months to the said company to be given within the twelve months immediately preceding the expiration of the said twenty years, assume the ownership of the said railway and of all real and personal property in connection with the working thereof and on the

(1) Vo. Arbitrage n° 454. (2) Vo. Vente n° 382.

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payment of their value to be determined by arbitration together with ten per cent. over and above the value thereof."

The notice in this case was given on the 21st. Nov. 1884, and the twenty years expired on the 9th Feb. 1885. I entirely concur in the opinion expressed by the majority of my learned colleagues that the notice is too short. The condition is a condition precedent to the right of the corporation to assume the ownership of the railway after twenty years.

I also concur with Mr. Justice Strong in holding that the court has no power under the agreement to appoint an arbitrator for the company. If it were the case of expropriation of public land for public use the court, no doubt, would have had power to appoint the arbitrator. But the agreement here distinctly provides that the company's arbitrator should be appointed by themselves and there is no provision that in the case of the refusal of the company to appoint their arbitrator a judge or court can then appoint one.

I have serious doubts on the other point raised, but it is sufficient for me to say that upon these two grounds I am of opinion that the present appeal should be allowed with costs and the judgment of the Superior Court in the first action restored.

TASCHEREAU J.—I am of opinion that the notice is defective and therefore the present appeal should be allowed with costs.

GWYNNE J.—The notice was quite insufficient; there is therefore no necessity to refer to the other points argued.

Appeal allowed with costs.

Solicitors for appellants: *Caron, Pentland & Stuart.*

Solicitors for respondents: *Baillargé & Pelletier.*

THE MERCHANTS MARINE INSURANCE CO. (DEFENDANTS) ..... } APPELLANTS;

AND

HOWARD BARSS AND LEBARON VAUGHAN (PLAINTIFFS) ..... } RESPONDENTS.

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*Feb. 27.
*June 14.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Marine insurance—Insurable interest—Not disclosed when policy issued—Notice of abandonment—Authority of agent.

The part owner of a vessel may insure the shares of other owners with his own, without disclosing the interest really insured, under a policy issued to himself insuring the vessel "for whom it may concern."

An agent effecting insurance under authority for that purpose only, may, in case of loss, give notice of abandonment to the underwriters without any other, or special authority.

APPEAL from a decision of the Supreme Court of New Brunswick (1), refusing to set aside the verdict for the plaintiff and order a nonsuit pursuant to leave reserved.

The facts of this case are simple. Barss & Co., a Liverpool firm, cabled to one Vaughan, in St. John, N. B., to insure for them $3,500 on the barque "Landseer." Under this authority Vaughan applied for the insurance, and the application asked for insurance "on our account" by H. Barss & Co. The policy was made out stating that the insurance was "for whom it may concern." A loss having occurred a claim was made under the policy by H. Barss & Co. and several others who were shown to be interested in the vessel. The company resisted payment on the ground that only the interest of Barss & Co. was insured. Whereupon the policy was sued on by all the owners and

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

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

(1) 26 N. B. Rep. 339.

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on the trial a verdict was entered for the plaintiffs with leave reserved to the defendants to move for a nonsuit, or to reduce the verdict to an amount agreed upon as representing the interest of Barss & Co. The verdict was sustained by the Supreme Court of New Brunswick, and the defendants appealed to the Supreme Court of Canada.

Weldon Q. C. and *C. A. Palmer* for the appellants. There was no authority in Vaughan to insure anything but the interest of Barss & Co. Any authority that Barss & Co. may have had over the interest of the other owners cannot be held to govern the action of Vaughan.

Further, there was no constructive total loss. The only evidence of loss is that of the captain, and his evidence is mostly inadmissible as it refers to the proofs of loss which are not evidence of the facts contained in them.

Lastly the notice of abandonment was insufficient. Only the person having authority to insure can abandon, and only the person having authority to transfer the property can insure. The test is whether, independently of the Merchants' Shipping Act, Vaughan could have given a bill of sale of the interest of the owners other than Barss & Co.

The cases of *Stewart* v *The Greenock Marine Ins. Co.* (1); *Kaltenbach* v. *Mackenzie* (2); *Jardine* v. *Leathley* (3). were cited

Forbes for the respondents cited Brown's Parliamentary Cases, Tomlins, 204. *McManus* v. *Etna Ins. Co.* (4); *Currie* v. *Bombay Ins. Co.* (5); *Patapsco Ins. Co.* v. *Southgate* (6); *Hunt* v. *Royal Ass. Co.* (7); *Rankin* v. *Potter* (8).

(1) 2 H. L. Cas. 159.
(2) 3 C. P. D. 467.
(3) 3 B. & S. 700.
(4) 6 All. (N. B.) 314.
(5) L. R. 3 P. C. 72.
(6) 5 Peters 604.
(7) 5 M. & S. 47.
(8) L. R. 6 H. L. 83.

SIR W. J. RITCHIE C. J.—I think there was sufficient evidence to warrant the jury in finding that there was a constructive total loss; that as agent for the assured H. Vaughan had a right to give notice of abandonment; and I think the notice so given was sufficient to convey to the underwriters the intention of the assured to abandon; that defendants having, by their policy, insured the vessel "on account of whom it may concern" it was open to the plaintiffs to show an insurable interest and for whose benefit the insurance was effected, the intention of the party directing the insurance determining whose interest the policy protects; and independently of the direct evidence in this case that twenty shares were intended to be insured would seem to appear very clearly from the amount insured, $3,500 on a valuation of $10,000. If the insurance was only on eight shares instead of twenty it would have amounted to only some $1,222 and they would have been paying premiums on $2,278 which they never could have received in case of loss—a most unlikely and unreasonable thing for business men to do—and it was, no doubt, seeing this would be the case that the agent of the company insured "on account of whom it may concern" to enable the plaintiffs, in case of loss, to declare the intent and cover all the interest the insured represented and intended to insure, without requiring him to disclose what that interest was at the time of effecting the insurance.

The fact of the agent of the insured departing from the words of the application, and using language of a more extended character, would seem to show that the interest was not to be confined to the shares standing in the name of Barss & Co. but was intended to cover all the interest they represented.

As to the claim to have a reduction of freight said

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to have been received by the assured and alleged to belong to the owners, the defendants not having furnished any means of ascertaining the amount, if any, so received there is no amount that can be deducted in this action.

STRONG J.—I concur in all respects in the full and very able judgment delivered by Mr. Justice Palmer in the court below.

FOURNIER, TASCHEREAU and GWYNNE JJ. concurred in dismissing the appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Weldon, McLean & Devlin.*

Solicitor for respondents: *J. G. Forbes.*

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Mar. 21.

JOHN KYLE (DEFENDANT).....APPELLANT;

AND

THE CANADA COMPANY (PLAINTIFFS) RESPONDENTS.

ROBERT HISLOP (PLAINTIFF).....APPELLANT;

AND

THE CORPORATION OF THE TOWN OF McGILLEVRAY (DEFENDANTS). } RESPONDENTS

Appeal—Direct from Divisional Court of Ontario—Special circumstances—Decision of Court of Appeal on abstract question of law.

It is not a sufficient ground for allowing an appeal direct from the decision of the trial judge on further consideration or of a Divisional Court of the High Court of Justice of Ontario, that the Court of Appeal of that province had already, in a similar case before it, given a decision on the abstract question of law involved in the case in which the appeal was sought, though it might be sufficient if such decision had been given on the same state of facts and the same evidence.

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APPLICATION to STRONG J. in chambers for leave to appeal to the Supreme Court of Canada from the deci-

sion on further consideration of the judge who tried the cause, without any appeal to the Divisional Court or the Court of Appeal for Ontario.

The grounds urged in support of the application are fully set out in the judgment of His Lordship.

Godfrey supported the application.

McCracken contra.

STRONG J.—This is an application for leave to appeal directly to this court from the judgment pronounced on further consideration by the judge who tried the action, there having been no intermediate appeal either to the Divisional Court, or to the Provincial Court of Appeal. The application is of course made under section 6 of the "Supreme Court Amendment Act of 1879," the only enactment which authorises the making of such an order as is sought to be obtained. I am of opinion that the section referred to authorises an order being made in any proper case, as well when the proceeding in the court below is an action at law as where it is a suit in equity; and, indeed, as regards the province from which this case comes it would be almost impossible, in the altered state of the practice under the Judicature Act, to give effect to any such distinction. But I am clear that no such distinction ever existed. Then, it is objected that this section 6 does not apply to a case like the present, where it is sought to appeal directly from the judgment of the judge who tried the case (without a jury), no recourse having been had to the jurisdiction of the Divisional Court. I am against this objection also. Under the practice now prevailing in Ontario the judgment of the judge at the trial is in effect the judgment of the Divisional Court, and appeals directly from a judgment such as this to the Court of Appeal are according to the general course of practice. Every appeal from this province

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to the Supreme Court heard during the present session has been a proceeding of this kind, that is, one in which the appeal to the Court of Appeal was directly from the judgment of the judge at the trial on further consideration.

It remains, however, to be considered whether this is a case in which section 6, being, as already said, applicable, it is proper to exercise the power thereby conferred, and I am clearly of opinion that it is not. It is suggested as a reason for allowing an appeal directly to this court that an appeal to the Court of Appeal would be useless, as that court has already decided the point in dispute viz., that the period of limitation to an action on a covenant for the payment of rent is 20 years and not 10 years as the defendant contends. It is, therefore, said that this abstract point of law having been thus decided, and subsequent cases in England (1) having, as it is urged, since decided otherwise, it would be useless now to appeal to the Court of Appeal, inasmuch as that court, without regard to the English cases referred to, would adhere to its previous decisions. I could not admit this as a sufficient reason for making the order asked for even if I thought that the English cases referred to at all affected the question decided by the learned judge whose decision is sought to be brought under review. In the case of *Moffatt* v. *Merchant's Bank* (2), which is relied on for the appellant, leave to appeal direct to the Supreme Court of Canada was given because the Court of Appeal had not only decided the same legal question which the proposed appellant sought to raise, but had decided it upon the same actual state of facts and virtually upon the same evidence, oral and documentary, as that upon which the decision which it was proposed to appeal

(1) *Sutton* v. *Sutton* 22 ch. D 511; *Fearnside* v. *Flint* 22 ch. D 579.
(2) 11 Can. S. C. R. 47.

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from had proceeded. Under these circumstances it was manifestly a proper case for giving leave for a direct appeal, since the Court of Appeal could not be expected to take a different view of the legal consequences flowing from the identical state of facts upon which they had lately pronounced. Here, however, it is, at the most, said that the Court of Appeal has decided the same abstract proposition of law which it is proposed to raise in this court if the appeal is admitted. I should regard this as an insufficient ground even if the assertion was found to be warranted upon a consideration of the decided cases. But it is clear the Court of Appeal has never pronounced any decision which would debar them from acting on the English authorities referred to if they applied.

These English cases, however, have no application whatever. The question which arises here was in England set at rest by *Foley* v. *Paget* (1), a decision which is wholly untouched by the recent English authorities. To my mind an appeal to this court on any such grounds as those suggested would be frivolous and unfounded, and as the foundation of an application under section 6 of the Act of 1879 for leave to appeal direct must be some reasonable ground of appeal, I hold that for want of any such ground this motion must be refused with costs.

Motion refused with cost.

HISLOP *v.* THE TOWN OF McGILLEVRAY.

1887
April 16.

APPLICATION to HENRY J. in Chambers for leave to appeal to the Supreme Court of Canada from the judgment of the Queen's Bench Division of the High Court of Justice for Ontario without an intermediate appeal to the Court of Appeal.

The grounds of the application are sufficiently set out in the judgment.

(1) 2 Bing. (N. C.) 679.

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Henry J.

HENRY J.—This is an action brought by the appellant who, by means of an injunction in the nature of a mandamus, seeks to compel the respondent, through its municipal officers, to open up a highway reserved for the purpose adjoining the land of the appellant. A verdict on the trial was given in favor of the appellant, but it was ordered to be set aside and judgment entered for the respondent by the Queen's Bench Divisional Court. Proceedings were then taken by the appellant for an appeal to the Court of Appeal for Ontario, but the same have remained in abeyance, pending an application to a judge of this court to order an appeal directly to this court under sec. 6 of the Supreme Court Amendment Act of 1879.

The application was opposed and I have now to dispose of it.

The section in question provides, amongst other things, that by leave of this court or a judge thereof an appeal shall lie to it "from the final judgment of any superior court of any province, other than the province of Quebec, in any action, suit, cause, matter or other judicial proceeding originally commenced in such superior court, without any intermediate appeal being had to any intermediate court of appeal in the province."

Under the provisions of that section ample discretionary power is, in my opinion, given to this court or one of its judges to make an order such as that applied for in this case, but I cannot assume that it was intended to be acted on unless some good reason could be found for doing so.

The reason advanced in this case is that the Court of Appeal in Ontario, in a case before it, decided the main point in this case; and that inasmuch as that court has in their judgment virtually settled that point against the appellant, it would be an useless ex-

pense to have an intermediate appeal to that court.

The case referred to is *re Moulton* and *Haldimand* (1.)

I have carefully considered it and am of the opinion that the decision of this case ought not to be affected by the decision in that. It was heard by four of the learned judges of that court. It was an application to the court by a writ of mandamus to compel the county of Haldimand to repair an existing bridge or the erection of a new one—the bridge being part of a highway then opened up and used. The court decided that the duty to repair the bridge or erect a new one was on the county of Haldimand, but were equally divided as to the remedy sought, and the court below having decided to refuse the mandamus, the appeal was dismissed—two of the learned judges arriving at the conclusion that the remedy by indictment was alone available.

The case now under consideration differs from that just referred to. The latter was virtually to compel the repairing of a bridge forming part of a highway then in use by the public. In this the proceeding is to compel the opening up of a new highway on land appropriated for it. The Appeal Court in Ontario, by an equal division of its members, dismissed an appeal from a decision that the remedy by indictment was alone available as applicable to the matter of the repair of the existing highway, but I could hardly conclude that any member of that court would be heard to say that the respondent township could be indicted for not opening up a new highway.

The decision of the one case does not therefore, in my opinion, in that respect affect the other, and the same learned judges who were of opinion that an indictment was the only means of remedy may be of the opinion that although mandamus is not the proper remedy in the one case, it may be in the other. I

(1) 12 Ont. App. R. 503.

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think, therefore, it would be a wrong exercise of the power bestowed on this court and its judges to allow an appeal directly to this court.

The application of the appellant is therefore refused with costs.

Motion refused with costs.

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*Nov. 21.
*Dec. 20.

JAMES BYERS (DEFENDANT).....APPELLANT;

AND

DANIEL H. McMILLAN AND WILLIAM W. McMILLAN (PLAINTIFFS).....RESPONDENTS.

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

Contract—Written instrument—Collateral parol agreement—Admissibility of evidence of—Work and labor—Security—Lien.

By an agreement in writing B. contracted to cut for A. a quantity of wood and haul and deliver the same at a time and to a place mentioned, B. to pay for the same on delivery. The agreement made no provision for securing to A. the payment of his labor, but when it was drawn up there was a verbal agreement between the parties that in default of payment by B. the wood could be held by A. as security and be sold for the amount of his claim.

Held, reversing the judgment of the court below, Henry J. dissenting, that evidence of this verbal agreement was admissible on the trial of an action of replevin for the wood by an assignee of A., and that its effect was to give B. a lien on the wood for the amount due him.

APPEAL from a decision of the Court of Queen's Bench, Manitoba (1), setting aside a verdict for the defendant and directing judgment to be entered for the plaintiffs.

This was an action of replevin and arose out of an agreement by the defendant to cut and haul a quantity of cordwood for one Andrews who had a license from

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*PRESENT—Strong, Fournier, Henry, Taschereau and Gwynne JJ.

(1) 4 Man. L. R. 76.

the Hudson Bay Company, who owned the land on which the wood originally stood, to cut and remove it. The agreement between the defendant and Andrews was as follows:—

"Sewell, Oct. 6th, 1882.

"Memorandum of agreement made in duplicate this 6th day of October, A.D., 1882, between James Byers, of Sewell, in the County of Brandon and Province of Manitoba, lumberman, of the first part, and Geo. R. Andrew, of the said town of Brandon, hotel keeper, of the second part: Witnesseth, that the said party of the first part hereby agrees to cut and deliver five hundred or more cords of wood taken from section twenty-six, township ten, range 16 west and to be delivered at Sewell station at three dollars per cord, excepting what may be delivered before snow, which amount will be paid for at three dollars and twenty-five cents per cord, also to cut and take from section eight, township ten, range 16 west, two hundred cords or more at three dollars and fifty cents, the whole to be delivered at Sewell station before the twentieth day of March, 1883; and for the due fulfilment of the above contract the said party of the second part hereby agrees to pay to the said party of the first part the contract price less twenty per cent. for all wood according to measurement at Sewell station, which twenty per cent. will be paid on the fulfilment of this contract."

Andrews assigned his license to cut the wood, and all his interest in the contract with the defendant, to one Stephenson, and by various *mesne* assignments it finally became vested in the present plaintiffs.

The defendant cut the wood and carried it to Sewell station, placing it upon the grounds of the railway company, where it remained until after the 20th March when, not having received payment for his work, he shipped three carloads to Brandon, where it was replevied by the respondents.

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On the trial of the action the defendant set up a parol agreement with Andrews made, as he alleged, at the same time that the above contract was signed, to the effect that if the amount due him for cutting and hauling the wood at the rates specified was not paid on the 20th March, 1883, (the date mentioned in the agreement) the defendant would be entitled to hold the wood as security and to sell it to realize what was then due. Evidence of this alleged parol agreement was admitted by the judge subject to objection by plaintiff's counsel.

The learned judge who tried the case held that such a parol agreement was really made, and that it vested the property in the wood in the defendant, who obtained a verdict in accordance with such ruling.

The Court of Queen's Bench set aside this verdict on the ground that the evidence of the parol agreement was improperly admitted as its effect would be to vary the written contract entered into by the parties. From this decision the defendant appealed to the Supreme Court of Canada.

Ewart Q.C. for the appellant.

The original contract was entirely complete and the parol agreement can only be regarded as collateral; in fact, security is generally given by an agreement outside of the main contract. *Harris* v. *Rickett* (1); *Lindley* v. *Lacey* (2); *Morgan* v. *Griffith* (3); *Erskine* v. *Adeane* (4); *Malpas* v. *London & S. W. Ry. Co.* (5); *Porteous* v. *Muir* (6); *McNeely* v. *McWilliams* (7); *Lancey* v. *Brake* (8); *Fitzgerald* v. *G. T. Ry. Co.* (9); *Adamson* v. *Yeager* (10); *Lingley* v. *Smith* (11).

The plaintiff was always in possession of the wood

(1) 4 H. & N. 1.
(2) 17 C. B. N. S. 578.
(3) L. R. 6 Ex. 70.
(4) 8 Ch. App. 756.
(5) L. R. 1 C. P. 336.
(6) 8 O. R. 127.
(7) 9 O. R. 728; 13 Ont. App. R. 324.
(8) 10 O. R. 428.
(9) 4 Ont. App. R. 601; 5 Can. S. C. R. 204.
(10) 10 Ont. App. R. 477.
(11) 1 Han. (N.B.) 600.

and his possession is recognized by the form of the action. That he was in legal possession see *Stanford* v. *Hurlstone* (1).

Being in lawful possession of the property a demand is necessary before replevin will lie. *Alexander* v. *Southey* (2).

Robinson Q.C. for the respondents.

If the evidence is admissible at all the parol agreement must be clearly proved. *Erskine* v. *Adeane* (3).

The cases in our own courts show clearly that the appellant is not entitled to the relief claimed. *Re Mason* and *Scott* (4). *McNeely* v. *McWilliams* (5).

STRONG J.—This is an appeal from a judgment of the Court of Queen's Bench of Manitoba, reversing the decision of Mr. Justice Dubuc, before whom the action was tried without a jury, and directing judgment to be entered for the plaintiffs in the action.

The material facts disclosed by the evidence are as follows: George Andrew having a permit from the Hudson's Bay Company, authorising him to cut and remove from certain lands belonging to them a quantity of wood—five hundred cords or upwards, on the 6th of October, 1882, entered into an agreement with the defendant, James Byers, to cut the before mentioned quantityof wood and haul it to a railway station known as "Sewell Station." This agreement was reduced into writing by Andrew and was signed by the parties to it, and was in the following words:—

Memorandum of agreement made in duplicate this 6th day of October, A.D., 1882, between James Byers of Sewell, in the County of Brandon and Province of Manitoba, lumberman, of the first part, and Geo. R. Andrews of the said town of Brandon, hotelkeeper, of the second part; Witnesseth, that the said party of the first part hereby agrees to cut and deliver 500 or more cords of wood taken from section 26, township 10, range 16 west, and to be delivered at

(1) 9 Ch. App. 116.
(2) 5 B. & Al. 247.
(3) 8 Ch. App. 764.
(4) 22 Gr. 592.
(5) 9 O. R. 728; 13 Ont. App. R. 324.

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Sewell station at $3 per cord, excepting what may be delivered before snow, which amount will be paid for at $3.25 per cord, also to cut and take from section 8, township 10, range 16 west, 200 cords or more at $3.50, the whole to be delivered at Sewell station before the 20th day of March, 1883; and for the due fulfilment of the above contract the said party of the second part hereby agrees to pay to the said party of the first part the contract price less 20 per cent. for all wood according to measurement at Sewell station, which 20 per cent. will be paid on the fulfilment of contract.

The agreement was prepared by Andrews himself and the parties had no professional assistance.

Before signing, however, the appellant raised a question as to what security he was to have for the monies to be paid him under the agreement, and both he and Andrews state that it was then verbally agreed that he was to have security for the amount to which he would be entitled under the agreement upon the wood itself which, in case of default in payment, he was to be at liberty to sell in order to raise the amount due to him; in other words, that he was to have a lien or right of retention until payment, with a power of sale superadded.

What passed between the parties is thus detailed in the depositions of the appellant and Andrews. Byers' evidence is as follows:—

Q. I want to know as to any security? A. I spoke to Mr. Andrews as to any security for this wood, for the pay, and he said it was not necessary to have any security for the wood, that he thought it was enough security that it was mine until he paid for it.

Q. Was there anything further? A. He also said that it was agreed that if at the expiration of the agreement it was not paid, if he did not pay for the wood and take possession of it, that I had a right to sell the wood.

Q. Had you known Mr. Andrews previous to that time? A. No, that is the reason I asked for security; that was the first time I had seen him.

Q. Now you spoke about a verbal agreement that was made with Mr. Andrews, now was that made at the time the writing was drawn up? A. Yes.

Q. Who drew up the written agreement? A. Mr. Andrews.

Q. And you signed it then and there? A. Yes.

Q. And it was when this was being drawn up that you came to the

agreement about the security? A. Yes.

Q. It was not made afterward or before it? A. No.

Q. It was part of the same agreement really? A. Yes, it was a verbal agreement.

Q. But was really part of the same agreement? A. Yes.

Q. Was there anything on the face of this document that induced you to sign it—was there anything in this exhibit "4" that induced you to sign it? A. Yes.

Q. What was it? A. I was to have the wood as security for my pay in case of his not paying me when the time was up, I had a right to sell the wood.

Q. And that is what induced you to sign it? A. Yes.

A. I spoke to him about security and he said he did not see that I needed any more security, that I had the wood, that the wood was my security until I was paid according to the contract, and that in case I was not paid at the time the contract was up I had a right to sell the wood.

And this is entirely confirmed by Andrews as shewn by the following extract from his evidence:—

A. The bargain was, when he talked about security, and I told him that the wood was all the security he needed, that he could hold the wood until he was paid for it; I intended to take the wood right along as he got it out and pay the balance on the first of March when the contract expired.

Q. That is the bargain that was made as to security? A. Yes, as to security, if I did not pay him he had the wood, that he was the owner of it?

Q. That is what was said? A. Yes.

Q. Now what was the bargain? A. I cannot profess to repeat it in the same words. I cannot remember the exact words for three or four years. If Byers was not paid for the wood when the contract was completed, that he was the owner of the wood; the wood was his security.

Upon the faith of this agreement the appellant went on and cut the wood and hauled it to Sewell station in fulfilment of this contract.

On the 4th January, 1883, Andrews assigned his right under the contract to one Stephenson who on the same day made a similar assignment to the firm of Woodworth & Rouncefell, who subsequently by two formal bills of sale dated respectively the 13th of August, and 26th September, 1883, transferred their rights to the present respondents.

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The wood remained at the railway station in the possession of the appellant until after the 20th March, 1883, the day fixed by the memorandum of agreement for completion and until some time in October, 1883, when the appellant not having been paid the full amount due to him for the cutting caused three cars to be loaded with wood which he designed to send forward to a market for sale, when the respondent on the 2nd of November, 1883, issued the writ of replevin in this action.

The appellant's pleas were, 1st, *Non cepit*; 2nd, that the goods were his and not the respondent's, and 3rd, not guilty.

The cause coming on for trial before Mr. Justice Dubuc, it was objected that the parol evidence of the appellant and Andrews already set forth was not admissible to establish the appellant's right to security on the wood. The learned judge, however, over-ruled the objection and admitted the evidence, which he held to be worthy of credit and sufficient to establish the agreement for a lien. He also held that the execution of the written agreement by the appellant constituted a sufficient consideration for the supplementary verbal agreement, and gave judgment accordingly for the defendant.

From this judgment an appeal was taken to the Court of Queen's Bench, which reversed the decision of the trial judge and ordered judgment to be entered for the plaintiffs. The defendant has now appealed to this court.

The judgment of the Court of Queen's Bench proceeds upon two distinct grounds. First, it is said that the parol evidence was inadmissible, being excluded by the written agreement; and, secondly, that there was no consideration for the collateral agreement for a lien. I am of opinion that the court was wrong on both points.

No difficulty arises as to the law of lien for it is beyond all doubt or question that a party to an agreement for the performance of work such as that undertaken by the appellant may stipulate for a lien on the products of his labor. And it is equally clear that subject to the applicability of any objection based on the rule of evidence invoked by the respondents that such an agreement may at common law be made orally and without writing (1). Further, no objection to such a stipulation being made without writing can be founded either on the Statute of Frauds or on the Chattel Mortgage Act. The Statute of Frauds does not in any of its provisions apply to agreements for liens, and the Chattel Mortgage Act is out of the question since the possession was to be retained by the appellant as it clearly was in fact according to the evidence.

That Mr. Justice Dubuc was warranted by the evidence in finding that this verbal agreement was actually concluded between the parties and that upon the faith of it the appellant signed the written memorandum provided he gave credit to the witnesses, cannot admit of dispute, and as regards the credibility of the witnesses his finding must be held conclusive. I am also of opinion that the learned judge rightly construed the evidence as shewing an agreement for a lien with a right of sale, and not as a conditional agreement for an absolute sale of the wood to the appellant in the event of non-payment. The parties had no professional assistance in the transaction and we must not therefore assume that they understood the technical meaning of the language in which they expressed themselves. Both Andrews and the appellant say that the collateral arrangement was for the object of providing security for the appellant. Andrews distinctly says, "the bargain was when he talked about security and I told him the wood

(1) See Smith's Mercantile Law (ed. 9) p. 561 and cases there cited.

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was all the security he needed that he could hold the wood until he was paid for it," and again, "if Byers was not paid for the wood when the contract was completed that he was the owner of the wood, the wood was his security."

It is apparent from the context that by the ownership of the wood here spoken of what was meant was ownership by way of security, the parties not discriminating between absolute ownership and special ownership by way of lien or pledge.

There remains therefore as the only point in the case the question as to the admissibility of the evidence, and upon this I confess I see little room to doubt the correctness of the ruling of Mr. Justice Dubuc.

The cases between landlord and tenant in which parol evidence of stipulations as to repairs and other incidental matters, and as to keeping down and dealing with the game on the demised premises, has been held admissible, although there was a written lease, *Erskine* v. *Adeane* (1); *Morgan* v. *Griffith* (2); *Lindley* v. *Lacey* (3), afford illustrations of the rule in question by the terms of which any agreement collateral or supplementary to the written agreement may be established by parol evidence, provided it is one which as an independent agreement could be made without writing, and that it is not in any way inconsistent with or contradictory of the written agreement.

The cases referred to as instances in which the rule of exclusion has been held not applicable are all fully stated and considered in the judgments of the court below and need not here be more particularly referred to.

These cases (particularly *Erskine* v. *Adeane* which was a judgment of the Court of Appeal) appear

(1) 8 Ch. App. 764. (2) L. R. 6 Ex. 70.
(3) 17 C. B. (N. S.) 578.

to be all stronger decisions than that which the appellant calls upon us to make in the present case, for it is difficult to see how an agreement, that one who in writing had undertaken by his labor to produce a chattel which is to become the property of another shall have a lien on such product for the money to be paid as the reward of his labor, in any way derogates from the contemporaneous or prior writing. By such a stipulation no term or provision of the writing is varied or in the slightest degree infringed upon; both agreements can well stand together; the writing provides for the performance of the contract, and the consideration to be paid for it, and the parol agreement merely adds something respecting security for payment of the price to these terms. Surely it would be competent to the parties, either contemporaneously with the written memorandum or subsequently to it, to have stipulated by parol that the appellant should have had as security for payment a lien or pledge upon some chattel belonging to Andrews other than the wood then delivered to him or already in his possession, and if such an agreement would not have been obnoxious to the rule of evidence in question it is hard to see how the circumstance that the lien was to be on chattels to be brought into existence under the agreement can make any difference.

On the whole I am of opinion that the cases cited are indistinguishable and amply support the appellant's contention, and that the judgment of the Court of Queen's Bench must be reversed. I regard the question of consideration concluded by the finding of Mr. Justice Dubuc; there was not only ample circumstantial evidence warranting the inference that the appellant signed the written memorandum on the faith of having the security stipulated for by him, but there is direct evidence to that effect to be found in the deposition of the appellant whose testi-

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mony was fully accredited by the learned judge. The Court of Queen's Bench seems to have overlooked this evidence for it is said there was no consideration for the verbal agreement other than that given for the written contract.

In the view I take, I do not feel called upon to consider the other questions which were raised and I avoid expressing any opinion upon those points.

The appeal must be allowed with costs and judgment in the action entered for the appellant with costs.

FOURNIER J.—Concurs.

HENRY J.—The determination of the issues in this case depends on the right of the appellant to change the legal effect of the following agreement under seal entered into by him and one George R. Andrew, which is as follows:

(His Lordship read the agreement.)

The wood to be cut and hauled was the property of Andrews, and Byers was therefore only his employee or servant for the purpose of cutting and transporting it to the railway station at Sewell, owned by the Canadian Pacific Railway Co. When so placed the appellant had by law under the above agreement no lien on the wood whatever. Any possession he had of it was only to enable him to fulfill his contract, and even that qualified possession was at an end when, in pursuance of his contract, he placed it upon property not belonging to himself nor under his control, but upon the property of the Canadian Pacific Railway Co. His doing so would destroy any lien if any he had on it. The property in the wood therefore remained in Andrew. He, however, assigned over his property therein to one E. F. Stephenson who subsequently

assigned the same to Messrs. Woodworth & Rowncefell, of Brandon, who before the beginning of the present action assigned to the respondents.

On the part of the appellant it is contended that a parol contract in relation to the wood in question was entered into between him and Andrews which, as may be stated substantially, was to give to the appellant the ownership of the wood, or at least a lien upon it, for the amount due him under the contract or until his account for cutting and hauling was paid. It is well laid down in Taylor on evidence, (1) as follows:—

The first general rule which it will be necessary to notice respecting the admissibility of extrinsic evidence to affect what is in writing is that parol testimony cannot be received to contradict, vary, add to or substract from the terms of a valid written instrument, and that * * * applies to every document which contains the terms of a contract between different parties; and is designed to be the repository and evidence of their final intention.

He then proceeds at p. 966:

Having thus pointed out the class of written instruments to which the rule applies it may next be observed that the rule does not prevent parties to a written contract from proving that either contemporaneously or as a preliminary measure they had entered into a distinct oral agreement on some collateral matters. Still less * * * does the rule exclude evidence of an oral agreement, which constitutes a condition on which the performance of the written agreement is to depend.

There are many cases where parol evidence may be received to show a written contract void, but the principles affecting them are not necessary to be considered in this case.

There is no doubt that where there is a written contract a parol agreement on some *collateral* matter may be enforced, and that the operation of a written agreement may be limited to the happening of a particular event or otherwise. The rule in regard to the latter position will, however, have no effect on the construction and effect of the written document when once operative.

(1) 8th Ed. p. 963 *et. seq.*

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If a man by writing leases a house and premises to another and the writing contains all that is necessary as to the holding, rent, &c., but makes no reference to the house as being finished or not, and the lessor makes a parol independent contract for a consideration *dehors* the written contract for the finishing of one or more rooms, that would be what might be considered as a collateral matter, although to some extent improving the house and rendering it more desirable as a residence. I have considered the decisions referred to by the learned judge who tried this action and consider them clearly distinguishable from the present case. It is true that in *Lindlay* v. *Lacey* (1) evidence of a previous oral agreement was admitted, but the case shows it to have been so admitted solely on the ground that it was specially made a condition of the execution of the written agreement, such execution being considered a sufficient consideration to bind the parol contract. That consideration was expressly proved and admitted, but it was not, as I shall hereafter show, in this case. *Mann* v. *Nunn* (2) has been cited but in that case the agreement by parol was entered into some days before the agreement for lease and the court held that it was independent of the terms of the lease which was silent as to the subject matter of the parol agreement, and that the execution of the lease was the necessary result of the previous parol contract and the consideration for executing it. That however is not the case here.

In *Angell* v. *Duke* (3) the result of *Mann* v. *Nunn* (2) was at least questioned and it was virtually overruled. Lord Cockburn C.J. said :

I agree with the cases which have been cited to this extent that there may be instances of collateral parol agreements which would be admissible but this is not the case here—something passes between the parties during the negotiations but afterwards the plain-

(1) 17 C. B. N. S. 578. (2) 30 L. T. N. S. 526.
(3) 32 L. T. N. S. 320.

tiff enters into a written agreement to take the house and the furniture in the house which is specified. Having once executed that without making the terms of the alleged parol agreement a part of it, he cannot afterwards set up the parol agreement. Mellor and Field, Justices, concurred, as did also Lord Blackburn who said, "It is a most important rule that where there is a contract in writing it should not be added to if the written contract is intended to be the record of all the terms agreed upon between the parties; where there is a collateral contract the written contract does not contain the whole of the terms. As to the cases which have been cited I should decide *Morgan* v. *Griffith* (1) the same way. The decision in *Mann* v. *Nunn* I am inclined to think wrong but it is unnecessary to say how that may be. Here the lease expresses the whole of the terms—the defendant agrees to let and the plaintiff to take the house and furniture at a certain rent—there is said to have been an arrangement made beforehand during the negotiation that the defendant should let the plaintiff have more furniture for the same rent—How is this collateral? I cannot perceive that it is."

That decision was founded on the fact that the written agreement provided for the rent to be paid for the house and the furniture described in it. The parol agreement if admitted would have made the same rent payable for the house and furniture mentioned in the lease with the addition of the extra furniture referred to in the parol agreement. The parol agreement would therefore be contradictory to the lease. So in this case if as I have shown the property in the wood in question when deposited at the railway station would under the written contract remain in Andrews and his assignees, the result of the admission of the parol agreement would be to deprive him of that property, and the legal effect of the written agreement would be wholly destroyed and the right to property transferred by a parol agreement wholly inconsistent with and opposed to the terms of the written agreement. By the written agreement the property in the wood would be in Andrews and his assignees, by the parol agreement it would be in the appellant. Can there be a doubt as to which should

(1) 23 L.T. N. S. 783.

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prevail? And how can the parol agreement be considered as an independent collateral one?

See also *Evans* v. *Roe* (1); *Abrey* v. *Crux* (2); *Mason* v. *Scott* (3); In this latter case it was held:—

That a verbal stipulation and agreement by a lessor as to improvements to be constructed by him upon demised premises could not be established by parol, so as to add to or vary the lease, although it was proved that without such verbal promise and agreement the lease would not have been accepted.

In the conclusion of his judgment in that case Harrison C.J. very properly says:—

To allow the respondents contention in this case to prevail would, in my opinion, be to fritter away, if not to destroy the plain terms of an old and well established rule of evidence, which is or ought be common alike to courts of law and equity.

Mr. Justice Moss in that case said:—

But even if this agreement were collateral or independent in the same manner as the agreements enforced in some of the modern cases it may be excluded by the universally recognized limitation that the parol agreement cannot be proved if it conflicts with the written document.

I have already shown that the parol agreement in this case is in no wise collateral to the written one but wholly negatives the legal effect of it, inasmuch as it transfers the right of property from Andrews to the appellant. I will hereafter refer to the proof of the parol agreement as shown by the testimony of the appellant and Andrews. I agree with the learned judge who tried the action that it was a rather unlikely one, but being so, it should be received, as it was by him, with a good deal of doubt. I have examined that testimony and it is anything but satisfactory. To permit oral evidence to contradict a deed would be a violation of one of the fundamental principles of evidence, but it is alleged that such is not asked for here. It is, however, asked to be permitted to add to it and show either an antecedent or contemporaneous collateral parol agreement. If that does

(1) L. R. 7 C. P. 138. (2) L. R. 5 C. P. 37.
(3) 22 Gr. 592.

not affect the written agreement, it may be admitted as collateral, but if it does, then it is not collateral and must be rejected. In some cases in Ontario verbal "warranties" have been admitted where there were written contracts of sale. These decisions are not at all binding on this court, nor, in my opinion, do they affect the general rule.

In *Morgan* v. *Griffiths* (1) it was decided that a collateral binding agreement had been proved. Kelly C. B. said :—

> The signature to the lease was a good and sufficient consideration. * * * I think the verbal agreement was entirely collateral to the lease, and was founded on a good consideration. The plaintiff, unless the promise to destroy the rabbits had been given, would not have signed the lease. Pigott B. said: "It was on the basis of its performance that the lease was signed by the plaintiff, and it does not appear to me to contain any terms which conflict with the written document."

It will appear from that case that the parol agreement was admitted because—first that it was made before the written document, and that the lessee refused to sign the latter unless under the terms of the previous parol agreement, and secondly, that it did not appear to contain any terms in conflict with the written document.

In reference to *Lindley* v. *Lacey* (2) a parol agreement was admitted, but it was because the promise was given in consideration of the purchasers signing the agreement, and it was in other respects an agreement altogether in respect of a collateral matter.

Erskine v. *Adeane* (3) was in regard to an excess of game complained of by the lessee, and he refused to sign the lease until the lessor undertook in a prescribed manner to lessen it which he did not do. The latter case was decided on the same legal principles as in *Morgan* v. *Griffith* (1).

The decisions in those cases do not affect the legal

(1) L. R. 6 Ex. 70. (2) 17 C. B. N. S. 578. (3) 8 Ch. App. 756.

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position of the parties in this. I have already shown that the two positions are required to be shown. The consideration for the signing of the agreement must be shown and the non-interference with the terms of the written document, which could not be shown in this case affecting as it does the right of property. According to the authorities quoted and cited it is necessary, as before shown, that the signing of the written contract was in consideration of the previous parol agreement, and so stipulated, and that the parol agreement did not affect or contradict the written one. Both are necessary. I have shown that in the latter respect that in this case the parol agreement would over-ride the written contract, and I will now consider the evidence as to the first.

To affect the operation of a solemn agreement, under seal as in this case, the most clear, decided and reliable evidence must be adduced. The appellant must show then that such evidence appears on the record. The evidence of the parol agreement was objected to on the trial by the counsel of the respondent and was received subject to the objection.

Turning then to the evidence of the appellant on the point in answer to this question from his counsel :—

You have told us that Mr. Andrews promised you some security. Will you tell me what he said.

To which he replied:—

When I spoke to him about security he said he did not see that I needed any more security than what I had, that was the wood—he said the wood was mine until he paid me in full for it.

He was asked again :—

Did he tell you anything else? Answer. Yes, he said it was agreed, that suppose he should not, when the contract was fulfilled on the 20th of March, if I was not paid for the wood according to the agreement, that I had a right to sell the wood. Did he say anything else? I don't remember anything further.

He is asked further :—

Was there anything said about your selling the wood before you actually put your names to the agreement. Did you sign your agreement first, then did he give you the right to sell the wood, or did he

give you the right first? Answer. I cannot remember that.

Again in answer to the leading question :—

Then that agreement was come to before you actually put your signature down there? Answer. Yes, I think it was.

Again by the significant pressure of his counsel in the question or statement :—

That took place before you signed it and this conversation took place while he was writing out this agreement? Answer. Yes, we talked about it. I cannot just remember now.

If, then, the appellant could not say at the trial whether the alleged parol agreement was made before or after he signed the written contract, he has certainly failed to give such evidence as would justify any court or jury in finding that it was before the signing of the written contract, and the case is not therefore within the rule laid down and acted on in the cases before referred to. I have read carefully the evidence of Andrews and although he corroborates the evidence of the appellant he does not appear to have been asked or to have stated whether it was before or after the signing of the written contract. There is, therefore, no evidence that it took place before and so this case is unaffected by the decisions in *Lindley* v. *Lacey* (1); *Morgan* v. *Griffith*(2); or in *Erskine* v. *Adeane* (3); upon which the learned judge of first instance relied.

The whole current of reliable authorities establish the rule of evidence laid down by Taylor before quoted, and I would not feel justified in aiding to fritter away one so long and beneficially established as must be the result if the parol agreement is permitted in this case to contradict or vary the terms of the valid written instrument.

I am, for the reasons given, of opinion that the appeal herein should be dismissed and the judgment of the court below affirmed with costs.

TASCHEREAU J.—I concur in the judgment prepared by Mr, Justice Gwynne.

(1) 17 C. B. N. S. 578. (2) L. R. 6 Ex. 70.
(3) 8 Ch. App. 756.

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Gwynne J.

GWYNNE J.—I concur in the judgment of my brother Strong that this appeal should be allowed. The question seems to me to be reduced to this, namely, whether the agreement in virtue of which the defendant claimed a lien with a power of sale to indemnify himself in case Andrews should not pay for the wood in the terms of the written agreement, was or was not collateral to the written agreement, and I am of opinion that it clearly was; and that nothing said in *Angell* v. *Duke* on the motion for a nonsuit as reported (1) militates against this conclusion. The court in that case held that the matter there relied upon as being collateral to the lease constituted from its nature a qualification of the terms of the demise, and therefore could not be set up as part of those terms by parol against the written lease.

Blackburn J. there while disapproving of *Mann* v. *Nunn* (2), which was a case similar to *Angell* v. *Duke* (1) approved of *Morgan* v. *Griffiths* (3), and this latter case is sufficient for our present purpose, and, in my opinion, governs the present case. As a matter of fact it was established to the satisfaction of the learned judge, who tried the case without a jury, that but for the agreement as to the lien with power of sale the defendant never would have executed the written agreement which was merely in relation to the defendant cutting wood upon land in which Andrews had an interest under license from the Hudson Bay Company, at and for certain sums per cord to be paid by Andrews on delivery as provided in the written agreement.

Now, the contract for the lien and power of sale was made for the express purpose of taking effect only in the event of a breach being committed of his written agreement as to payment by Andrews; there can therefore, I think, be no doubt that a verbal agree-

(1) 32 L. T. N. S. 320. (2) 30 L. T. N. S. 526.
(3) L. R. 6 Ex. 70.

ment which provides only for the event of a breach of the written agreement being committed by Andrews, an event which according to the terms of the written agreement was never to occur, is an agreement wholly collateral to and independent of the written agreement, and can therefore be proved by parol. Such a parol agreement is quite consistent with, and does not necessarily form part of, the terms that should have been expressed in the written agreement. The written agreement contemplated that it should be fulfilled in all its terms. The verbal agreement contemplated taking effect only in the event of a breach being committed in the written one, and is therefore, as I think, clearly collateral to it.

Appeal allowed with costs.

Solicitors for appellant: *Daly & Caldwell*.

Solicitor for respondents: *J. W. E. Darby*

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*March 23.
*Dec. 10.

ARCHIBALD M. ROBERTSON AND ANOTHER (DEFENDANTS)..... } APPELLANTS;

AND

SOLOMON WIGLE (PLAINTIFF).....RESPONDENT.

THE ST. MAGNUS.

ON APPEAL FROM THE MARITIME COURT OF ONTARIO.

Appeal—Notice—Rules of Maritime Court—Effect of—R. S. C. ch. 137 ss. 18 & 19—Judgment of Surrogate—Pronouncing of—Entry by registrar.

Rule 269 of the rules of the Maritime Court of Ontario (1) requires notice of appeal from a decision of that court to the Supreme Court of Canada to be given within fifteen days from the pronouncing of such decision.

A judgment of the Maritime Court was handed by the Surrogate to the registrar, but not in open court, on August 31, and was not drawn up and entered by the registrar for some time after.

Held, Taschereau J. *dubitante,* that notice of appeal within fifteen days from the entry of such judgment was sufficient under the said rule.

Quaere—Is such rule 269 *intra vires* of the Maritime Court?

APPEAL from an order of Henry J. in Chambers dismissing a motion to quash appeal for want of notice required by rule 269 of the rules of the Maritime Court of Ontario.

This appeal is in an action in the Maritime Court for Ontario arising from a collision between the plain-

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

(Mr. Justice Henry heard the argument but died before the judgment was delivered.)

(1) R. S. C. ch. 137 s. 19 (Maritime Court Act) provides as follows:—

The practice, procedure and powers, as to costs and otherwise, of the Supreme Court of Canada in other appeals shall, so far as applicable, and unless such court otherwise orders, apply and extend to appeals under this act, when no other provision is made under this act or under "The Supreme and Exchequer Courts Act."

tiff's tug, the "Bob. Hackett" and the steam propeller "St. Magnus," belonging to the defendants. The motion to quash is founded on rule 269 of the Maritime Court which the respondents claim was not complied with.

Rule 269 is as follows: "A party intending to appeal from a decision of the court to the Supreme Court of Canada must give notice of his intention to appeal to the opposite party within fifteen days from the time of pronouncing the decision appealed from, and otherwise the appeal to be governed by the rules of the Supreme Court."

The action was tried on March 13th, 1886. On August 31st the Surrogate handed to the registrar his written judgment, but this was not done in open court and no notice was given to the defendants of the intention to deliver judgment. The formal judgment was not drawn up for some days afterwards. Notice of appeal was given within fifteen days from the entry of the judgment, but more than fifteen days after the judgment was given to the registrar by the Surrogate, namely, August 31st.

Security for costs of the appeal by the defendants was allowed by Mr. Justice Henry. The plaintiffs moved before the registrar to set aside the order allowing the security, and, subsequently, to dismiss the appeal; both motions were referred by the registrar to Mr. Justice Henry and both were dismissed. The plaintiffs appealed to the full court from the order of Henry J. dismissing the motion to quash the appeal.

S. White in support of the motion referred to rule 269 of the Maritime Court, R. S. C. c. 137 s. 19; Supreme Court Act sec. 25 (*c*). *In re New Callao* (1).

McKelcan Q.C. and *Lash* Q.C. *contra.*

The Maritime Court can only make rules regula-

(1) 22 Ch. D. 484.

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ting its own procedure and cannot interfere with the jurisdiction of this court.

If the rule is *intra vires* the time would not run until the entry of the judgment, as the decision was not pronounced in open court and we had no knowledge of it.

The following authorities were cited: *Hill* v. *Curtis* (1); *Holmes* v. *Russel* (2); *Re Crosley* (3); *Re Callao* (4); *Herr* v. *Douglas* (5); *Re Manchester Economic Building Society* (6); *Re Stockton Iron Furnace Co.* (7); *Re Blyth and Young* (8); *Little's Case* (9); *Pierce* v. *Palmer* (10).

Sir W. J. RITCHIE C.J.—I think the court only had authority to make rules for regulating its practice and procedure, and had no power to make rules affecting the jurisdiction of the Supreme Court of Canada. If the rule relied on in this case has that effect it is *ultra vires;* if it has not that effect it merely relates to practice and procedure, and in that case it could be waived and, in my opinion, it was waived.

As there was no judgment delivered in open court on August 31, 1887, I am not prepared to differ from the opinion that the time would not run until entry of the judgment on September 15, 1887, and therefore the appeal is properly before this court.

STRONG J.—The action having been heard on the 13th of March, 1886, at Sandwich, the judgment of the Maritime Court was handed (not in court) by the surrogate to the registrar on 31st August, 1887.

The judgment or decree was, however, not drawn up until some days afterwards; the exact day on which

(1) 1 Ch. App. 425.
(2) 9 Dowl. 487.
(3) 34 Ch. D. 664.
(4) 22 Ch. D. 484.
(5) 4 P. R. (Ont.) 102.
(6) 24 Ch. D. 488.
(7) 10 Ch. D. 348.
(8) 13 Ch. D. 416.
(9) 8 Ch. D. 806.
(10) 12 P. R. (Ont.) 308.

it was drawn up by the registrar does not appear, but I understood it to be conceded on the argument of the motion, that within fifteen days after the judgment was actually drawn up by the registrar notice of appeal to the Supreme Court of Canada was given. The appeal was perfected by the allowance of the security by Mr. Justice Henry on the 28th of September, 1887.

The Maritime Court Act, R. S. C. ch. 137 secs. 18 and 19 are as follows:—

Sec. 18. An appeal shall lie to the Supreme Court of Canada from every decision of the court having the force and effect of a definitive sentence or final order.

Sec. 19. The practice, procedure and powers as to costs and otherwise of the Supreme Court of Canada in other appeals shall, as far as applicable, and unless such court otherwise orders, apply and extend to appeals under this act when no other provision is made, either by this act, or the general rules made under this act, or under "The Supreme and Exchequer Courts Act."

By rule 269 of the Maritime Court it is provided that:

A party intending to appeal from a decision of the court to the Supreme Court of Canada must give notice of his intention to appeal to the opposite party within fifteen days from the time of pronouncing the decision appealed from, and otherwise the appeal to be governed by the rules of the Supreme Court.

At the time this appeal was taken the Supreme Court Act required notice of an appeal from a final judgment to be given within thirty days from the date of the judgment being pronounced.

In the view I take I do not feel called upon to express any opinion as to whether rule 269 of the Maritime Court is *ultra vires* or not. I am inclined to think it comes within the powers conferred by sec. 19 of R. S. C. ch. 137. But whether this is so or not I consider that the motion to quash must be refused on the ground that inasmuch as the notice of appeal was served within fifteen days of the date at which the order was actually drawn up by the registrar it comes within the terms of rule 269.

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I do not recognize the handing by the judge to the registrar, not in open court but in his office or perhaps in the street, as a "pronouncing of a decision" within the terms of rule 269.

Then, if we are not to take the date of the 31st of August, 1886, as the time from which the fifteen days began to run, to what other date are we to ascribe the commencement of that period? There is only one other date to which it can be referred, and that is the date at which the registrar completed the judgment, and before the fifteen days, calculated from that time, had run out it is admitted that notice of appeal was duly served.

The motion to quash must be refused with costs.

FOURNIER J.—I concur in the judgment of the Chief Justice.

TASCHEREAU J.—I was inclined to think the notice of appeal too late, but I will not dissent on a question of practice.

GWYNNE J.—I entirely concur in the judgment of my brother Henry in chambers when the matter was before him, and in the judgment of the Chief Justice pronounced in open court to-day.

Motion refused with costs.

Solicitors for appellants: *Mackelcan, Gibson & Gausby.*

Solicitors for respondents: *White & Ellis.*

THE CANADA ATLANTIC RAILWAY CO. AND DANIEL C. LINSLEY (PLAINTIFFS) ..... APPELLANTS;

AND

THE CORPORATION OF THE TOWNSHIP OF CAMBRIDGE AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

1887 *Nov. 25.
1888 *June 14.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal Corporation—By-law—Voting by ratepayers on—Casting vote by returning officer—R. S. O. (1877) *c.* 174 *ss.* 286-7.

In case of a tie in voting on a municipal by-law there is no authority to the returning officer to give a casting vote sec. 152 of R. S. O. (1877) ch. 174 not applying to such a vote (1).

APPEAL from a decision of the Court of Appeal for Ontario (2) reversing the judgment of the Common Pleas Division (3) in favor of the plaintiffs.

This was an action to procure delivery to plaintiffs of debentures granted by the township of Cambridge under a by-law passed in 1880. The defence was that the by-law was invalid.

The by-law was submitted to the ratepayers and a

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

(1) Sec. 299 of the act provides "That the proceedings at the poll (that is in voting on the by-law) and for and incidental to the same and the purposes thereof shall be the same, as nearly as may be, as at municipal elections, and all the provisions of sections 116 to 169 inclusive of the act, so far as the same are applicable, and except so far as is herein otherwise provided, shall apply to the taking of votes at such poll and to all matters incidental thereto.

Sec. 152. In case it appears upon the casting up of the votes as aforesaid (at a municipal election) that two or more candidates have an equal number of votes the clerk of the municipality * * whether otherwise qualified or not, shall, at the time he declares the result of the poll, give a vote for one or more of such candidates so as to decide the election.

(2) 14 Ont. App. R. 299.

(3) 11 O. R. 392.

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vote was taken which resulted in a tie. The returning officer on summing up the votes, and finding there was a tie, gave a casting vote in favor of the adoption of the by-law and reported it carried. It was subsequently confirmed by vote of the council and was supposed by the plaintiffs to be in force. The plaintiffs contend that under section 152 of the Municipal Act, R. S. O. ch. 174, the returning officer had power to give the casting vote; the defendants say that that does not apply to an election on a by-law.

Another objection was that the debentures to be issued under the by-law were not made payable within twenty years. It was provided in the by-law that the debentures should not issue until the railway was completed and were made payable twenty years after issue.

The plaintiffs having succeeded on the hearing and before the Common Pleas Division, the judgment in their favor was reversed by the Court of Appeal on the first of the above grounds of objection, and it was held that the by-law was not passed by a majority of the votes of the ratepayers. The plaintiffs appealed to the Supreme Court of Canada from the jndgment of the Court of Appeal.

Chrysler for the appellants relied on secs. 299 and 152 of R. S. O. (1877) ch. 174, and cited *Bickford* v. *Chatham* (1); *Hammersmith, &c., Ry. Co.* v. *Brand* (2); *Commissioners Knox Co.* v. *Aspinwall* (3).

O'Gara Q.C. for the respondents referred to *Exchange Bank of Canada* v. *The Queen* (4); *Baroness Wenlock* v. *River Dee Co.* (5); *Tomkinson* v. *S. E. Ry. Co.* (6).

Sir W. J. RITCHIE C.J.—I think the by-law was not carried by a majority of the qualified electors voting to

(1) 14 Ont. App. R. 32.
(2) L. R. 4 H. L. 171.
(3) 21 How. 559.
(4) 11 App. Cas. 157.
(5) 10 App. Cas. 354.
(3) 35 Ch. D. 675.

pass the same within the said provisions of the Municipal Act; and I agree with the observations of Mr. Justice Osler of the Court of Appeal. I cannot add anything thereto with advantage. As this must settle the case of the appellants I deem it unnecessary to discuss or determine any of the other questions raised.

STRONG J. concurred in the judgment of Mr. Justice Gwynne.

FOURNIER J.—I concur in the judgment of the court but am very sorry to do so. The township passed the by-law, but there is a doubt as to the right of the returning officer to vote in the way he did.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed with costs for the reasons given by Mr. Justice Osler in the court below, and by my brother Gwynne in this court.

GWYNNE J.—The main question in this case is whether a proposed by-law for granting a bonus to the Canada Atlantic Railway Company introduced into the council of the municipality of the township of Cambridge, and there read a first and second time and submitted to the ratepayers qualified to vote thereon, and subsequently read a third time and purported to have been passed, is a valid by-law binding upon the municipality and its ratepayers, it appearing that upon the taking a poll of the votes of the ratepayers upon the proposed by-law a majority of the qualified voters voting thereat had not voted for the passing and adoption of the proposed by-law. However much it is to be regretted that the contractor for building the railway should be disappointed in receiving the benefit purported to be granted by the muni-

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cipality of the township of Cambridge, there cannot, I think, be any doubt that, for the reasons ably and fully given by Mr. Justice Osler when delivering the judgment of the Court of Appeal for Ontario, the instrument relied upon as a by-law has no validity. It appears that the council of the municipality in the year 1882, for the same reason by resolution in council repudiated the action of the council of 1880 in passing the by-law as *ultra vires*.

It is in the interest and for the protection of the ratepayers that the power which is conferred upon a municipality to incur a debt for granting a bonus to a railway company, is subjected to the express condition that the proposed by-law shall, before the final passing thereof, receive the assent of the ratepayers in the manner provided by the act.

The manner provided by the act is :—

1. Sec. 286. The council shall by the by-law fix the day and hour for taking the votes of the electors, and such places in the municipality as the council shall in their discretion deem best, and where the votes are to be taken at more than one place shall name a deputy returning officer to take the votes at every such place.

2. They shall publish a copy of the proposed by-law with a notice attached specifying the time and places fixed for taking the votss.

3. The votes at the polling shall be taken by ballot.

4. Sec. 307. Every deputy returning officer at the completion of the counting of votes after the close of the poll, shall in the presence of the persons authorized to attend, make up into separate packets sealed with his own seal and the seals of such persons authorized to attend as desire to affix their seals and marked upon the outside with a short statement of the contents of such packet, the date of the day of polling, the name of the deputy returning officer, and of the ward or polling sub-division and municipality containing among other things,

(*a.*) The statement of votes given for and against the by-law and of the rejected ballot papers.

Sec. 308. Every deputy returning officer shall at the close of the poll certify under his signature on the voters list in full words, the

total number of persons who voted at the polling place at which he has been appointed to preside, and shall before placing the voters list in its proper packet, make and subscribe before the clerk of the municipality, a justice of the peace, or the poll clerk his solemn declaration that the voters list was used in the manner prescribed by law, and that the entries required by law to be made therein were correctly made, which declaration shall be in the form of Schedule G to this act, and shall thereafter be annexed to the voters list, he shall also forthwith return the ballot box to the clerk of the municipality.

5. Sec. 310. The clerk after he has received the ballot papers and statements before mentioned of the number of votes given in such polling papers shall, at the time and place appointed by the by-law, in the presence of the persons authorized to attend, or such of them as may be present, without opening any of the sealed packets of ballot papers, sum up from such statements the number of votes for and against the by-law and shall then and there declare the result and forthwith certify to the council under his hand whether the majority of the electors voting upon the by-law have approved or disapproved of the by-law.

Now, by the law it was provided, as required by sec. 286, above quoted, that

The votes of the electors of the said municipality shall be taken on this by-law on the 26th February, 1880, commencing at 9 o'clock in the forenoon and closing at five o'clock in the afternoon of the same day, at the following places and before the following returning officers, that is to say, at polling sub-division No. 1, at the town hall, Onésime Lefrénce, deputy returning officer, and for polling sub-division No. 2, at the school house of section No. 5 in the said municipality, Peter Stewart, deputy returning officer.

The Onésime Lefrénce here named as deputy returning officer at polling sub-division No. 1 was also the clerk of the municipality, so that the duties by the act imposed upon a deputy returning officer presiding at a poll and upon the clerk of the township devolved upon him. He acted as the deputy returning officer presiding at the poll at sub-division number one and, at the close of the poll, in the presence of a Mr. Johnstone, acting for the railway company as agent for the by-law, and of a Mr. Cameron acting as agent against the by-law, he made the statement required by the act to be made by the person presiding as deputy returning officer at

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the taking the poll of votes, which he signed with his name as follows,

Statement of the returning officer for electoral division number one, municipality of Cambridge, at the voting held 26th February, 1880.

Number of votes for and against the by-law.

For the by-law.....	Fifty three	53
Against the by-law	Forty.....	40

Mr. Stewart who was the presiding officer at polling sub-division No. 2 at the close of the poll in that sub-division prepared and signed a similar statement in the presence of a Mr. J. S. Castleman acting as agent for the by-law, and who appears to have been reeve of the township, whereby it appeared that the number of votes given for the by-law

were.....	(thirty-four)	34
and against the by-law.....	(forty-seven)	47

Now the polls having been closed and these statements signed and the ballot boxes placed in the hands of the clerk of the municipality, it is obvious that no change could be made in either of the statements otherwise than upon a scrutiny taking place under the provisions in that behalf contained in the act. The duty of the clerk of the municipality was expressly limited by the act to summing up the two statements, the one made by himself as presiding officer at polling sub-division No. 1, and the other by the presiding officer at sub-division No. 2, the number of votes given for and against the by-law and to declare the result and to certify that result under his hand to the council. Such summing up showed 87 votes to have been given for and 87 against the by-law, so that the result clearly was that the by-law had not been approved by a majority of the ratepayers voting at the polls and that the council had no power to read the by-law a third time and pass it. However four days after the close of the poll, namely, on the 1st March, 1880, he signed a paper

in his capacity of township clerk whereby he certified that a majority had voted in favor of the by-law. This certificate is attempted to be justified as in point of fact true upon the contention that the township clerk had a right to give, and that upon summing up the votes and finding them to be equal for and against the by-law, he did give, a casting vote in its favor. This right is claimed under sec. 152 of the act which upon an election for councillors gives to the clerk a casting vote in the case of a tie "to decide the election," and upon sec. 299 of the act which, as is contended, makes sec. 152 applicable to the case of a tie in voting upon a by-law. That sec. 299 enacts that at the taking of a poll upon a by-law which must be submitted to a vote of the ratepayers and approved by a majority before it can be passed

> the proceedings of such poll and for and incidental to the same and the purposes thereof shall be the same as nearly as may be as at municipal elections and all the provisions of sections one hundred and sixteen to one hundred and sixty-nine inclusive of this act, so far as the same are applicable and except so far as herein otherwise provided, shall apply to the taking of the votes at such poll and to all matters incidental thereto.

The inapplicability of section 152 to the case of a poll taken upon a by-law for incurring a debt has been so clearly pointed out by Mr. Justice Osler that it may seem unnecessary to add any thing thereto; apart, however, from the absence of any analogy between an election of municipal councillors and a vote taken upon a by-law requiring approval by a majority of the ratepayers upon a poll of votes taken by ballot before it can be passed, it may be said that as the clerk's duty is expressly limited to summing up the votes *pro.* and *con.* as appearing on the statements signed by the officers presiding at the taking of the polls and thus ascertaining the result and certifying that result to the council, it is plain that special provision is made which

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in the terms of section 299 excludes the application of section 152. Moreover the giving a vote by the clerk, after the close of the polls, whether he be a ratepayer or not, as his right is contended to be, cannot, I think, be said to be "a proceeding at the poll and for and in-"cidental to the same and to the purposes thereof," and it is only those provisions of sections 116 to 169 inclusive, which, so far as applicable, and except as otherwise provided by the act, are by section 299 made applicable to voting upon a by-law.

I concur in Mr. Justice Osler's judgment also that it is unnecessary now to decide whether promulgation of the by-law does or does not cure the otherwise manifest defect in it in professing to authorize the debentures to be issued under it to run, and the rate to pay them to be levied beyond the period of twenty years from the day prescribed for the by-law to take effect, that being the remotest period allowed and expressly prescribed by section 330 of the act in respect of a by-law, such as that in question here is, namely, "a by-law for contracting a debt (by borrowing money or otherwise,) for any purpose within the jurisdiction of the council." In the present case it is sufficient to say that the defect which has rendered the document in question utterly void, and, in fact, no by-law, cannot be cured by the promulgation clauses of the Municipal Institutions Act. These clauses apply only to by-laws which it was competent for the council of the municipal corporation to pass, as is provided by the 321st section. Now, by section 559 of the act it was not within the competency of the municipal corporation to give to the proposed by-law in question here, a third reading and to pass it as it had not received the assent of the rate payers in the manner provided by the act.

The appeal therefore must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Stewart, Chrysler & Godfrey.*

Solicitors for respondents: *O'Gara & Remon.*

ABRAHAM DEDRICK AND KENNETH M. DEDRICK (PLAINTIFFS)... } APPELLANTS;

1887 *Nov. 22.

AND

JAMES H. ASHDOWN AND CASPER KILLER (DEFENDANTS)..... } RESPONDENTS.

1888 *June 14.

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

Chattel mortgage—Possession of goods under—Right of mortgagor to sell—Proviso as to—Ordinary course of trade—Seizure of goods under execution—Justification for.

In a chattel mortgage containing no redemise clause there may be an implied contract that the mortgagor shall remain in possession until default, of equal efficacy with an express clause to that effect; and such an implied contract necessarily arises from the nature of the instrument, unless it be very expressly excluded by its terms. *Porter & Flintoff* (6 U. C. C. P. 335) distinguished.

In a chattel mortgage of the stock in trade and business effects of a trader there was a proviso to the effect that if the mortgagor should attempt to sell or dispose of the said goods the mortgagee might take possession of the same as in case of default of payment.

Held,—That this proviso only prohibited the sale of the goods other than in the ordinary course of business. Ritchie C.J. *contra*.

The mortgagee of the chattels seized the mortgaged goods under an execution in a suit for the debt secured by the mortgage. The execution was set aside as being against good faith. In an action for the wrongful seizure and conversion of the goods,—

Held—That the mortgagee could not justify the seizure under the mortgage.

APPEAL from a decision of the Court of Queen's Bench (Man.) (1), setting aside a verdict for the plaintiffs and ordering a judgment of non-suit to be entered

The facts, which are more fully set out in the judgment of Mr. Justice Gwynne, may be stated as follows:—

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

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

(1) 4 Man. L. R. 139

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This was an action of trespass and trover against the defendants for entering the plaintiffs' shop and carrying away and converting to their own use the plaintiffs' goods and a continuance of such trespass for the space of ten days.

The plaintiffs being indebted to the defendants in the sum of $800 and upwards agreed to give security for their debt on the understanding that they be allowed to carry on their business and the time of payment be extended for six months. This was assented to and a chattel mortage was executed by the plaintiffs, the considera tion for which was the amount of the debt, and the time of payment the six months' extension agreed upon.

As soon as this mortgage was registered judgment was signed in the suit which the defendants had brought to recover their said debt and execution was issued under which the sheriff seized the plaintiffs' stock in trade and sold it, a bailiff being in possession of the same in plaintiffs' shop for about ten days. On application to a judge the writ of execution was set aside as being contrary to good faith, and this action was brought in which plaintiffs obtained a verdict with $1,484 damages, the jury, under the direction of the presiding judge, making a special assessment of damages for the goods taken by the sheriff which were not covered by the mortgage. This verdict was set aside by the Court of Queen's Bench, and a non-suit ordered on the ground that under a plea denying the plaintiffs' title to the goods the defendants could set up the title of Ashdown under the chattel mortgage, and that under that mortgage they were entitled to enter and take the goods. The plaintiffs then appealed to the Supreme Court of Canada.

Ewart Q.C. for the appellants.

The goods were seized under execution and when

the execution has been set aside the defendants cannot claim that they took possession under their mortgage. At all events evidence of the mortgage was not admissible under the counts for trespass. *Leake* v. *Loveday*, (1); *Corbett* v. *Shepard* (2); *Hatch* v. *Holland* (3).

The mortgage gave the mortgagee a license to enter and take possession on default and such license should be specially pleaded. *Kavanagh* v. *Gudge* (4); *Samuel* v. *Coulter* (5); *Young* v. *Smith* (6); *Bingham* v. *Bettinson* (7); *Closter* v. *Headly* (8); *Watson* v. *Waltham* (9).

The covenant in the mortgage was that the goods should not be sold without the written consent of the mortgagee. The defendants allege a breach of this covenant and must show that no written consent was given, of which there was no evidence. Moreover, selling the goods in the ordinary course of business would not be a breach of the covenant. *Walker* v. *Clay* (10).

A redemise clause is not necessary to entitle the mortgagor to remain in possession of the goods mortgaged. *Albert* v. *Grosvenor Investment Co.* (11); *Wheeler* v. *Montefiore* (12); *Bingham* v. *Bettinson* (7); *Moore* v. *Shelley* (13).

The defendant had an option to take the goods under the execution or under the mortgage, which option was never exercised. *Cadwell* v. *Pray* (14).

Clearly the court had no power to order a nonsuit. The plaintiffs had a right to retain their verdict, at all events; for $266 the amount assessed as damages for taking the goods not covered by the mortgage.

(1) 4 M. & G. 972.
(2) 4 U. C. C. P. 68.
(3) 28 U. C. Q. B. 213.
(4) 5 M. & G. 726.
(5) 28 U. C. C. P. 240.
(6) 29 U. C. C. P. 109.
(7) 30 U. C. C. P. 438.
(8) 12 U. C. Q. B. 364.
(9) 2 A. & E. 485.
(10) 49 L. J. C. L. 560.
(11) L. R. 3 Q. B. 123.
(12) 2 Q. B. 133.
(13) 8 App. Cas. 285.
(14) 41 Mich. 307.

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Robinson Q.C. for the respondents. The right of a mortgagor to maintain actions in respect to goods mortgaged by a deed like the present, where there is no redemise clause, is dealt with by a number of cases both in England and Ontario. *Porter* v. *Flintoff* (1); *Ruttan* v. *Beamish* (2); *McAulay* v. *Allen* (3); *Paterson* v. *Maughan* (4); and the following which are especially to be considered, *Bunker* v. *Emmany* (5); *Bingham* v. *Bettinson* (6); and *Whimsell* v. *Giffard* (7).

The English cases are dealt with in the judgment of the court below, delivered by Mr. Justice Taylor. *National Mercantile Bank* v. *Hampson* (8); *Walker* v. *Clay* (9); *Taylor* v. *McKeand* (10); *Payne* v. *Fern* (11).

It is clear that the verdict for the plaintiffs cannot stand as the evidence shows that the goods were worth much less than the damages allowed and the plaintiffs cannot recover more than their interest in the goods. *Clark* v. *Newsom* (12); *Brierly* v. *Kendall* (13); *Toms* v. *Wilson* (14).

Primâ facie the sale by the plaintiffs was unlawful and to justify it a written consent by the mortgagee must be shown.

Ewart Q.C. in reply. The jury have a right to take into consideration the loss of the business and give damages therefor, and the court will not cut down their verdict to mere inventory prices.

Sir W. J. RITCHIE C.J. -It is clear these executions so improperly issued did not justify the sheriff in disposing, on behalf of the defendants, of the goods in the manner in which they were disposed of.

(1) 6 U. C. C. P. 335.
(2) 10 U. C. C. P. 90.
(3) 20 U. C. C. P. 417.
(4) 39 U. C. Q. B. 371.
(5) 28 U. C. C. P. 438.
(6) 30 U. C. C. P. 438.
(7) 3 O. R. 1.
(8) 5 Q. B. D. 177.
(9) 49 L. J. C. L. 560.
(10) 49 L. J. C. L. 563.
(11) 6 Q. B. D. 620.
(12) 1 Ex. 131.
(13) 17 Q. B. 937.
(14) 32 L. J. Q. B. 382.

The sheriff had a writ; he entered under it, seized, sold the defendant's goods; and by such sale levied the judgment debt. These executions having been set aside as being improperly issued it is not now, in my opinion, open to the defendants to contend that they can ignore and repudiate such entry and dealing with the plaintiffs' goods and set up that they were taken under another authority and for a purpose different from that of levying the money supposed to be due on the executions to the judgment creditors. The sheriff's officers at the time had a warrant and, according to the directions in the writs, took the goods and disposed of them according to the exigencies of the writs; as execution creditors they could only justify taking possession for the purpose of levying the debt under the executions by the hands of the sheriff. The sheriff acted *bonâ fide* under the writs and had no authority, express or implied, to act for the defendants under the mortgage and did not profess so to act; he entered and seized and sold the goods by virtue of the writs to him directed and for no other cause.

The defendants cannot justify the acts of the sheriff. I do not think the cases of the dismissal of a servant for one cause and justifying for another, or distraining for one cause and justifying for another, are at all applicable to this case. The right of a man to do an act with regard to the property of another depends upon the authority or right which he really has to do the act. What right had the defendants to send the sheriff into the plaintiffs' premises to seize and sell the plaintiffs' goods under a writ which they had caused to be improperly issued and which was subsequently set aside?

The defendants cannot justify as mortgagees, inasmuch as they never acted, or claimed to act, in relation

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to the seizure and sale of these goods, under the mortgage or any forfeiture thereunder.

I think that construing this bill of sale as the mortgagor contends would, unquestionably, be to enable the mortgagor to effectually destroy the security. If the mortgagor is at liberty to sell and dispose of his whole stock in trade, and appropriate the proceeds for his own support and maintenance, or otherwise dispose of them for his own use, it is difficult to see in what consists the use or value of the security.

One can well understand that a man might mortgage a stock of merchandize and sell the goods in the usual course of trade if there was a provision that he should keep the stock up to its value at that time, or that he should apply the proceeds of the sales to the payment of the debt secured by the mortgage; but without any obligation to do one or the other, in the face of an express covenant not to sell without permission in writing, it is difficult to understand how there can be an implied covenant that he may carry on his trade and from time to time sell and dispose of his stock in the course of his business, without being bound to keep the stock up or account for the proceeds, and so utterly destroy the security of the mortgagee.

It may well be that the mortgagee might be willing that the mortgagor should continue his business, knowing that at any time he had it in his power to prevent further sales, if the selling of the goods was without his consent first had and obtained in writing, and he considered further sales would interfere with the value of his security.

There was, therefore, in my opinion, a forfeiture which the defendants might have acted on but did not, but instead thereof relied on the executions which have failed to sustain their acts, and the plaintiff is, therefore, entitled to recover the value of the goods

seized, less the amount of the mortgage, and also damages for the sheriff's unlawful entry, seizure and sale. I think there should be a new trial to ascertain these damages, the amount awarded being entirely too high and not justified by the evidence, unless the parties consent to a reduction of the damages as suggested by Mr. Justice Gwynne.

FOURNIER J.—I have read the judgment prepared by Mr. Justice Gwynne in this case, and I entirely agree with the views he has expressed therein. I think the appeal should be allowed.

TASCHEREAU J.—I am of opinion that this appeal should be allowed with costs, and concur with my brother Gwynne in the conclusion which he has reached.

GWYNNE J.—(After setting out the pleadings in the case, the order setting aside the execution and the pertinent facts established by the evidence, His Lordship proceeded as follows):—

By the chattel mortgage the plaintiffs, who were described therein as hardware merchants, sold and assigned to the defendant Ashdown, therein called the mortgagee, all and singular the entire stock of hardware, tinware, paints and oils and all other the goods, wares and merchandise of every description whatsoever belonging to the plaintiffs in and about the store occupied by them in the town of Pilot Mound, &c., to have and to hold to the said mortgagee, his executors, administrators and assigns, to his and their own use, provided always, and the said mortgage was declared to be made upon the express condition, that the said mortgage and everything therein contained should cease, determine and be utterly void to all intents and purposes, anything therein contained to the contrary

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notwithstanding, if the plaintiffs, their executors or administrators, should pay or cause to be paid to the mortgagee on the 1st March, 1884, the sum of $847.80 with interest from the 1st of August, 1883. This sum included the whole of the amount which was due by the plaintiff to the defendants jointly and to the mortgagee himself alone. The mortgage contained no redimise clause, that is to say, no clause providing in express terms that until default the mortgagors should continue in possession of the goods assigned, but it contained a clause that:

In case default shall be made in the payment of the said sum of money in the said proviso mentioned or of the interest thereon or any part thereof, or in case the mortgagors shall attempt to sell or dispose of or in any way part with the possession of the said goods and chattels or any of them, or to remove the same or any part thereof out of the said store and premises, or suffer or permit the same to be seized or taken in execution without the consent of the mortgagee, his executors, &c., to such sale, removal or disposal thereof first had and obtained in writing, then and in such case it shall and may be lawful for the mortgagee, his executors, &c., with his or their servant or servants and with such other assistants as he or they may require, at any time during the day to enter into and upon any lands, &c,. where the said goods and chattels or any part thereof may be and to break and force open any doors, locks, bars, &c., for the purpose of taking possession of and removing the said goods and chattels, and upon, from and after taking possession of such goods and chattels aforesaid, it shall and may be lawful, and the mortgagee, his executors, &c., and each or any of them is and are hereby authorized and empowered, to sell the said goods and chattels or any of them or any part thereof at public auction or private sale as to them or any of them may seem meet; and from and out of the proceeds of such sale in the first place to pay and reimburse himself or themselves all such sums of money as may then be due by virtue of these presents and all such expenses as may have been incurred by the mortgagee, his executors, &c., in consequence of the default, neglect or failure of the mortgagors, &c., in payment of the said sum of money with interest thereon as above mentioned, or in consequence of such sale or removal as above mentioned, and in the next place to pay unto the mortgagors any surplus.

The clause empowering the mortgagee to sell would,

I apprehend, if a case should arise requiring adjudication upon this point, be construed as empowering him to act only in such a manner as a mortgagee in possession with a power of sale is required by equity to do; that is to say, to sell the goods in such a manner as should be reasonably conceived to be best calculated, in the interest of the mortgagors as well as of the mortgagee, to obtain the best price that possibly could be obtained for them; not to sacrifice the property by a wanton, careless, vexatious sale, at a ruinously inadequate price, but to take all prudent measures calculated to secure as good a sale as possible.

For the present I shall assume that the mortgage authorized the mortgagee to take immediate possession of the goods upon the execution of the mortgage and to sell them under the power of sale contained therein in such a manner as a mortgagee in possession might do, deferring the consideration of the question whether it did or not to the last.

It is apparent from the evidence that, whatever the chattel mortgage may have authorized to be done, the defendants, in authorizing and causing to be done the acts which were done, did not, in point of fact, act or intend to act under and in pursuance of the powers vested in them by the chattel mortgage. But that, on the contrary, they acted and at the time intended to act in defiance of, and in repudiation of, the power of sale vested in them by the mortgage and in a manner quite inconsistent with such power; for on the very day that, in adoption of the mortgage on the real estate, they caused that mortgage to be registered, within, it may be, two or three days from the date of their acceptance of the chattel mortgage and their causing it to be registered, without any complaint whatever that, and before they had, so far as appears, any reason whatever to believe or suspect that, the mortgagors

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had done anything in violation of the terms of the mortgage, and without any inquiry whether they had or not, in apparent disregard of the mortgage they put a writ of *fieri facias* issued at their suit, and the mortgagee put a writ of *fieri facias* issued at his suit, in the hands of the sheriff to be executed upon the goods in question as the goods and chattels of the plaintiffs, liable to the satisfaction of the moneys directed to be levied under the said writs, and they caused the goods to be sold under these writs and another shortly afterwards issued by the mortgagee the defendant Ashdown, and so caused them to be sold at the sacrifice usually attending sales by sheriffs under executions; and upon their right to issue such writs of execution and to cause them to be executed being contested in court, upon the ground that the plaintiffs had executed the said two mortgages on realty and on their stock in trade upon an arrangement that they should be permitted to carry on their business until the 1st March, 1884, they resisted the plaintiffs' application to set aside the said writs of *fieri facias* and persistently insisted upon their right to issue them and to have caused the goods to be sold thereunder and to retain the moneys realized by the sale thereof; and to the very last, by their pleadings on the record, insisted that the sale under the said writs of *fieri facias* was good, denying the plaintiffs' pleading that they and all proceedings had thereunder had been vacated and set aside; and, that contention failing them, they insisted that, notwithstanding the writs and all proceedings had thereunder had been set aside, still the seizure and sale of which the plaintiffs complained having been completed, and the moneys arising from such sale realized, before the order setting aside the said writs was made they have a right to retain the benefit of their seizure and sale under the executions as good and

valid in law.

Now there having been but one continuous act of trespass of which the plaintiffs complained, and those being the circumstances under which it was committed, it is impossible for the defendants to get over the facts proved and their consequences, namely, that the defendants acted not in virtue of any authority vested in them by the chattel mortgage but in defiance and repudiation of it; and their claim now to avail themselves of any benefit the chattel mortgage might have given them simply amounts to this: that admitting they did not act under the power of sale contained in the chattel mortgage but under an authority quite inconsistent therewith, namely, writs of execution issued upon judgments obtained regularly as they contend against the plaintiffs, still they ask that as the defendant Ashdown might have, as they contend he might have, taken the goods and have sold them under the power of sale contained in the mortgage, the jury in estimating the amount of the damages to which the defendants have exposed themselves by acting in defiance of the chattel mortgage, should take into their consideration by way of reduction of damages what the defendant Ashdown might have done but did not. To this the jury might well say, that what the defendants in fact did exposed the plaintiffs to the vexatious, unnecessary and wrongful expense of the sheriff's fees, possession money and poundage, &c., amounting to $103.25, and to an injurious sacrifice of their goods at a sheriff's sale under execution, which could not reasonably have been suffered if the mortgagee had sold the goods under the power in that behalf contained in the mortgage; so that whatever protection the chattel mortgage might have given the defendants if they had acted under it, they cannot get over the indisputably established fact that they did not

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act under it but in defiance of it, and the plaintiffs under the issues joined by them upon the defendant's fourth plea are entitled to such substantial damages as a jury under all the circumstances, including this last, may find to be reasonable.

Now as to the construction of the chattel mortgage. There can be doubt that the courts of Upper Canada have held, but not without dissent, that *Porter* v. *Flintoff* (1) is an authority that in the case of a chattel mortgage, in form precisely similar to the present, being executed without an express redemise clause the mortgagor is not entitled to possession of the chattels mortgaged until default, and that therefore the mortgagor cannot maintain any action against the mortgagee for taking possession of the chattels, even though such possession should be taken before any default committed. In *McAulay* v. *Allen* (2) ; and *Samuel* v. *Coulter* (3), the majority of the Court of Common Pleas at Toronto held themselves to be bound by *Porter* v. *Flintoff* as so deciding and by *Ruttan* v. *Beamish* (4), as affirming it. In *Samuel* v. *Coulter* (3), however, Hagarty C. J. suggested that the plaintiff should seek his remedy in appeal when *Porter* v. *Flintoff* (1) might be reviewed. The point comes up now for the first time, so far as I am aware, in appeal. In *Porter* v. *Flintoff* (1) the question whether there might not be gathered from the terms of the mortgage an implied contract that the mortgagor should remain in possession until default, which would be as effectual as an express clause to that effect, does not appear to have been very much, if at all, discussed. I remain of the opinion which was expressed by me in *McAulay* v. *Allen* (2) and *Samuel* v. *Coulter* (3), that the point so assumed to have been decided by *Porter* v. *Flintoff* (1) was not at all neces-

(1) 6 U. C. C. P. 335.
(2) 20. U.C.C.P. 417.
(3) 28 U. C. C. P. 240.
(4) 10 U. C. C. P 90.

sary to a decision upon the precise point adjudged in that case, and that as it was not, the judgment in *Porter* v. *Flintoff* (1) was not binding upon the point when it should be, as it was in those cases, especially raised. The judgment in *Porter* v. *Flintoff* (1) is supportable upon the authority of the principle upon which *Watson* v. *MacQuire* (2) proceeded, namely, that the constructive possession which follows the property in personal chattels is sufficient to enable a mortgagee of chattels which still are in the actual possession of the mortgagor to maintain an action of trespass *de bonis asportatis* against a stranger who in such form of action cannot set up the *jus tertii* ; and that a sheriff who seizes the chattels in the possession of a mortgagor is, as to the true owner, the mortgagee, such stranger, unless he shall make it appear that the writ of *fieri facias* under which he seized the goods issued upon a judgment obtained against the mortgagor at the suit of a creditor against whom the mortgage was fraudulent and void under the statute as conveyances fraudulent against creditors. In *Ruttan* v. *Beamish* (3) the point did not arise at all ; that was an action of detinue and trover brought by a mortgagor of chattels against the mortgagee after default, which, of course, could not be maintained unless after the default the mortgage had been discharged by payment in full. In neither of those cases was it necessary to decide what was the right of the mortgagor to the possession of the goods as against the mortgagee before default.

The authorities in England, are to my mind, conclusive that in a mortgage of personal chattels there may be an implied contract that the mortgagor shall remain in possession until default of equal efficacy as an express clause to that effect (4) ; and

(1) 6 U. C. C. P. 335.
(2) 5 C. B. 836.
(3) 10 U. C. C. P. 90.
(4) *Brierly* v. *Kendall* 17 Q. B. 937.

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that such an implied contract necessarily arises from the nature of the instrument unless it be very expressly excluded by its terms. In *Wheeler* v. *Montefiore* (1) there was a proviso in the mortgage that on non-payment of the mortgage debt on the 24th June following it should be lawful for the mortgagee to enter upon the premises where the chattels mortgaged were and to sell them; there was no provision that the mortgagor should retain possession until default. Lord Denman in giving judgment says (2)—

There is no covenant that Franks (the mortgagor) shall continue in possession until the 24th June, but looking at the whole deed we are of opinion that the plaintiff's right to take possession did not attach until the 24th June.

Hereby clearly determining that a right to retain possession may by implication arise from the terms of the deed as effectually as if there were in it an express redemise clause. So in *Albert* v. *Grosvenor Investment Company* (3) Cockburn C.J. says (4) :—

This is the case of a mortgage whereby the mortgagor transfers the property in certain goods to the mortgagees, but subject to the mortgagor's right of redemption, and there are certain clauses in the deed, the result of which is that the mortgagees cannot seize and sell the goods unless the mortgagor makes default in paying the instalments of £2, which he is bound to do each successive Monday.

And Lush J. (5) says :—

It is also true the property in the goods passed by the deed to the mortgagees, but though it is not specially said so in the deed the mortgagor had clearly reserved to him a special property in the goods until he had made default, and he had, therefore, a right of action for seizing and selling the goods without default.

In *ex parte Allard* (6), Lord Justice James referring to the deed then before the court which was a composition deed says :—

It appears to me that we must decide this case upon a consideration of what was the real and true bargain between the parties at the time when the arrangement for a composition was made. What

(1) 2 Q. B. 133.
(2) P. 142.
(3) L. R. 3 Q. B. 123.
(4) P. 127.
(5) P. 129.
(6) 16 Ch. D. 511.

was it they meant to do and did do in substance and intention? It appears to me that what they intended was this, that in consideration of the composition the business was to be carried on by the son alone (not by the mother) in the usual way in which such business is carried on, and that in carrying it on he was to exercise such a control over the assets as would enable him to raise money for the purpose of paying the composition. It would be utterly inconsistent with this intention that the debtors should have no power to deal with the trade debts which were then outstanding. An implied authority was given to deal with them to that extent. All that it is necessary for us to say is that the implied authority given to the debtors goes to the extent of authorizing any dealing with the assets in the ordinary course of business or for the purpose of raising money to carry on the business or to pay the composition.

The learned Chief Justice in the court below holds this language to be applicable to a composition deed only and not to apply to a chattel mortgage of his stock in trade executed by a trader, but this distinction, as it appears to me, rests upon no foundation, for the ordinary object and intent of a trader in executing a chattel mortgage upon his stock in trade, upon getting an extension of time for the payment of his debt to the wholesale trader with whom he deals, is to enable him to continue carrying on his trade in the ordinary course of business until the day named in the mortgage for payment of his debt equally as such is the object and intent in the case of a composition deed. I can see no distinction whatever in substance between the two cases and the language of the learned judges in the Court of Appeal in *ex parte Allard* (1) is, in my opinion, equally applicable to the present case.

So in *National Mercantile Bank* v. *Hampson* (2), in which the point came up on the pleadings the defence having been specially pleaded, the mortgagee of chattels brought an action of trover against a purchaser of some of the goods from the mortgagor and the defendant pleaded that he bought the goods in the ordinary course of business and without notice that they were

(1) 16 Ch. D. 511. (2) 5 Q. B. D. 177

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not the property of the vendor. Lush J. held the defence good, saying:—

Having regard to the terms of the bill of sale there was an implied license for the grantor to carry on his business * * * and any *bonâ fide* purchaser from him would have a good title.

So in *Walker* v. *Clay* (1), Grove J. says:

The object of the bill of sale is to permit the grantor to carry on his business of an inn-keeper and horse-dealer, and it must therefore be taken to have contemplated this sale. In his character of publican the grantor would of course be entitled, and the bill of sale must be taken to have intended him to be entitled, to sell wine and beer to his customers.

And Lindley J. says:

The object of the bill of sale is obviously not to paralyze the trade of the grantor, but to enable him to carry on his trade, and the bill of sale would be worthless if we were to construe it otherwise.

And he concludes by saying that the title of the defendant who was a purchaser from the grantor of the bill of some of the chattels covered thereby is, to his mind, an extension of the doctrine that a *bonâ fide* purchaser for value without notice is to be protected. This observation was simply an enunciation of the principle upon which a purchase of personal chattels from one who has the possession of them only, the property in them being in another, can be maintained against the true owner, and he says in substance that one who purchases *bonâ fide* from a trader goods in the ordinary course of the trader's business stands in the position well known in equity of a *bonâ fide* purchaser for value without notice. But this exposition of the principle upon which a purchase of chattels from a mortgagor in possession is maintained against the true owner does not at all detract from the weight of the decisions which hold that an implied right for a mortgagor of chattels to continue in the exercise of his business, and to sell the chattels mortgaged in the ordinary course of business, may be gathered from the terms of the instrument, nor can it be construed as qualifying the

(1) 49 L. J. C. L. 560.

judgment of Lindley J. himself in that very case that the grantor of the bill of sale then before him had such an implied right, and that the court could not hold otherwise without making the bill of sale worthless. It was the fact of the sale having been made in the ordinary course of the grantor's business that, although there was no express proviso in the instrument that he might continue to carry on his business, made the purchaser's title good although the vendor had not the property in the thing sold. Upon this principle it was also held in *Taylor* v. *McKeand* (1) that a purchase from a trader, a mortgagor of goods, which the jury found to have been sold with a fraudulent intent by the mortgagor and not in the ordinary course of business, could not maintain title against the mortgagee although the purchaser was ignorant of the fraud and bought *bonâ fide*—thus showing that the title of the purchaser depends on the fact of the sale to him being made in the ordinary course of the vendor's business. A trader, mortgagor in possession of chattels, has no right whatever to sell otherwise than in the ordinary course of his business, but to sell in the ordinary course of his business he has, from the very nature of a chattel mortgage and the purpose for which it has come into use among traders. So that on a sale made in the former case a purchaser cannot acquire title but in the latter he can. *Payne* v. *Fern* (2) is precisely to the same effect.

These authorities abundantly establish that a right of the mortgagor to retain possession of the mortgaged property until default may be gathered by implication from the terms of the instrument as well as from an express proviso contained therein.

In construing the mortgage before us we must bear in mind that the usual intent and common

(1) 5 C. P. D. 358.
(2) 6 Q. B. D. 620.

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object of the mortgage of the stock in trade of a trader being executed by him is not to effect a winding up of his business, or as Lindley J. expresses it in *Walker* v. *Clay* "to paralyse his trade," but to enable him to carry on his business in the ordinary course of his trade until default in payment of his debt on the day named in the mortgage for that purpose. In the present case the evidence expressly states that to have been the object and intent of the mortgagors, but apart from this evidence we must regard them as having executed the mortgage with that object and intent which is the usual and natural object and intent of traders in such cases. It was because these instruments had come into use among traders without a transfer of the possession to the mortgagee, the mortgagor still continuing to carry on his trade disposing of his stock in trade as before, that the Legislature of Canada, as far back as the year 1849, passed an act which, with certain amendments made thereto, is still in force, prescribing the contents and mode for the execution and registration of those instruments—that is to say—mortgages of chattels not accompanied with an actual and continued change of possession, to make them valid as against creditors of the mortgagors or subsequent purchasers or mortgagees in good faith. It was because of the common use of those instruments by traders as security to their creditors while the mortgagor traders continued in possession of the chattels mortgaged, carrying on their trade, disposing of their stock mortgaged as before, that the Legislature interposed to regulate the instruments as to their contents, their mode of execution and their registration, and ever since they have become a common assurance in use between traders, and recognized by the Legislature for the express purpose of enabling the trader debtor to continue carrying on his business,

disposing of his stock in trade in the ordinary course of his business until default, while vesting the property in the stock in trade in the mortgage creditor, giving him a security in preference to other creditors. A similar statute, apparently copied in great measure from the Canada Statute, was passed by the Legislature of Manitoba in 1875. It is, however, contended that by reason of the clause as to the mortgagee taking possession not being limited to the case of default in payment of the mortgage debt, but in the same sentence providing also that "in case of default in the payment of the said sum of money in the proviso mentioned or of interest thereon or in case the mortgagor shall attempt to sell or dispose of or in any way part with the possession of the said goods and chattels or any of them or to remove the same or any part thereof out of the said store (or) suffer or permit the same to be seized or taken in execution without the consent of the mortgagee, his executors, &c., to such sale, removal or disposal thereof first had and obtained in writing," &c., that the effect of this proviso is that although the mortgagor is entitled to retain possession of the goods until the time specified for payment of the mortgage debt; if he should do nothing whatever with them and in fact ceases carrying on his business, he loses all right to possession of the goods if he presumes to continue his business and attempts to sell a single article in the ordinary course of his trade without such consent in writing of the mortgagee. So to hold would be to defeat the intent and object of the mortgagors in executing the mortgage, and would not only have the effect of utterly paralysing their trade but would leave them completely at the mercy of the mortgagee, and would convert the instrument from its well known character of a security intended to enable the mortgagors to continue carrying on their

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business as before until the time specified for payment of the mortage debt, into an instrument designed to enable the mortgagee, at his own sole will and pleasure to wind up the trader's business, for the mortgagee might altogether refuse his consent to the business being carried on, or might withhold it unless the mortgagors should consent not to purchase any new goods, not to replenish their stock, and to pay over daily to the mortgagee every cent to be realized from the sale of the mortgaged stock, and thus compel the mortgagors to submit to wholly new terms, quite different from the arrangement, contained not only in the chattel mortgage but also in the mortgage on realty, that the mortgagors should have until the 1st March, 1884, to pay their debt. There is no more efficacy in the word "sell" in the clause under consideration than in the words "dispose of," and "removal" is but a mode of "disposing of." Having regard, therefore, to the character of the instrument, and to the fact that its well known and recognized use among traders is to enable the trader, mortgagor, to continue carrying on his trade, these words "sell or "dispose of" in the connection in which they are used in the clause under consideration, which is the ordinary form that has always been in use, must be construed in the same sense as the words coupled with them, viz; "or remove them or any of them out of the said store, or part with the possession of them or any of them, or permit or suffer them to be seized in execution," and to be intended to prohibit only any sale or disposition of the goods other than in the ordinary course of business, and the doing of any thing which might prejudice the mortgagees' right to take possession upon default in payment at the time specified as by removal to another place which would defeat the mortgage altogether unless some new provision

should be made; for the description of the goods mortgaged, and the only mode of identification of them provided by the mortgage is in the store of the mortgagors where they were when the mortgage was executed; or by suffering the goods to be taken in execution which might expose the mortgagee to litigation, but to permit the mortgagors to carry on their business and to sell the stock in trade in the ordinary course, as is usual among traders executing such instruments; any other construction would defeat the plain object of the mortgagors in executing the instrument and the very purpose for which the instrument has come into use as a commercial security; it would be also contrary to the plain intention of the mortgagee in the present case, for the defendant, Ashdown, while his legal agent McDonald was in treaty with the plaintiffs for security for their debt, writes a letter to them in answer to one received from them wherein he says:—

> I note what you say *re* goods but as the amount now owing by you to this firm and to Ashdown & Co. is so much in excess of what I intended, I will simply hold your order in hand and be prepared to ship immediately that I hear you have came to satisfactory arrangements with McDonald *re* the past.
>
> Trusting this will be satisfactory and that your utmost expectations *re* the fall trade may be realized, I remain, &c.

Just consider to what extent the defendants' contention now goes—that although they had taken as part of the security which constituted one transaction a mortgage upon real estate which had cost the plaintiffs $1,040, and upon which there remained due upon a prior mortgage only the sum of $120 with some interest thereon, and had taken a mortgage upon the whole of the plaintiffs' stock in trade of about the value of the whole of the mortgage debt, viz., $847, still if the plaintiff should, after executing these mortgages, proceed to sell a single thing in the ordinary course of their trade the mortgagee might instantly enter the

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plaintiffs' shop and take and sell the whole of their stock in trade and receive the proceeds on account of the debt which by the terms of the mortgage on the real estate as well as of the chattel mortgage was not payable until the 1st March, 1884. In fact that by giving these two mortgages the traders had only acquired the right of keeping their stock in trade insured upon the shelves in their shop, unsold unless, in order to obtain permission to sell in the ordinary course of their trade, they should submit to such other terms, however extravagant, the mortgagee should insist upon. Can it be supposed that any persons in their senses could have executed those instruments which the plaintiffs' executed with that intent or that the defendants could have received them as executed with that intent ?

The only construction that the clause under consideration can, in my judgment, receive, is that the qualification as to the mortgagors' right to "sell and dispose of" the goods mortgaged is that if sold otherwise than in the ordinary course of business the mortgagee might enter, &c., and that they had a perfect right to sell in the ordinary course of their trade.

There is but one other point in the judgment of the court below requiring to be noticed. The case of the defendants now attempting to set up rights which they claim to have under the chattel mortgage in justification of the acts committed by them, after having failed on their justification under the writs of *fieri facias* upon the sufficiency of which they rested to the last moment, is compared to the case of a master having said that he dismissed his servant for one cause which would have been insufficient, resting upon a different cause on an action being brought for a wrongful dismissal. But there is no analogy whatever between the two cases.

There is no question here as to the right in which the defendants merely said that they acted—the question is not as to what the defendants may have said at different times, different from the defence now set up, but as to what they did in point of fact, which they have also pleaded by way of justification upon the record and as to which there is no dispute or contradiction whatever. The fact is undisputed that the goods in question were seized and taken from the plaintiffs' possession and sold only under one authority, namely, the writs of *fieri facias* under which the defendants justified; that is an act of the defendants, not an assertion merely; it is an act which now that it has been established in evidence cannot be got over or laid aside and the sole question is: Was that act justified? It was a seizure in plain disregard of the chattel mortgage and inconsistent with it. There is no pretence that the goods were ever seized or taken under the powers contained in the chattel mortgage. If they had been taken under it they would have been taken as the property of the mortgagee, the defendant Ashdown alone, the plaintiffs' right to retain possession of which had been forfeited for violation of the terms upon which they were left in their possession. If that had been the ground of defence it must have been specially pleaded as justifying under a forfeiture insisted upon as having been incurred by the misconduct of the plaintiffs, and Ashdown alone as mortgagee could have set up that justification, and the other defendant as his servant which also would have required a special plea. But, it is useless to refer to the mode in which such a defence could be set up, as the act which is complained of, namely, the seizure which has been proved to have been authorized only by the writs of *fieri facias* and was in point of fact only made under them was not authorized by the chattel mort-

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gage. Seizure under the writs was in violation of the chattel mortgage, and was in fact a repudiation of it, for being taken under executions issued upon judgments obtained by the defendants the goods were by the defendants themselves authorized to be seized as the property of the plaintiffs to satisfy the execution which the defendant Ashdown swore issued in the ordinary course, and so for the purpose of thereby realizing satisfaction of judgment debts by sale of property thus admitted to be the property of the plaintiffs, a position quite at variance with the defendants or either of them having title to, and property in, the goods under the mortgage. In fact the act of seizure and sale under the writ of *fieri facias* is now as much unauthorized by and in violation of the chattel mortgage as it was when the Court of Queen's Bench in Manitoba (which now by its judgment holds that act to have been authorized by the chattel mortgage) set aside the writs as in violation of the mortgages executed by the plaintiffs and in breach of the agreement contained therein.

The appeal must be allowed with costs. But as to the damages. The jury have found the value of the goods to have been at the time of the seizure $986. This may be a large estimate, but I do not think we could interfere with the finding of the jury upon that point. The only amount realized by the sheriff's sale has been $256. Upon the above estimate of the value of the goods seized and wrongfully sold, the plaintiffs would be entitled to $730, but the jury by their verdict have given to the plaintiffs $1,484 as for damages which by their answers to the questions put to them is plainly intended to be in excess of the whole of the plaintiffs' debt to the defendants jointly and to Ashdown alone of $852. I do not see how it is to be made to appear upon the record in this case that the amount of $1,484 for which alone

judgment could be entered upon their verdict against the defendants jointly, is in excess of the judgment debts due to the defendants jointly, and to the defendant Ashdown alone, so as to give to the plaintiffs the benefit intended by the jury—which would entitle them to have satisfaction entered on all the judgments and a release also of the real estate mortgage. These judgment debts have in fact, so far as we know, been satisfied only to the extent of $256 realized by the sheriff's sale. If the defendants have realized anything out of the real estate mortgaged, the amount, if any, so realized should not be deducted from the amount to be recovered in this action. I think, therefore, the better way to deal with the case will be to render a verdict for the plaintiffs for the difference between the sum of $256 realized by the sheriff's sale and the true value as found by the jury of the goods so sold and for such further amount as may be reasonable for the wrongful act of the defendants, leaving them to apply for a remedy by way of set off or otherwise to have allowed to them so much of the said several judgment debts as may really remain due after giving credit to the plaintiffs for the said sum of $256 realized by the sheriff's sale, and such other sums, if any, as may have been realized out of the mortgaged real estate or any other estate of the plaintiffs. The equities between the parties as to entering satisfaction of the judgments and the release of the mortgage of the real estate can thus at the least possible expense be effectually disposed of.

The damages of $1,350 awarded by the jury cannot, I think, be sustained—that sum does not seem to be warranted by any just and rational view of the evidence. Ample justice would I think be done by a verdict for the plaintiffs for $1,000, and if the plaintiffs will consent to a rule to be drawn up upon

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their consent, for the verdict being reduced to that amount upon the footing above stated as to the defendants setting off against that verdict the balance remaining due in respect of the three above named debts of the plaintiffs to the defendants jointly and to the defendant Ashdown alone, after giving credit to the plaintiffs as above mentioned, then the rule for a new trial in the Court of Queen's Bench, in Manitoba, to be discharged with costs, but if the plaintiffs will not so consent then that rule to be made absolute for a new trial for excessive damages upon payment of costs.

In setting off the mortgage debt it is to cease to carry interest upon and from the day upon which the verdict was rendered.

The reduction of the judgment by such set-off will, of course, not prejudice the plaintiffs' right to full costs in the action.

Appeal allowed with costs.

Solicitors for appellants: *Ewart, Fisher & Wilson.*

Solicitors for respondents: *Biggs & Dawson.*

JOHN H. R. MOLSON & AL. (PETITIONERS) ..... } APPELLANTS;

AND

WILLIAM B. LAMBE, *ès-qualité* (INTERVENANT) ..... } RESPONDENT.

1887 Nov. 2 & 3.

1888 March 15.

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

Prohibition—Licensed brewers—Quebec License Act—41 Vic. ch. 3 (P. Q.)—Constitutionality of—43 Vic. ch. 19 (D).

The inspector of licenses for the revenue district of Montreal charged R. a drayman in the employ of J. H. R. M. & Bros., duly licensed brewers under the Dominion Statutes, 43 Vic. ch. 19, before the court of Special Sessions of the Peace at Montreal, with having sold beer outside the business premises of J. H. R. M. & Bros., but within the said revenue district in contravention of the Quebec License Act, 1878, and its amendments, and asked a condemnation of $95 and costs against R. for said offence. Thereupon J. H. R. M. & Bros. and R., claiming *inter alia* that being licensed brewers under the Dominion Statute, they had a right of selling beer by and through their employees and draymen without a provincial license, and that 41 Vic. ch. 3 (P. Q.) and its amendments were *ultra vires*, and if constitutional did not authorize his complaint against R., caused a writ of prohibition to be issued out of the Superior Court enjoining the court of Special Sessions of the Peace from further proceeding with the complaint against R.

Held, Per Ritchie C.J. and Strong, Fournier and Henry JJ., that the Quebec License Act and its amendments were *intra vires*, and that the court of Special Sessions of the Peace at Montreal having jurisdiction to try the alleged offence and being the proper tribunal to decide the question of facts and of law involved, a writ of prohibition did not lie.

Per Taschereau and Gwynne JJ., that the case was one which it was proper for the Superior Court to deal with by proceedings on prohibition.

Per Gwynne J.—The Quebec License Act of 1878 imposes no obligation upon brewers to take out a provincial license to enable them to sell their beer, and therefore the court of Special Sessions of the Peace had no jurisdiction and prohibition should issue absolutely.

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

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APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal side) (1) affirming the judgment of the Superior Court (2).

The proceedings in this case were commenced before the Court of Special Sessions of the Peace sitting in the city and district of Montreal by the issue of a summons and complaint by M. C. Desnoyers, Esq., Police Magistrate, against the appellant Andrew Ryan, upon the complaint of the present respondent, W. B. Lambe, Esq., Inspector of Licenses for the Revenue District of Montreal, charging the said Andrew Ryan with having sold intoxicating liquors without a license.

The declaration is as follows :

"William Busby Lambe, de la cité de Montréal, dans le district de Montréal, Inspecteur des Licences pour le District du Revenu de Montréal, au nom de Notre Souveraine Dame La Reine poursuit Andrew Ryan, de la cité de Montréal dans le dit district de Montréal, commerçant.

" Attendu que le dit Andrew Ryan n'étant muni d'aucune licence pour la vente de liqueurs enivrantes en quelque quantité que ce soit, a, en la dite cité de Montréal, dans le district du Revenu de Montréal, dans le dit district de Montréal, le sixième pour de juin en l'année mil huit cent quatre-vingt deux et à différentes reprises avant et depuis, vendu de la liqueur enivrante, contrairement au Statut fait et pourvu en pareil cas : Par lequel et en vertu du dit Statut, le dit Andrew Ryan est devenu passible du paiement de la somme de quatre-vingt-quinze piastres courant.

" En conséquence le dit Inspecteur des Licenses demande que jugement soit rendu sur les prémises et que le dit Andrew Ryan soit condamné à payer la

(1) M. L. R. 2 Q. B. 381. (2) M. L. R. 1 S. C. 264.

somme de quatre-vingt quinze piastres courant, pour la dite offense, avec les frais."

And the summons is as follows:

Canada,
Province de Québec,
District de Montréal,
Cité de Montréal.

"A ANDREW RYAN, commerçant de la cité de Montréal, dans le district du Revenu de Montréal :—

Les présentes sont pour vous enjoindre d'être et de comparaitre devant moi le soussigné Mathias Charles Desnoyers, Ecuyer, Magistrat de Police pour le district de Montréal, à une Session de la Cour des Sessions Spéciales de la Paix, qui se tiendra au Palais de Justice, en la cité de Montréal, dans le dit district, le quinzème jour de juin courant à dix heures de l'avant midi, ou devant tel Juge de Paix ou Juges de Paix pour le dit district, qui sera ou seront alors présent, ou présents, aux fins de répondre à la plainte portée contre vous par William Busby Lambe, Ecuyer, de la cité de Montréal dans le district de Montréal, Inspecteur des Licences pour le district du Revenu de Montréal, qui vous poursuit au nom et de la part de Sa Majesté, pour les causes mentionnées dans la déclaration ci-annexée ; autrement jugement sera rendu contre vous par défaut.

[L. S.] Donné sous mon seing et sceau ce dixième jour de Juin dans l'année de Notre Seigneur mil huit cent quatre-vingt-deux au Bureau de Police dans la cité de Montréal dans le district susdit.

(Signé) M. C. DESNOYERS,
Magistrat de Police."

To which the defendant pleaded as follows:

"The defendant for plea alleges :—

"That he is and was at the time mentioned in the information, a servant and employee of the firm of J.

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H. R. Molson & Bros., brewers of the said city of Montreal, who hold a license from the Dominion of Canada, under the provisions of the Act of the Parliament of Canada, and who have been in business as such brewers in Montreal for over eighty years. That during the whole of the said term and up to the present time it has always been the custom and usage of trade of brewers to send around through the country their drays with beer, which beer was sold by their draymen during their trips to the said customers.

"That on the occasion charged in the said information the said defendant was a servant and drayman of the said firm of J. H. R. Molson & Bros.

"That if the said defendant sold any beer whatsoever he so sold it as the agent and as the drayman of the said J. H. R. Molson & Bros., and under and by virtue of their authority under the said license, and sold it according to the custom and usage of trade in the said province ever since the brewers were first established therein.

"That the said John H. R. Molson & Bros. being licensed under the provisions of the said Act of the Parliament of Canada, are not liable to be taxed either by or through their employees or draymen under the provisions of any Act passed by the Legislature of Quebec.

"And defendant further saith that he is not guilty in manner or form as set forth in the said information and summons.

"Wherefore, defendant prays the dismissal of the said prosecution."

The following is an extract from the register of proceedings as printed in the case :—

Canada,
Province of Quebec,
District of Montreal,
City of Montreal.

SPECIAL SESSIONS.

The fifteenth day of June, 1882,

Present: MATHIAS C. DESNOYERS, Esquire, Police Magistrate for the District of Montreal.

WM. B. LAMBE, *Complainant*, against ANDREW RYAN, *Defendant*. } On charge of selling liquor without a license.

Defendant by attorney and pleads not guilty.

Mr. BOURGOUIN, *for Prosecution*.

Mr. KERR, *for Defendant*.

The counsel for defence fyles a plea in writing, and the case is continued to the 1st September next, 1882.

Friday, 1st September, 1882.

Present: MATHIAS C. DESNOYERS, Esq., P.M.

WM. B. LAMBE, and ANDREW RYAN, } Selling liquor without license. (Continued from the 15th June.)

Wednesday, 6th September, 1882.

Present: MATHIAS C. DESNOYERS, Esq., P. M.

WM. B. LAMBE, and ANDREW RYAN. } Selling liquor without a license. Continued from 1st September. Continued to the 8th.

Friday, 8th September, 1882.

Present: MATHIAS C. DESNOYERS, Esq., P. M.

WM. B. LAMBE, and ANDREW RYAN } Selling liquor without a license. (Continued from the 6th.) *En délibéré.*

(A true copy)

M. C. DESNOYERS, P. M.

Before any decision was given in this case, which is still under advisement, J. H. R. Molson, J. T. Molson and Andrew Ryan doing business under the firm of J. H. R. Molson & Bros., applied by petition to the Superior Court for a writ of prohibition to prohibit the said M. C. Desnoyers, Police Magistrate, from further proceeding upon the said summons and complaint, on the ground that Ryan committed no offence whatever

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against any act of the local legislature:—

(a.) Because there is no act of the legislature of the Province of Quebec, which authorizes the said complaint and prosecution.

(b.) Because the pretended act of the legislature, upon which such prosecution is founded is not an act of the legislature of the Province of Quebec, but purports to have been made and enacted by Her Majesty the Queen, Her Majesty the Queen having no right or title to pass acts binding on the Province of Quebec.

(c.) Because the pretended act intituled "The Quebec License Law of 1878," under which the said prosecution is instituted, is entirely illegal, null and void and unconstitutional, the same not being passed by the proper body gifted with legislative powers upon the subject in the Province of Quebec.

(d.) Because the said act purports to treat of and regulate criminal procedure.

(e.) Because the penal clause is by fine and imprisonment.

(f.) Because your said petitioner Andrew Ryan being in the employ and being the drayman of your other petitioners, and acting under their orders, the act of your petitioner Ryan selling the said intoxicating liquor, to wit, beer, was the act of your other petitioners, co-partners, who in their license from the Government of the Dominion of Canada, were authorized and empowered so to sell such intoxicating liquor.

(g.) Because your said petitioners, co-partners, being licensed brewers, had the right of selling by and through their employees and draymen, without any further license whatsoever, under the provisions of the Quebec License Act of 1878.

(h.) Because the Legislature of the Province of Quebec have no right whatsoever to limit or interfere with the traffic of brewers duly licensed by the Government of Canada.

That under these circumstances the said court of Special Sessions of the Peace and the said Mathias C. Desnoyers have unlawfully and improperly taken jurisdiction over the said Andrew Ryan, your petitioner, and the other petitioners, and that it has become necessary for them for their own preservation to apply for a writ of prohibition to prohibit the said court of Special Sessions of the Peace, sitting at the said city of Montreal, and the said Mathias C. Desnoyers from taking jurisdiction over them your petitioners, and further proceedings on the said summons and complaint.

The respondent, in his quality of inspector of licenses, intervened to support the complaint and to contest the writ of prohibition, and after issue joined and admissions filed by the parties of the matters of fact set forth in the proceedings, the Superior Court held

that the Quebec License Act of 1878 and its amendments were constitutional and that a writ of prohibition did not lie on appeal to the Court of Queen's Bench for Lower Canada (Appeal side) the judgment of the Superior Court was confirmed, but the holding that prohibition did not lie was reversed.

W. H. Kerr Q.C. for the appellants and *Geoffrion* Q. C. and *N. H. Bourgouin* for the respondent.

In addition to the points of argument and authorities relied on in the court below (1), the learned counsel for the appellants cited Lloyd on Prohibition (2); High on Mandamus (3); and counsel for the respondent cited *Simard* v. *Corporation du comté de Montmorency* (4); High on Extraordinary Legal Remedies (5); *Griffith* v. *Rioux* (6); *Dion* v. *Chauveau* (7); and *Lapointe* v. *Doyon* (8); *Côté* v. *Paradis* (9).

SIR W. J. RITCHIE C.J.—In view of the cases determined by the Privy Council, since the case of *Severn* v. *The Queen* (10) was decided in this court, which appear to me to have established conclusively that the right and power to legislate in relation to the issue of licenses for the sale of intoxicating liquors by wholesale and retail belong to the local legislature, we are bound to hold that the Quebec License Act of 1878, and its amendments are valid and constitutional. By that act sec. 2 the sale of intoxicating liquors without license obtained from the government is forbidden. By section 1 the words "intoxicating liquors" mean *inter alia* ale, beer, lager, &c. Section 71 provides, that whosoever without license sells in any quantity whatsoever intoxicating liquors in any part of this province muni-

(1) M. L. R. 2 Q. B. 328.
(2) Pp. 29-30.
(3) Sect. 781.
(4) 8 Rev. Leg. 546.
(5) Pp. 550-558.
(6) 6 Leg. News 214.
(7) 9 Q. L. R. 220.
(8) 10 Q. L. R. p. .
(9) 1 App. Cas. 374.
(10) 2 Can. S. C. R. 70.

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cipally organized is liable to a fine of $95.00 if such contravention takes place in the City of Montreal. And section 196 of 41 Vic. ch. 3, provides for the courts which shall have power to try actions or prosecutions for breach of this law in these words:

All actions or prosecutions, where the amount claimed does not exceed one hundred dollars, may be, optionally with the prosecutors, brought before the Circuit Court, but without any right of evocation therefrom to the Superior Court, or before two Justices of the Peace in the judicial district or before the judge of the sessions of the peace or before the court of the recorder or of the police magistrate or before the district magistrate; but if the amount claimed exceeds one hundred dollars they shall be brought before the Circuit Court or the Superior Court, according to the competency of the court, with reference to the amount claimed.

The code of procedure by article 1031 provides for the issue of writs of prohibition in these words:— "Writs of prohibition are addressed to courts of inferior jurisdiction whenever they exceed their jurisdiction."

The only question that I can discover that we have to determine in this case is: Had the police magistrate before whom the complaint was made by the inspector of licenses for the district of Montreal and who issued the summons in this case jurisdiction over the matter of this complaint and jurisdiction and authority to try the offence charged in the declaration or information and summons? If he had, no prohibition in my opinion can be awarded. On this point, it seems to me, the authorities are clear and conclusive. In the *Mayor of London* v. *Cox* (1) Willes J. delivering the opinion of the judges in the House of Lords says:—

In cases where there is jurisdiction over the subject matter, prohibition will not go for mere irregularity in the proceedings, or even a wrong decision of the merits, *Blaquiere* v. *Hawkins* (2).

And again he says:—

The proceeding in prohibition, therefore, does not stand upon the footing of an action for a wrong in a prohibition for want of juris-

(1) L. R. 2 H. L. 276. (2) Doug. 378.

diction for the question is not whether the party or the court has done a wilful wrong, but "whether the court has or has not jurisdiction." *Ede* v. *Jackson* (1).

And again:

The law upon this question of discretion is thus stated in the judgment of the Queen's Bench, in *Burder* v. *Veley* (2). If called upon we are bound to issue a writ of prohibition as soon as we are duly informed that any court of inferior jurisdiction has committed such a fault as to found our authority to prohibit, though there may be a possibility of correcting it by appeal * * * *
The question then remains, what are the defects that authorize and require us to issne the writ of prohibition? The answer is, that they are in every case of such a nature as to show a want of jurisdiction to decide the case before them; *Gardner* v. *Booth* (3). In whatever stage that fact is made manifest to us, either the crown or one of its subjects, we are bound to interpose.

Lord Cranworth says (4), delivering judgment in the House of Lords in the same case:—

Where an inferior court is proceeding in a cause which arises on a subject over which it has jurisdiction, no prohibition can be awarded till the party sued in the inferior court sets up a defence on some ground raising an issue which the inferior court is incompetent to try. Until that is done no ground for prohibition has been shewn.

Prohibitions by law are to be granted at any time to restrain a court to intermeddle with or execute anything which by law they ought not to hold the plea of (5). In *Toft* v *Reyner* (6), it was held that the court had no power to issue a prohibition to the judge of a county court, in a matter that was within his jurisdiction. In this case it was stated that the plaintiff had already recovered judgment against the defendant in an action for the same debt in the borough court of Cambridge, and that his goods had been taken and sold under that judgment and the plaintiff who was present admitted such statement to be true. A prohibition was moved for to restrain the county court judge on the ground that the matter being *res judicata*

(1) Fortesc. 345.
(2) 12 A. & E. 263.
(3) 2 Salk. 543.
(4) P. 293.
(5) 2 Inst. 602.
(6) 5 C. B. 162.

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he had no jurisdiction, that his jurisdiction ceased when the defendant's plea was admitted to be true, but per Wilde C.J.:—

Whether the plea was good or bad was a matter of law which he was bound to decide and his decision was final.

Adding:

A mistake in that respect would, ordinarily speaking, be matter of error; but the act creating these county courts has taken away that form of remedy; there is no ground therefore, for granting a prohibition, which lies only where the inferior court has assumed to to act without or beyond its jurisdiction.

And Maule J. says:—

This might have been error, if the writ of error had not been taken away in these cases; and that shows that it is not ground for a prohibition.

And Williams J. says:

I am of the same opinion. The ground of this application is neither more or less than that the judge of the county court, in deciding what it was competent for him to decide, has made a mistake in point of law; and that clearly is not a case in which prohibition lies.

In *Ellis* v. *Watt* (1) per Maule J:

Your application is for a prohibition which can only be granted when the inferior court had not jurisdiction to proceed.

Writs of prohibition are, therefore, framed to restrain inferior courts in cases where the cognizance of the matter belongs not to such courts, but, this is the first time I have heard it propounded that they can be used to restrain courts from intermeddling with matters over which they are specially authorized to take cognizance and hold plea. Can there be a doubt as to the Police Magistrate having authority to hear and determine this matter? If so, how is it possible for the Police Magistrate to decide whether or not there was a breach of the License Law by the sale of intoxicating liquors without license contrary to the provisions of the Quebec License Act until he hears the case? If the defendant's contentions are correct, which I more than doubt, and he establishes them before the Police

(1) 8 C. B. 615.

Magistrate, he will have furnished a defence and be entitled to acquittal. If not correct and the recorder holds they do not amount to a defence he will be bound to convict and the defendant will be left to any remedy he may have by way of appeal or otherwise as he may be advised. It was in my opinion unquestionably for the Police Magistrate to say whether the sale if proved was lawful or unlawful, which question it is clear is quite impossible for him to determine without hearing the case, and whether his determination was right or wrong either in matter of law or of fact, it was no question of jurisdiction. The justice may give an erroneous decision either of law or of fact, or of both, though no person has a right to assume that he will do so, and if he does, if he acts within his jurisdiction his decision is conclusive, unless appealed against, and whether appealable or not it is no case for prohibition.

To determine, in the case before us, whether Ryan has been guilty of a breach of the license act, questions of fact as well as of law are, by defendant's own showing, necessarily involved, the determination of which is now in progress of trial before a tribunal having jurisdiction over the subject matter in controversy, and the only ground on which prohibition appears to me to be asked is the assumption that the judge will decide, not only the questions of law, but those of fact, incorrectly against the defendant. There certainly is no usurpation of jurisdiction in this case, and no issue which the inferior court is incompetent to try; on the contrary, the only issue in the case, namely, whether the defendant was, or was not, guilty of selling liquor without a license, contrary to the provisions of the Quebec license act of 1878, could only be tried under, and by virtue of, the section before referred to, and under which section, in my opinion, M. C. Desnoyers, the police magistrate, had unquestionable jurisdiction,

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and constituted the legal and proper tribunal to deal with any alleged infringement of the said act, and therefore no cause is shown to justify the issue of a writ of prohibition, and this appeal should be dismissed with costs.

STRONG J.—Apart altogether from the reasons given by the Court of Appeal, and from the other points raised and argued here, and exculsively for the reasons and upon the authorities stated and referred to by me in a judgment delivered in the case of *Poulin* v. *Quebec* (1), to which I now desire to add a reference to the cases and authorities collected in Short on Informations (2), a work recently published, I am of opinion that a writ of prohibition did not lie in the present case and that this appeal should therefore be dismissed with costs.

FOURNIER J.—La demande d'un bref de prohibition adressé à la cour des Sessions spéciales de la Paix du district de Montreal, avait pour but d'empêcher cette cour d'entendre et juger une poursuite dirigée contre un nommé Ryan, employé des appelants, brasseurs et distillateurs, pour avoir vendu des liqueurs enivrantes distillées par eux, sans être muni d'une licence à cet effet en vertu de l'acte des licences de Québec. Les principales raisons invoquées au soutien de cette demande sont, 1o. que la province de Québec n'avait pas le pouvoir de passer l'acte des licences au nom de Sa Majesté. 2o. que le dit acte établit des peines, en cumulant l'amende et l'emprisonnement. 3. que le dit acte est *ultra vires* en autant qu'il affecte le commerce et qu'il impose une taxe sur l'industrie des appelants, laquelle n'est soumise à aucune licence provinciale.

La première objection, que la législature n'avait pas le pouvoir d'édicter les lois au nom de Sa Majesté à été abandonnée. Sur la seconde qui dénie à la législature

(1) 9 Can. S. C. R. 185. (2) See p. 436 & seq.

le pouvoir de prononcer des peines comportant l'emprisonnement et l'amende à la fois, je partage entièrement l'opinion exprimé à cet égard par l'honorable juge Cross. La s.s. 15 de la sec. 92 de l'acte B. N. A., donnant le pouvoir de punir par amende, pénalité ou emprisonnement, a conféré le pouvoir de cumuler ces divers châtiments aussi bien que de les imposer séparément. Les raisonnements de l'honorable juge pour établir cette proposition me paraissent concluants et je me borne à y référer.

Quant à la constitutionalité de l'acte des licences de 1878, question si souvent discutée devant les tribunaux depuis quelques années, elle doit être considérée comme finalement réglée par le cas spécial soumis à cette cour en vertu de l'acte 47 Vict. ch. 32 (1), porté plus tard en appel au Conseil Privé de Sa Majesté. La décision rendu sur cette question fait maintenant loi sur le sujet. Il n'est plus permis d'élever de doute sur le pouvoir exclusif des législatures de passer des lois règlant les licences pour la vente des boissons enivrantes, ni sur la constitutionalité de l'acte des licences de Québec de 1878. Cette dernière question a été portée devant cette cour dans la cause de la *Corporation de Trois-Rivières* v. *Sulte* (2), et la validité de la loi y a été reconnue.

Cette loi, par la sec. 196 donnant une juridiction complète à la cour des Sessions Spéciales de la Paix pour entrendre et juger la poursuite intentée devant elle contre le nommé Ryan, il ne peut pas y avoir lieu de faire émaner un bref de prohibition pour empêcher cette cour d'exercer sa juridiction.

L'appel doit être renvoyé avec dépens.

HENRY J. — This is an action brought by the respondent Lambe as inspector of licenses for the revenue dis-

(1) *In re* Liquor License Act, 1883; Cassels's Digest, p. 219.
(2) 11 Can. S. C. R. 25.

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trict of Montreal, against Andrew Ryan for an alleged breach of the license law of the Province of Quebec, in having sold spirituous liquors without license and contrary to law.

In addition to the general plea of non-guilty Ryan pleaded a justification as the servant and employee of the firm of J. H. R. Molson & Brothers, doing business as brewers under a license as such brewers from the Dominion Government to sell the liquors brewed and manufactured by them at Montreal.

The questions to be decided in the action were arranged to be submitted for the decision of the justice who issued the writ, and were substantially embodied in admissions signed by the counsel of both parties, and are in substance the points raised by the pleas in this action.

The case was submitted for the consideration of the justice, but before any decision by him a writ of prohibition was issued by the Superior Court; and, after argument before that court, the learned judge decided substantially that the local license act of 1878, did not supersede the act of the Dominion as to brewers' licenses, and that Ryan was justified in selling beer as he did, but inasmuch as the justice had jurisdiction to decide the matters of fact and law and that as the decision of the justice could be reviewed by a higher court by means of a writ of *certiorari* the court quashed the writ of prohibition. That judgment was affirmed, but apparently for other reasons, by the Court of Appeal at Montreal, and from the latter judgment an appeal was taken to this court.

The question then is as to the applicability of the writ of prohibition to the circumstances of this case.

The writ of prohibition is an extraordinary judicial writ issuing out of a court of a superior jurisdiction and directed to an inferior court for the purpose of

preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested. It is an original remedial writ, and is the remedy afforded by the common law against the incroachments of jurisdiction by inferior courts; and is used to keep such courts within the limits and bounds prescribed for them by law. Such being the object, and I may say the only one, it should be upheld where it can be legitimately employed.

Blackstone says: (1).

A prohibition is a writ issuing properly out of the Court of King's Bench, being the King's prerogative writ, but for the furtherance of justice it may be now also had in some cases out of the Court of Chancery, Common Pleas or Exchequer, directed to the judge and parties of a suit in any inferior court commanding them to cease from the prosecution thereof upon suggestion that either the cause originally or some collateral matter arising therein does not belong to that jurisdiction but to the cognizance of some other court.

High on Extraordinary Remedies (2) says:

The court does not lie for grievances which may be redressed in the ordinary course of judicial proceedings. * * Nor is it a writ of right granted *ex dubito justitiae*, but rather one of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case. Nor should it be granted except in a clear case of want of jurisdiction in the court whose action it is sought to prohibit.

On an application for the writ the want of jurisdiction about to be exercised should be clearly shown, and regardless of the law and facts to be considered by the court sought to be prohibited the sole question is as to its jurisdiction to deal with them. If that is not clearly shown the issue of the writ would be unjustifiable.

I have carefully considered the petition for the writ of prohibition in this case and the admissions of the counsel but neither contains any allegation of the want of jurisdiction of the justice who issued the writ between the original parties, and therefore it must be

(1) 3 Black. Comm. 111. (2) P. 606.

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presumed that such jurisdiction existed. See Short on Prohibition (1). If so, there is no justification shown for the issue of the writ of prohibition. Besides I hold that under the law the justice before whom the case was originally brought had ample jurisdiction to try all the issues raised before him, and no court by prohibition could prevent him from the performance of the duty imposed upon him by law by a decision on the matter of fact and law involved.

After his decision a review of it may be had by a Superior Court as pointed out in the judgment of the Superior Court; but under the law as to the writ of prohibition that writ could not be interposed even if his judgment would be unappealable or could not in any way be reviewed by a higher court.

I will not discuss the merits of the case as between the original parties, as they should in the first place be disposed of by the justice, the only tribunal, in my opinion, at present having power to deal with them. I think therefore the appeal in this case should be dismissed and the judgments of the two courts below affirmed with costs.

TASCHEREAU J.—Upon the question of prohibition I dissent from the majority of the court and I think with the court below that the writ of prohibition lies in such a case as the present. It will be remarked that although the judgment of the Court of Queen's Bench is reversed on the question of prohibition yet the appellant fails on his appeal.

On the merits of the case the majority of the court being of opinion that no writ of prohibition lies in the present case it is useless for me and I think wrong to express an opinion, as what I would say about it would be merely *obiter dictum.*

(1) P. 446 and case there cited *Yates* v. *Palmer.*

GWYNNE J.—The questions involved in this case are:

1. As to the procedure by writ of prohibition according to the law prevailing in the Province of Quebec; and

2. As to the proper determination, upon the merits, of the issue joined in the proceedings in prohibition, this latter question depending upon the validity and construction of an act of the legislature of the Province.

The judgment of Willes J. delivering the unanimous opinion of the judges consulted by the House of Lords in *The Mayor of London* v. *Cox* (1), and which is an authoritative and almost an exhaustive treatise upon all questions of prohibition under the law of England, affirms as well established law, that the courts that may award prohibition being informed either by the parties themselves or by any stranger that any court temporal or ecclesiastical, doth hold plea of that whereof they have no jurisdiction, may lawfully prohibit the same as well after judgment and execution as before; that in whatever stage of the proceeding in the inferior court; whether on the face of the complaint itself or by collateral matter set up by way of plea to that complaint, or in evidence in the course of the proeeedings in the inferior court, or by affidavit, the fact is made to appear to the court having power to award prohibition that the case is of such a nature as to show a want of jurisdiction in the inferior court to decide the particular case, prohibition lies either at the suit of a stranger or of a party even though there might be a remedy by appeal from the judgment of the inferior tribunal, citing upon this latter point *Burder* v. *Veley* (2); *a fortiori* if in the particular proceeding in the inferior court there be no appeal from the judgment

(1) L. R. 2 H. L. 239. (2) 12 A. & E. 263.

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of that court prohibition will lie, and to an application for a prohibition, or upon the determination of an issue, whether of law or of fact, joined in the proceedings in prohibition, it cannot be urged as a sufficient objection to the writ going absolutely that in case of a conviction by the inferior tribunal the party might have a remedy by *certiorari* to quash the conviction; indeed, the writ being issuable at the suit of a stranger as well as of a party shows that the right to it could not be affected by any such suggestion. In the above case of *The Mayor of London* v. *Cox*, Willes J. referring to the writ being issuable at the suit of a stranger says:

In this respect prohibition strongly resembles *mandamus*, where the Court of Queen's Bench exercises a discretion as to whether the writ shall go, but the writ once granted must be met by a return showing a legal answer.

And he adds:

The writ however, although it may be of right, in the sense that upon an application being made in proper time, upon sufficient materials, by a party who has not by misconduct or laches lost his right, its grant or refusal is not in the mere discretion of the court, is not a writ of course, like a writ of summons in an ordinary action, but is the subject of a special application to the court upon affidavit which application, and the proceedings thereupon, are now regulated by the Act 1 Wm. 4 ch. 21.

Before that act the declaration on prohibition was *qui tam*, and it supposed a contempt in disobeying an imaginary precedent writ of prohibition.

The act of William 4th enacted that:

It shall not be necessary to file a suggestion on any application for a writ of prohibition, but such application may be made on affidavits only; and in case the party applying shall be directed to declare in prohibition before writ issued, such declaration shall be expressed to be on behalf of such party only, and not as heretofore on behalf of the party and of His Majesty, and shall contain and set forth in a concise manner so much only of the proceeding in the court below as may be necessary to show the ground of the application without alleging the delivery of a writ or any contempt, and shall conclude by praying that a writ of prohibition may issue; to which declaration the party, defendant may demur or plead such matters by way of traverse or otherwise, as may be proper to show,

that the writ ought not to issue, and conclude by praying that such writ may not issue; and judgment shall be given that the writ of prohibition do or do not issue as justice may require, and the party in whose favor judgment shall be given, whether on non-suit, verdict, demurrer or otherwise, shall be entitled to the costs attending the application and subsequent proceedings and have judgment to recover the same.

The practice under this statute seems to have been in accordance with the ancient usage, that when upon the affidavits filed for and against the application it clearly appeared that the jurisdiction of the inferior court to adjudicate in the particular case could not be questioned, the court would neither grant the rule nor put the parties to the expense of a declaration and proceedings in prohibition, so in like manner if it should clearly appear that the writ ought to go absolutely, it was granted at once without requiring a declaration in prohibition; but if it appeared open to doubt whether the writ should or should not be finally granted, if the question was arguable, and always upon the demand of the party against whom the application was made, then the applicant was ordered to declare in prohibition in order that the points to be argued should be brought before the court in the shape of precise issue either of law or of fact upon record. See *Lloyd* v. *Jones* (1); *In re Chancellor of Oxford* (2); *In re Dean of York* (3); *Mossop* v. *G. N. Ry. Co.* (4); *In re Aykroyd* (5); *Remington* v. *Dolby* (6).

Subsequently the practice upon applications for writs of prohibition to issue, addressed to judges of the county courts, was regulated by 13-14 Vic. ch. 61, and 19-20 Vic. ch. 108, the 42nd section of which latter act enacts that:

When an application shall be made to a Supreme Court or a judge

(1) 6 C. B. 81.
(2) 1 Q. B. 972.
(3) 2 Q. B. 39.
(4) 16 C. B. 585.
(5) 1 Ex. 487.
(6) 9 Q. B. 178.

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thereof for a writ of prohibition to be addressed to a judge of a county court, the matter shall be finally disposed of by rule or order, and no declaration or further proceedings in prohibition shall be allowed.

Now the practice in the Province of Quebec is regulated by the code of civil procedure, the 1031st article of which code enacts that writs of prohibition are applied for, obtained and executed in the same manner as writs of *mandamus* and with the same formalities, thus placing the proceedings for writs of prohibition in all respects upon the same footing as writs of *mandamus*, which, in some respects, as said by Willes J. in the *Mayor of London* v. *Cox* (1), "they strongly resemble." Now the procedure in the cases of *mandamus* by the code of civil procedure is as stated in article 1023, as follows:—

The application is made by petition supported with affidavits setting forth the facts of the case and presented to the court or judge who may thereupon order the writ to issue and such writ is served in the same manner as any other writ of summons.

And article 1024 enacts that:

"The proceedings subsequent to the service are had in accordance with the provisions contained in the first section of this chapter."

Which provisions are; that the defendant may set up against the petition such preliminary exceptions, or exceptions to the form as they deem advisable, and the plaintiff may demur to the pleas set up in defence; that the defendant is bound to appear on the day fixed in the suit, and if he fails to do so, the petitioner proceeds with his case by default; within three days from the filing of the answer the petitioner must proceed to prove the allegations of the petition in the same manner as proof is made in ordinary cases, and after closing of his proof and within a further delay of two days the defendant is bound to adduce his proof—as soon as the proof of the defendant is closed the petitioner may be allowed to produce evidence in rebuttal, if there is occasion for it; if he does not, either of the parties may inscribe the cause upon the merits,

(1) L. R. 2 H. L. 239.

giving the opposite party notice of at least one day before the day fixed.

In accordance with the practice so prevailing in the Province of Quebec, John Henry R. Molson, John Thomas Molson and Adam Skaife, trading in partnership as brewers, under the name of John H. R. Molson & Brothers, who were not parties to the proceedings in the inferior court hereinafter mentioned, and Andrew Ryan, who was the sole party named in such proceedings, presented their petition to the Superior Court for the district of Montreal, wherein, in short substance, they alleged that the said Messrs. Molson & Brothers were duly licensed by the Dominion Government, under and in pursuance of an act of the Dominion Parliament, to carry on the trade and business of brewers in the Province of Quebec; that they carried on such their trade and business in the city of Montreal; that it always has been and is the custom of the trade of brewers in the Province of Quebec for brewers to send out their draymen for the purpose of delivering to their customers the beer manufactured by the said brewers; that the petitioner Andrew Ryan is, and for some time has been, the servant and drayman of the said Messrs. Molson & Brothers, employed by them, according to the said custom of the trade of brewers, to sell and deliver for and on their behalf, to their customers, the beer manufactured by them, the said Messrs. Molson & Brothers, in quantities not less than in dozen bottles, containing not less than three half pints each, and in kegs holding not less than five gallons each; that on the 10th of June, 1882, William Busby Lambe of the city of Montreal, exhibited an information and complaint against the said Andrew Ryan before Mathias C. Desnoyers, police magistrate of the said city of Montreal, and procured a summons to be signed by the said

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police magistrate, addressed to the said Ryan, whereby he was commanded to appear before the said police magistrate at a session of the court of Special Sessions of the Peace, to be held in the court house of the said city of Montreal, on a day therein named, to answer the said information and complaint of the said Lambe,—

For that he ,the said Ryan not having any license for the sale of intoxicating liquors in any quantity whatever, had in the said city of Montreal, on the 6th day of June, A.D. 1882, and upon divers occasions before and since sold intoxicating liquors contrary to the statute in such case made and provided, whereby and in virtue of the said statute the said Andrew Ryan had become liable to the payment of a fine of the sum of ninety-five dollars; which sum that the said Ryan should be condemned to pay for the said offence, the said Lambe prayed judgment.

The petition further alleged that the said Ryan appeared to said summons and complaint, and pleaded thereto as follows:—

"That he is and at the time mentioned in the said information was a servant and employée of the firm of J. H. R. Molson & Brothers, brewers, of the city of Montreal, who hold a license from the Dominion Government under the provisions of an act of the parliament of Canada, and who have been in business as such brewers in Montreal for eighty years, that during the whole of the said term, and up to the present time it has always been the custom and usage of the trade of brewers to send around through the country their drays with beer, which beer was sold by their draymen during their trips to the said customers. That on the occasion charged in the said information the said Ryan was the agent, servant, and drayman of the said firm of J. H. R. Molson & Brothers.

That if he, the said Ryan, sold any beer whatever, he so sold it as the agent and drayman of the said J. H. R. Molson & Bros., and under and by virtue of their authority under the said license, and sold it according to the custom and usage of trade in the said province

ever since brewers were first established therein.

That the said John H. R. Molson & Brothers being licensed under the provisions of the said act of the parliament of Canada, are not liable to be taxed either by or through their employees and draymen under the provisions of any act passed by the legislature of the province of Quebec, and the said Ryan further alleged that he was not guilty in manner or form as set forth in the said information and summons, wherefore he prayed dismissal of the said prosecution."

The petition then alleges that, notwithstanding the said plea of the said Ryan to the jurisdiction of the said police magistrate, and otherwise, the said police magistrate took jurisdiction over the said Ryan and proceeded with the said case, and that after certain admissions made in the said case (the nature of which will appear further on) the said case was taken in advisement.

The petition then insists that the act, under which the said prosecution was instituted, namely, the Quebec License Law of 1878 and its amendments are unconstitutional, illegal, null and void, and moreover that they do not apply to, and that the said court of Special Sessions of the Peace have no jurisdiction to try, the said Ryan for the pretended offence so charged against him and the petitioners' grounds for this contention are stated (among others for it is not necessary to set these all out) to be.

1st. That there is no act of the legislature of the province of Quebec which authorizes the said complaint and prosecution.

6th. Because the petitioner Andrew Ryan being in the employ and being the drayman of the other petitioners, the act of the petitioner Ryan in selling the said beer was the act of the said other petitioners copartners who by their license from the Government of

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the Dominion of Canada were authorized and empowered so to sell such intoxicating liquor.

7th. Because the petitioners, the said Messrs. Molson and Brothers, being licensed brewers had the right of selling by and through their employees and draymen without any further license whatsoever under the provisions of the Quebec License Act of 1878; and

8th. Because the Legislature of the Province of Quebec have no right whatever to limit or interfere with the traffic of brewers duly licensed by the Government of Canada.

"Wherefore the petitioners prayed remedy and that a writ of our Lady the Queen of prohibition to the said court of Special Sessions of the Peace sitting in the city of Montreal, and to the said Mathias C. Desnoyers, police magistrate for the city of Montreal, holding the said court, do issue to prohibit the said court and the said Desnoyers from further proceedings upon the said summons and complaint."

Upon this petition the writ of prohibition issued as prayed and in the form prescribed by the 1031st and 1023rd articles of the Code of Civil Procedure, and having been duly served upon the police magistrate and the court of Special Sessions of the Peace, the said William B. Lambe in his quality of inspector of licenses for the district of Montreal, was permitted to intervene under the provisions of the articles of the Code of Civil Procedure in that behalf, 154 to 158 inclusive, and pleaded that by the 71st section of the Quebec License Act of 1878, whoever, without being licensed for that purpose, should sell in the city of Montreal in any quantity whatever any intoxicating liquors is liable for each offence to a fine of ninety-five dollars; and that the said Andrew Ryan, on the 6th day of June, 1882, in the city of Montreal sold intoxicating liquor as alleged in the complaint laid before the

police magistrate; that the said Andrew Ryan admitted the sale in question, before the said police magistrate; that the said Quebec License Law of 1878 and its amendments are constitutional, that it was in due form passed by the Legislature of the Province of Quebec in conformity with the British North America Act of 1867; that by force of the 92nd section of the said British North America Act the Legislature of the Province of Quebec has the right to pass the license law in question; that assuming the said John H. R. Molson & Brothers, brewers, to have the right in virtue of the license which they have to sell without any other license beer of their own manufacture, still the said Andrew Ryan had no right to hawke it about through the city of Montreal or to sell it outside of the premises of the said brewers without being provided with the license required by the Quebec License Law. That moreover the said Molson & Brothers themselves have no right in virtue of their license to sell their beer outside of their premises without a license of the Province of Quebec. That in virtue of the 196th section of the said Quebec License Law of 1878, every action or prosecution in which the sum demanded does not exceed $100, may be tried before the police magistrate, and that the said Mathias C. Desnoyers was such police magistrate. That under these circumstances the prosecution instituted against the said Andrew Ryan was legally instituted and came under the jurisdiction of the said police magistrate, who had in consequence the right to hear and decide it.

To this intervention the petitioners pleaded in answer:—

That the so-called license law of the Province of Quebec of 1878, referred to in the said intervention as well as its amendments is unconstitutional, inasmuch as the same was passed *ultra vires* of the Province of Quebec, and that each, all, and every of the said clauses

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referred to in the said intervention and *moyens d'intervention* are unconstitutional and *ultra vires* of the said Province of Quebec. And the said petitioners aver as they have already in their said petition averred, that even supposing that the said license law and its amendments are valid and constitutional, yet the said petitioners, Molson & Brothers, being duly licensed brewers at the said city of Montreal and the said petitioner, Andrew Ryan, being in their employ, and their agent, were, under their said license, under the provisions of the Dominion Acts of Parliament, justified and entitled to sell the beer according to the usage and custom of trade in the said province.

And the petitioners admitting the prosecution, defence, and admissions set up in the said intervention denied the liability of the said Andrew Ryan to the penalty claimed from him, and, also, denied the jurisdiction of the said court of Special Sessions and of the said police magistrate to take jurisdiction of the said cause.

To this the intervenant replied insisting that all the allegations of his said intervention were well founded in law.

The parties to the said cause in prohibition were thus at issue.

Now, the admissions referred to in the said intervention as having been made in the said cause in the said inferior court before the said police magistrate, are precisely the same as have also been made in the cause in prohibition for the determination of the issues joined between the parties to that proceeding, and are as follows:—

1. That the firm of John H. R Molson and Brothers are brewers in Montreal and have carried on their business for a number of years past, and that they were duly licensed brewers under a license issued by the Dominion Government under and by virtue of the act 43 Vic ch. 19, intituled: "The Inland Revenue Act of 1880."

2. That the said Andrew Ryan was at the time of the offence alleged, in the information, to have been

committed by him, in the employ of the said firm of John H. R. Molson and Brothers, as drayman, and that he was paid his wages as such drayman by a monthly salary, and by a commission on the moneys by him collected for the sale of beer manufactured by the said Molson & Brothers in the brewery mentioned in their said license.

3. That the sale in question was made outside of the said brewery, but in the revenue district of Montreal, and that the said Andrew Ryan, as drayman of the said firm, sold to a buyer who had not given his order at the office of the said firm, at the domicile of the said buyer.

4. That it has been the immemorial custom and usage in the said city of Montreal for a drayman employed by brewers to sell and furnish beer to customers of the said brewers, in the same manner as the said sale was effected without taking out a license.

5. That the Local Legislature of Quebec have refunded to the brewers licensed by the Dominion Government the amount of the license fee imposed by the act of the Local Legislature upon such brewers, owing to and after the decision in the case of Severn and the Queen decided in the Supreme Court of Canada at Ottawa.

Now proceedings in prohibition having been regularly instituted in accordance with the provisions of the Code of Civil Procedure of the Province of Quebec, by a writ and declaration in prohibition to which an answer has been filed and a replication thereto, and issue having been joined in such proceedings upon the matters to be determined by the Superior Court in which such proceedings were instituted, it is obvious that these issues so joined, whatever they were and whether of law or of fact, must be determined by the court in which such proceedings are pending. That

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court cannot evade the responsibility of passing its judgment upon those issues, by a suggestion that the points raised or any of them, are points which the inferior court, (whose jurisdiction under the facts and circumstances pleaded is disputed,) is competent itself to decide, and that if it should pronounce an erroneous judgment, then an application may be made to the Superior Court to interfere by *certiorari*. It is out of the question to suppose that the law, which provides such a precise procedure for bringing to issue in the Superior Court the questions to be determined in prohibition cases, could sanction such a mode of dealing with them.

In the present case, the facts pleaded being admitted, the only questions to be determined were questions of law involving the construction and validity of a statute of the Province of Quebec, of which statute, the act complained of and brought under the notice of the inferior court was alleged to be an infringement. It seems to be nothing short of a repudiation of those rights (which are of the essence of, and the inalienable prerogative of a superior court of common law) to say that the inferior court, whose jurisdiction in the given case was disputed, was as competent as the Superior Court to determine those question of law.

If the jurisdiction of an inferior court over a particular state of facts depends upon the construction and validity of an act of a Provincial Legislature, and if issues be joined in a proceeding in prohibition properly instituted in a Superior Court, raising a question as to the construction and validity of such provincial act, how is it possible to contend that the Superior Court in which such issue is pending can evade the duty of determining it? In *Brymer* v. *Atkins* (1), it is said to

(1) 1 H. Bl. 188.

be an ancient and essential maxim of common law, that not merely courts of common law of inferior jurisdiction, but that all courts of special jurisdiction, created by act of parliament must be limited in the exercise of that jurisdiction by such construction as the courts of common law, that is to say the Superior Courts, may give to the statute. Upon this principle a question having arisen in *Gare* v. *Gapper* (1), upon a motion for a writ of prohibition after sentence in an ecclesiastical court in a matter of tythe, whether the court had not proceeded upon an erroneous construction of an act of parliament, the applicant was directed to declare in prohibition that the question of the construction of the statute, which involved some doubt should be brought up for solemn adjudication, (the court thus directing that to be done in the particular case, which, in the case before us, has been done by the authority of the Code of Civil Procedure in the province of Quebec), and the question having been raised by a demurrer to the declaration in prohibition, it was adjudged that the construction of the statute by the ecclesiastical court was erroneous, and that therefore the prohibition should go, although after sentence and although the objection did not appear upon the face of the libel in the ecclesiastical court, but was collected from the whole of the proceedings in that court, *Gould* v. *Gapper* (2).

Now in the case before us the questions raised by the issue joined in the proceeding in prohibition are :—

1. Does the Quebec License Act of 1873 and its amendments impose any obligation upon brewers duly licensed as such by the Dominion Government to carry on the trade of brewers in the Province of Quebec, to take out any, and if any, what license required by such the

(1) 3 East 472. (2) 5 East 345.

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Quebec License Acts to entitle the brewers to dispose of the subject of their trade and of their manufacture within the said province?

2. If the provincial statute does impose such obligation, is the statute, *quoad* the imposition of such obligation, *intra vires* of the Provincial Legislature? and

3. Is the sale and delivery by brewers in the city of Montreal, through the agency of their draymen, of the beer manufactured by them to their customers at the dwelling houses or places of business of the latter under the circumstances appearing in the proceedings in p ohibition here, an infringement of the Quebec License Act of 1878, subjecting the brewers' drayman to the penalty imposed by the 71st or any other section of such license act? Every one of these questions must be answered in the affirmative to give to the police magistrate in the city of Montreal jurisdiction over the act complained of and the person charged with having committed it. And these questions were, by the procedure of the Province of Quebec in prohibition cases, as much before the Superior Court for its determination as they would have been before the Superior Court in England if, as in *Gould* v. *Gapper*, the parties applying for a writ of prohibition had been ordered to declare, and had declared in prohibition, and issues had been joined thereon for the express purpose of obtaining the judgment of the Superior Court upon the questions, which, in the present case, equally as in *Gould* v. *Gapper*, involved the construction of the statute in virtue of which the inferior court could only have had, if it had, any jurisdiction over the subject matter or the person who had done the act complained of.

The manner in which the Superior Court dealt with these issues so joined in a proceeding duly instituted according to the course and practice of the court was this: It adjudged the Quebec License Act in question to be

intra vires of the Provincial Legislature, but declined to adjudicate upon the questions whether it did or not impose any obligation upon brewers duly licensed as such by the Dominion Government under the Dominion Act 43 Vic. ch. 19, to take out any, and if any, what license from the Provincial Government to entitle them to dispose of the subject of their trade manufactured by them? or whether the sale and delivery by Messrs. Molson & Brothers through the agency of their drayman of the beer manufactured by them, to their customers at the dwelling houses or places of business of the latter, under the circumstances appearing in the proceedings in prohibition, was an infringement of the Quebec License Act of 1878 and its amendments, subjecting their drayman Ryan to the penalty imposed by the 71st section of the said act.

The learned judge presiding in the Superior Court referred these questions to the police magistrate; thereby submitting in effect to the court of inferior jurisdiction the determination of the issues joined in a proceeding duly instituted in the Superior Court, intimating, as a reason for so doing, that the petitioner Ryan, if condemned in the inferior court, might then apply to the Superior Court by writ of *certiorari*. But the writ of *certiorari* is a mode merely of informing the court of the particulars of the question brought up by that writ for its decision and it only issues after judgment while we have already seen it is the inalienable right of the superior courts of common law to entertain and decide all questions affecting the jurisdiction of the courts of common law of inferior, and indeed of all courts of special limited jurisdiction, by proceedings in prohibition at whatever stage the proceedings in the inferior court may be. And when issue is joined in proceedings in prohibition duly instituted, as they have been here, the court in which

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they have been so instituted becomes so seized of the issues that it is the inalienable right of the litigants to have judgment upon these issues rendered by the court, and in the proceeding in which the issues are joined. That the Superior Court therefore has erred in the judgment rendered by it, whatever may be the proper judgment to be rendered upon the questions raised, cannot, I think, admit of a doubt. Upon appeal to the Court of Queen's Bench at Montreal in appeal that court dismissed the appeal, a majority of the learned judges of that court against two dissentients, holding that although the proceedings in prohibition were duly instituted, the judgment of the Superior Court which declined adjudicating upon the issues joined therein is free from error. In support of this judgment, the case of the *Charkieh* decided in the Court of Queen's Bench in England (1) is relied upon, but a reference to that case will show that it is not at all analogous to the present case.

That was not a case presenting to the court for its decision certain issues joined in proceedings in prohibition duly instituted. It was not a case raising a question as to the proper construction of a statute upon which depended the jurisdiction, if any, which an inferior court had, under the circumstances of the particular case, all the material facts of which appeared upon the record in the Superior Court, and upon admissions of the parties. If upon an application for a prohibition in England, in a similar case to the present one, the applicant had been directed to declare in prohibition, and if he had done so, and if by the pleadings to that declaration issues had been joined raising questions similar to those raised in the present case such a case, would have been analogous to the present, but in such case there can be no

(1) L. R. 8 Q. B. 197.

doubt that the Court of Queen's Bench would have decided and finally determined all the issues, to raise which the applicant for the writ of prohibition had been directed to declare in prohibition. But the question was not at all as to the jurisdiction of a court of common law of inferior jurisdiction, which are questions peculiarly within the cognizance of a superior court of common law to decide, and the question which was raised was disposed of on the rule *nisi* for a writ of prohibition as we have seen to be the practice in England when the court entertains no doubt as to the point raised, and for that reason does not require the party to declare in prohibition; the rule was to show cause why a writ of prohibition should not issue to prohibit the High Court of Admiralty, itself a high court of record having jurisdiction in all matters relating to international and maritime law, and expressly by 24 and 25 Vic. ch. 10 "over any claim for damage done by any ship"—from further proceeding with a cause of damage instituted by or on behalf of the owners of the steamship Batavier against the *Charkieh*, which was alleged on affidavit to be a steamship of the Egyptian Government; and the sole ground of the application was that she was the property of a foreign government.

Blackburn J. in giving judgment says:

Taking every fact brought before us on the part of the persons applying for the prohibition to be true, the case would be this; that the Khedive of Egypt is a Sovereign Prince—as I assume for the present purposes, although that may be disputed hereafter; and is owner of the vessel in question; she was sent to this country for repairs—a collision then takes place in the Thames at the time the vessel was his property, and his officers were on board and in possession of her. Now the question arises whether the Court of Admiralty, having jurisdiction to administer maritime law and international law against foreign vessels, could proceed with the cause for damage, be cause by international law, such a ship is privileged, and cannot be proceeded against in a foreign court. There is authority for saying that courts of justice cannot proceed against a sovereign or a state,

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and I think there is also authority for saying they ought not to proceed against ships of war or national vessels; and it is obviously desirable that this rule should be established, otherwise, wars might be brought on between two countries. But there is another question – what is the liability of a vessel which is the property of a foreign state, when she causes damage by a collision to another vessel, she not being a ship of war, but a ship which happens to be national property and apparently employed on a mercantile adventure? Does the circumstance of her being the property of a foreign state oust the jurisdiction of the Court of Admiralty? Now, (he says), we are asked to prohibit the Court of Admiralty entertaining that which Lord Stowell, perhaps the highest authority upon these matters, declared was a difficult question of international law. It seems to me that this question can be better decided by a court which has almost a peculiar jurisdiction over matters relating to international law. It does seem to me that the Court of Admiralty has jurisdiction to determine the facts, and to decide whether international and maritime law do allow the circumstances stated to be a defence to a claim against the Charkieh; and if that court is wrong in its judgment the Privy Council can set it right, and their decision would be final. I do not see how it can be said that the Court of Admiralty is exceeding its jurisdiction in entertaining the suit as a question of international law; and taking that view of it, I think the court ought not to be prohibited.

It thus appears that the court refused to interfere by prohibition because the sole question raised was one of international law which the High Court of Admiralty and not the Court of Queen's Bench had peculiar jurisdiction to administer, subject only to an appeal to quite a different court from the Court of Queen's Bench, the judgment of which appeal court was by law final and conclusive. The court in fact did decide the only point presented to it, namely, that the fact of the Charkieh, being the property of a foreign sovereign, did not oust the jurisdiction of the High Court of Admiralty over the claim for damage to the Batavier, but in the present case, although it has always been the undoubted right of the superior courts of common law to enquire into and adjudicate upon all complaints against inferior temporal courts for acting without, or in excess of their jurisdiction, when duly brought before

them by proceedings in prohibition, and although it is the undoubted duty of such courts towards the litigants in such proceedings in prohibition to decide all issues joined therein between the parties thereto, yet the Superior Court, in which the proceedings in prohibition in the present case were pending, declined to exercise such its right and to discharge such its duty. It is obvious therefore that between the present case and that *in re* the Charkieh, there was no analogy whatever. The case must therefore now be dealt with upon its merits.

If the provisions of the Quebec License Act now under consideration are identical with the provisions of the Ontario Act, 37 Vic. ch. 32, in respect of the point in question we must be bound by the judgment of this court in *Severn* v. *The Queen* (1) which is no more at variance with the judgments rendered in *Russell* v. *The Queen* (2); *Hodge* v. *The Queen* (3); *In the matter of the acts of the Dominion Parliament*, 46 *Vic. ch.* 30 *and* 47 *Vic ch.* 32 (4), and *Sulte* v. *The Corporation of Three Rivers* (6), than were those judgments at variance, as they were at one time erroneously supposed to be, with the judgment in *The City of Fredericton* v. *The Queen*. All of those judgments rest upon the foundation that laws which make, or which empower municipal institutions to make, regulations for granting licenses for the sale of intoxicating liquors in taverns, shops, &c., and for the good government of the taverns and shops so licensed, and for the preservation of peace and public decency in the municipalities, and for the repression of drunkenness, and disorderly and riotous conduct, and imposing penalties for the infraction of such regulations, are laws which, as dealing with subjects of a purely local, municipal, private and domestic character, are *intra vires* of the Pro-

(1) 2 Can. S. C. R. 70.
(2) 7 App. Cas. 829.
(3) 9 App. 117.
(4) Cassells's Dig. 543.
(5) 9 Can. S. C. R. 25.
(6) 3 Can. S. C. R. 505.

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vincial Legislature. But *Severn* v. *The Queen* proceeded wholly upon the construction of item 9 of sec. 92 of the British North America Act, and in that case the late learned chief justice of this court, Sir William B. Richards, held, and a majority of this court concurred with him, that the obligation imposed by the Ontario act, 37 Vic. ch. 32 upon brewers to take out a provincial license to enable them, to dispose of the beer manufactured by them was in effect an obligation in restraint of the manufacturing by them of the article of their trade, which in virtue of a license from the Dominion Government, issued upon the authority of an act of the Dominion Parliament, they were authorized to carry on, and that the item 9 of sec. 92 of the British North America Act did not authorize the Provincial Legislatures to impose any such obligations upon brewers. That the words "and other licenses" in that item in connection with the preceding words, "shop, saloon, tavern "and auctioneers" must be construed, having regard to the general scope of the scheme of confederation, as referring to licenses *ejusdem generis* with the preceding licenses spoken of in the item, such as licenses on billiard tables, victualling houses, houses where fruit, &c., are sold, hawkers, peddlers, livery stables, intelligence offices, and such like matters of purely municipal character, and that those words could not consistently with a due regard to the intent of the framers of the scheme of confederation, as appearing in the British North America Act, be construed as giving to the Provincial Legislatures power to put a restraint upon the manufacture of an article of a trade authorized to be carried on by an act of the Dominion Parliament. So understanding the judgment in *Severn* v. *The Queen*, whether it be in point of law, sound or otherwise, it may well stand consistently with, and is not shaken by *Russell* v. *The Queen*, or any other of the above cases, and it is still a judgment binding upon this

court and all courts in this Dominion. But the question still remains to be considered, namely, whether the provisions of the Quebec License Act of 1878 are, upon the point under consideration, so identical with the provisions of the Ontario Act as to make the judgment in *Severn* v. *The Queen* (1) applicable in the determination of the present case. The two acts when compared appear to be very different, and so great is this difference as regards the point under consideration as to convey to my mind the idea that the draftsman of the Quebec Act of 1878, framed it with the object of complying with the judgment in *Severn* v. *The Queen* (1), which had been rendered five or six weeks before the passing of the act, and to avoid its being open to the objection of *ultra vires*, which that judgment had pronounced the Ontario Act to be open to. The Ontario Act, while professing to have no intention to interfere with any brewer, distiller or other person duly licensed by the Government of Canada for the manufacture of spirituous liquors, in the manufacturing such liquors, did nevertheless in effect do so by enacting that to enable any such brewer, distiller, &c., to sell the liquor manufactured for consumption within the Province of Ontario, he should first obtain a license to sell by wholesale under sec. 4 of the act. The "license by wholesale," and which brewers were thus required to take out, was a license to sell in quantities not less than five gallons in each cask or vessel at any one time, or in 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, *in any other place than inns, ale or beer houses, or other places of public entertainment*, and the act imposed a penalty upon brewers and distillers in case they should sell the liquor manufactured by them respectively without taking out such wholesale license.

Now the Quebec Act of 1878 and its amendments

(1) 2 Can. S. C. R. 70.

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contain no provision of such or the like nature as that in the Ontario Act upon, which the judgment in *Severn* v. *The Queen* (1) proceeded, and when we refer to the act in virtue of which license fees or duties had been collected from brewers in the Province of Quebec before the judgment in *Severn* v. *The Queen* (1), which license fees, as appears in the pleadings and admissions in the case now before us, were refunded by the Provincial Government in consequence of, and in submission to, that judgment, we find that the only authority under which such license fees so refunded had been collected was contained in sections 12, 13 and 14 of 36 Vic. ch. 3 as amended by 37 Vic. ch. 3, and that there is no similar enactment or provision contained in the act of 1878 or its amendments, while that act repeals all the previous acts; a fact which seems to confirm the view I have taken, that it was the intention of the Provincial Legislature in passing the License Act of 1878 to comply with the judgment of this court in *Severn* v *The Queen* (1).

There is no such license as the "wholesale license" of 36 Vic. ch. 3, required to be taken out by the act of 1878 or its amendments. All the licenses (as regards the sale of intoxicating liquors) which the License Act of 1878 as amended requires to be taken out are licenses:—

1. To keep an inn and for the sale of intoxicating liquors therein. The word "inn" being defined to be a house of entertainment, wherein intoxicating liquors are sold.

2. For the sale of intoxicating liquors in a club.

3. For the sale of intoxicating liquors in a restaurant or railway buffet.

4. For a steamboat bar—for the sale therein of intoxicating liquors.

5. For the sale of intoxicating liquors at the mines or in any mining district or division.

(1) 2 Can. S. C. R. 70.

6. A retail liquor shop license.

7. A wholesale liquor shop license, and

8. A license to sell for medicinal purposes or for use in divine worship in municipalities in which a prohibitory by-law is in force.

Now by 43–44 Vic ch. 11, a wholesale liquor shop is that wherein is sold at one time intoxicating liquors in quantities not less than two gallons imperial, or one dozen bottles of not less than one pint imperial measure each; and a retail liquor shop is defined to be that wherein are sold at any one time intoxicating liquors in quantities not less than one pint imperial measure. Now those licenses are required to be taken out for the sole purpose of enabling the Provincial Government to raise a revenue for the purposes of the province. That this must be held to be the sole object of the Quebec License Act of 1878 and its amendments, appears not only from item 9 of sec. 92 of the British North America Act, but from an act of the Provincial Legislature, 46 Vic. ch. 5, passed for the express purpose of remedying what the Legislature conceived to be a defect by reason of its not being so stated in the acts of 1878 and 1880. By this act 46 Vic. it is declared:—

That the duties payable for licenses imposed by sec. 63 of the Quebec License law of 1878, as replaced by sec. 17 of the act 43-44 Vic. ch. 11, were so imposed in order to the raising of a revenue for the purposes of this province under the powers conferred upon the Legislature of this Province by the 9th paragraph of sec. 92 of the British North America Act of 1867.

Now the Provincial Government cannot, under the acts in question, raise any revenue by the issue of any licenses other than those expressly named in the acts as subjected to duty, and a person not engaged in a business, which by the acts or one of them is subjected to a license tax, cannot be compelled to take out, and consequently cannot be punished for not taking out, one of the licenses upon which a duty or tax is imposed by

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the acts. In order to raise a revenue by taxation of any kind, the thing to be taxed must be expressly stated in the act imposing the tax. But none of the licenses named in the acts relate to the business of a brewer. His business is to manufacture beer and to sell the beer manufactured by him. The acts impose no tax upon his business, he cannot, therefore, be compelled to contribute to the provincial revenue by taking out, nor can he be punished for not taking out, a license authorizing him to keep an inn, a restaurant or railway buffet, a steamboat bar or a retail or wholesale liquor shop, none of which nor all of them together, if taken out, would enable him to carry on the business of a brewer or authorize him to dispose of the article manufactured by him. The Messrs. Molson & Brothers, although they should be possessed of every one of the above named licenses would be as liable for the act which is the subject of prosecution in the inferior court now under consideration, as they are now not having any of such licenses. Brewers therefore are not required, by the acts in question, in order to carry on their business, to take out any of the licenses which, for the purpose of raising a revenue, are subjected to a fee or tax. The intervenant in his pleading in intervention contends that admitting that the said Molson & Brothers are entitled in virtue of their license from the Dominion Government to sell the beer of their manufacture without any other license, still Andrew Ryan had no right to hawk or peddle the beer through the city of Montreal, and to sell it outside of the premises of the said brewers, without being supplied with the license required by the Quebec License Act, and that moreover the Messrs. Molson & Brothers themselves had no right to sell their beer outside of their premises without a license of the Province of Quebec, but as brewers are not, nor is their business, taxed by the acts in question, and they are not required by any

of the acts to take out a license from the Provincial Government to enable them to carry on their trade and as none of the licenses, which are by the acts subjected to a tax or duty, would give them any greater authority to sell their beer on the premises where it is manufactured any more than elsewhere, they must have the same right to sell and deliver the beer manufactured by them at the residences or places of business of their customers whether they be licensed inn, restaurant or steamboat, barkeepers or others equally as at the premises where the beer is manufactured, unless the provision in the acts as to peddlers license applies which is the only license which can be referred to in the pleadings in intervention: but apart from the absurdity of brewers by delivering their beer to their customers at their residences or places of business being deemed to be peddlers, the act expressly provides that no person is obliged to take out a license to peddle and sell goods, wares, &c., of their own manufacture excepting drugs, medicines and patent remedies whether peddled and sold by himself or his agents or servants.

Mr. Geoffrion, however, contended that although none of the licenses, named in the act, authorized to be done the act which is the subject of the prosecution instituted against Ryan, nevertheless the penalty sought to be recovered is exigible; but the object of imposing a penalty is to prevent the revenue being defrauded by a party doing without a license that, for doing which the act has required a license to be taken out, upon which for the purposes of revenue a tax is imposed. Accordingly the provincial statute 46 Vic. ch. 5 already referred to, and which was passed, as stated in the preamble, because doubts had arisen as to the constitutionality of certain provisions contained in the Quebec License Act of 1878 and the amendments thereto, and that it was expedient to make such

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provision as would ensure the collection of the revenue derivable from the duties imposed and payable for the different licenses specified in the above mentioned act as amended; and which, to remove the above doubts, declared that the duties payable for licenses imposed by the Quebec License Act of 1878 as amended by the act of 1880 were imposed in order to the raising of a revenue for the purposes of the Province, enacted that

Any person neglecting or refusing to pay the license duty payable by him shall be liable for such neglect or refusal to a fine equal to the amount of such duty and one half of such amount added thereto.

Now this provision (although in a statute passed since the prosecution in the present case was instituted, still as the statute was passed for the purpose of declaring the intent of the act of 1878 and its amendments) throws much light if such were necessary upon the construction to be put upon the 71st clause of the act of 1878, under which the prosecution in the present case was instituted, for the persons, who are subjected to penalties for infringing an act passed for the purpose of raising a revenue for the use of the province by the imposition of a tax upon certain licenses are, by legislative declaration, shown to be those only who neglect or refuse to pay the license duty payable by them respectively; now these must be persons who assume to do some or one of the acts for the doing of which the statute has required a license to be taken out upon which a specific duty has been imposed. The doing anything for the doing of which there is no license specified in the act nor any duty imposed can never be held to be an infringement of the act.

The 71st sec. of the act of 1878 as amended by the act of 1880 enacts that:

Any one who keeps, without a license to that effect still in force as hereinabove prescribed, an inn, restaurant, steamboat-bar, railway buffet or liquor shop for the sale by wholesale or retail of intoxicating liquors or sells in any quantity whatsoever intoxicating liquors in any part whatsoever of this province, municipally organized, is liable for each contravention to a fine of $95, if such contravention

takes place in the city of Montreal, and $75 if it has been committed in any other part of the organized territory; and if the contravention takes place in the new organized territory, the penalty is $35 —any one who keeps without a license to that effect still in force as by law prescribed a temperance hotel is liable for each contravention to a fine of $20.

Now in view of the object of the act being to raise a revenue for the purposes of the province by a tax upon certain licenses particularly specified in the act, required to be taken out for the doing certain things mentioned in such licenses respectively, the plain construction of the above section, is that any person who in any part of the Province of Quebec, which is municipally organized, shall in contravention of the act do any of those things enumerated in the section as only authorized to be done under a license as in the act prescribed, without the license as prescribed by the act appropriate to the things done shall be liable, &c.; and if the contravention takes place in new organized territory the penalty is $35.

There can be no contravention of the act unless the thing done is a thing for the doing which one of the licenses particularly specified in the act upon which a duty is imposed is required to be taken out. If there be no license specified in the act for authorizing to be done the thing complained of, the doing such thing is no contravention of the act, and there being no license specified in the act for the doing what Ryan has been prosecuted for doing, neither he nor the Messrs. Molson & Brothers, whose servant only Ryan was, in doing what is complained of, is so liable to any prosecution as for an infringement of the act. The act in fact imposes no obligation upon brewers to take out any license to enable them to dispose of the beer manufactured by them, which is the simple character of the act complained of; in this respect, it differs in its frame, and as it appears to me designedly, from the Ontario Act which was under consideration in *Severn*

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v. *The Queen* (1), but as it imposes no tax upon brewers disposing of the beer manufactured in the manner complained of, the inferior court had no jurisdiction in the matter of the prosecution instituted against the Messrs. Molson & Brothers' drayman, and the prohibition should be ordered to be issued from the Superior Court absolutely as prayed for with costs to the petitioners in all the courts.

Appeal dismissed with costs.

Solicitors for appellant: *Kerr, Carter & Goldstein.*

Solicitor for respondent: *N. H. Bourgouin.*

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*May 10.
*Dec. 14.

WILLIAM McKERCHER (DEFENDANT)...APPELLANT;

AND

WILLIAM SANDERSON (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Purchase of land—Joint negotiations—Deed to one only—Evidence—Resulting trust.

McK. & S. jointly negotiated for the purchase of land, and a deed was given to S. alone, a portion of the purchase money being secured by the joint notes of McK. & S. In an action by S. to have it declared that McK. had no interest in the property.

Held, reversing the judgment of the court below, and confirming the judgment of the trial judge, Henry J. dissenting, that the evidence greatly preponderated in favor of the contention of McK. that the purchase was a joint one by himself and S.

Held, also, that S. being liable for an ascertained portion of the purchase money there was a resulting trust in his favor for his interest in the land.

APPEAL from a decision of the Court of Appeal for Ontario (2) reversing the decision of Armour J. in favor of the defendant.

The question to be decided in this appeal is a simple one, namely, whether or not the purchase of land, the

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

(1) 2 Can. S. C. R. 70. (2) 13 Ont. App. R. 561.

deed of which was in the plaintiff's name, was a joint purchase by him and the defendant, the action being brought to have it declared that the defendant had no interest in the land.

The defendant had advanced, in money and promissory notes, a portion of the purchase money and claimed that he did so as a purchaser, that the deed was to the plaintiff alone according to the agreement between them and that the plaintiff was to execute a transfer of an undivided half in favor of the defendant. The plaintiff's contention was that the money so advanced was simply a loan and that there was no such agreement.

Mr. Justice Armour who tried the case gave judgment in favor of the defendant, holding that the evidence established a purchase by the parties on joint account. The Court of Appeal reversed his decision. The defendant then appealed to the Supreme Court of Canada.

McLennan Q.C. for the appellant.

Garrow Q.C. for the respondent.

Sir W. J. RITCHIE C.J.—I am of opinion that the original judgment of Mr. Justice Armour in this case was correct, and for the reasons given by Chief Justice Hagarty I think this appeal should be allowed and the judgment of Mr. Justice Armour restored. I cannot bring my mind to the conclusion that the money paid by defendant on account of this purchase was money lent to the plaintiff. All the surrounding circumstances of the case seem to me opposed to such an idea; on the contrary, it appears to me the payments made and notes given by defendant were for and on account of the purchase money of a joint speculation and purchase by defendant and plaintiff, each contributing a moiety, and that the deed of the property was taken in the plaintiff's name alone for their joint benefit. If the money had been advanced merely as a loan

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it is abundantly clear there would be no resulting trust, but thinking this not to have been the case, I think the appeal should be allowed.

STRONG J.—The purchase was completed on the 8th of April, 1882, when the conveyance of the land to the respondent was executed and the purchase money, or at least that portion of it which was to be paid in addition to the outstanding incumbrances assumed as part of the price, was secured by the joint promissory notes of the appellant and respondent, namely, one note at a short date for $1,500 and four notes at long dates for the residue, amounting altogether to $830. It is clear, therefore, that at the time of the completion of the purchase the appellant was legally bound to the vendor to contribute to the payment of the purchase money, equally with the respondent.

The law is clear that in order to raise a resulting trust the party asserting it must be able to show that at the time of the completion of the purchase he either actually paid, or came under an absolute obligation to pay, the whole or some ascertained proportion of the price. It cannot be doubted that, *primâ facie* at least, the appellant brings himself within these requirements of the law. If the appellant had insisted on his beneficial interest as a joint purchaser with the respondent before any money had been paid on account of the purchase, that is between the 8th and 17th April, he would have established his case by showing that he had become equally liable with the respondent for the payment of the promissory notes which had been given to secure the purchase money.

But a trust thus *primâ facie* resulting from the payment of an obligation to pay the purchase money may always be rebutted by parol evidence on the part of the nominal purchaser, and so on the other hand this rebutting evidence may in turn be contradicted by the same sort of evidence on the part of the alleged benefi-

ciary, and the question to be decided may thus become a pure question of fact to be determined on the conflicting evidence alternately adduced for these purposes. Such a question of fact to be determined on conflicting evidence is exactly what is presented by the case now before us.

The respondent attempts to destroy the presumption in favor of the appellant resulting from the joint liability on the promissory notes by proving that the appellant joined in making the notes, not as a joint purchaser of the land but as a mere surety for the respondent, and that his subsequent contributions to the monies applied to the payment of these notes were loans and advances made by him to the respondent.

The appellant in his turn denies that he was either a surety or a lender and asserts that he undertook the liability and paid the money for his own benefit as a joint purchaser of the land.

The question to be decided is, therefore, one not involving any legal principles, but exclusively one of fact, and to a considerable extent one of conflicting evidence to be determined according to the preference to be given to one set of witnesses rather than another. Then viewing the case as thus depending on a question of evidence, the first observation to be made is that the indirect and circumstantial proof by itself tends strongly in the appellant's favor inasmuch as the facts are inconsistent with the hypothesis that the appellant undertook the liability he came under in respect of the notes merely as a surety for the respondent. The appellant paid promptly and voluntarily and without any appeal being made to him by the respondent, but as a party primarily liable would have done, nearly an exact moiety of the money secured by these notes as they fell due, and altogether acted as if he was liable as a joint principal and not secondarily as a surety. This, however, is not conclusive against the respondent who

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asserts that the appellant was not only a surety in respect of his liab lity upon the notes, but, besides and beyond his undertaking as such, had agreed to lend to and advance for the respondent one-half of the money required to retire the notes, or rather the amount actually advanced by him for that purpose, being somewhat more than a half. There is, however, a total absence of evidence of any specific agreement for a loan, and the consequent uncertainty as to the terms of repayment, the rate of interest, and other details which the parties would naturally have provided for if that had been the real character of the transaction, operate strongly against the respondent's assertions in this respect and make the account which he gives of the appellant's connection with the matter an extremely improbable one. When, however, in addition we consider the conduct of the appellant from first to last in connection with the purchase, the chief part which he took in making the bargain and procuring the execution of the conveyance, and the principle of equality which, if not exactly observed owing to the inability of the respondent to furnish the full amount of his share, nevertheless runs throughout the whole transaction as regards the payments, to say nothing of the exercise by the appellant of indubitable acts of ownership over the property, the circumstances in evidence seem to me so strong in the appellant's favor, that even if they had been unsupported by any direct testimony I should have hesitated long before giving effect to the evidence of the respondent and the vendee Gibson as sufficient to displace the appellant's *primâ facie* title to a beneficial interest. When, however, we have opposed to the evidence of the respondent and Gibson not only the circumstances surrounding the transaction but also the positive and direct evidence of the appellant himself and his witness John Wilson, and when we find that these latter witnesses are accredited by the judge

before whom they were examined in open court, who accepts their statements in preference to those of the respondent and his witness, it seems to me impossible, without entirely disregarding at once the effect of the evidence, and the authority of decisions (now become numerous both here and in England) prescribing the rules which should govern appellate courts in dealing with the conflicting testimony of witnesses, to do otherwise than to adopt the conclusion of the learned judge who tried the action. Had I considered the facts and circumstances as disclosed in the evidence, corroborated the respondent's rather than the appellant's explanation of the transaction, I should not have hesitated to have come to a different conclusion; for as regards the rule in question I adhere to the definition and limitation of it given with the sanction of the Court of Appeal in *Sanderson* v. *Burdette* (1), and according to the terms in which it is there expressed the decision at the trial is only to be deemed conclusive as regards the credit to be given to conflicting witnesses, and the appellate court is not to be excluded from drawing inferences from documentary evidence, from the surrounding facts and circumstances, from inconsistencies of statements, and from the self-contradictions of witnesses, even though such inferences may vary from those of the primary judge. In the present case, however, I think all the inferences of this kind which the evidence warrants accord with the finding of the learned judge who presided at the trial, and if I had had to deal in the first instance with the same evidence now before us, but presented upon written depositions taken before an examiner or commissioner, I should, with a confidence at least as strong as that expressed by Mr. Justice Armour, have found in the same way.

As regards the costs I am of opinion that the conduct

(1) 18 Grant 417.

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of the appellant in withholding the deed from registration and thus endangering the respondent's title rendered the action to a certain extent necessary, and although the respondent failed in his demand so far as he claimed to be entitled to the whole of the land yet he in part succeeded at the trial, inasmuch as he established his right to have the deed produced for registration. Therefore, in my opinion, no costs should be given to either party up to and including the trial. The costs in appeal both here and in the Court of Appeal having been wholly caused by the contention of the respondent as to the character of the purchase, in which he has failed, should be paid by him to the appellant. Therefore the appeal should be allowed, the judgment of the Court of Appeal reversed, and the original judgment of the Common Pleas Division restored with the variation as to costs just mentioned.

Fournier J.—I, also, am of opinion that the appeal should be allowed and the judgment of Mr. Justice Armour restored.

Henry J.—I entirely agree with the views of the three learned judges of the Court of Appeal who gave judgment in this case, and with the conclusion at which they arrived. In regard to the evidence it is, in my mind, conclusive that the land in question was purchased solely by the respondent.

In regard to the law I think it is also in his favor. In cases where there is contradictory evidence as to important points in a case, and where the result depends upon the weight of evidence, the learned judge who tries the issue and has the witnesses before him is very possibly much better able to judge of their credibility than a judge who has not had that opportunity, and in such cases the finding of the judge is generally held to be conclusive. This, however, is not such a case, for there is little if any conflict of evidence, and upon the

only important point of difference between the parties in the cause the appellant, contradicted as he was by the respondent, is also, as to the same point, contradicted by three other witnesses and corroborated by none. The contention of the appellant upon which the decision of the case turns is, that the land was purchased by him and the respondent to be held by them as tenants in common, each of a moiety.

Before referring to the oral evidence I think it proper to refer to the deed. That is itself the strongest *primâ facie* evidence that it was made to the purchaser; and then it is shown to have been procured to be so made by the appellant himself without giving any satisfactory explanation why, if it were a joint purchase, a deed was given to the respondent alone. He attempted to do so, but his statements are contradictory and, to my mind, wholly unreliable. It would have been very different had the respondent caused the deed to be so made. The appellant might in such a case have complained, and if in his power shown a joint purchase. The appellant does not pretend that as to the deed being taken to the respondent after the purchase was made that there was any conversation or agreement between the parties on the subject; and if, when the purchase was agreed upon, the appellant was to have had a half interest in the land, is it not unaccountable that the appellant should have had the deed made as it was without the slightest understanding with the respondent? He is shown to have been an intelligent business man, and how can we so consider him such if in regard to an interest amounting to nearly two thousand dollars he failed in any way to provide for its protection? The deed being so made was the act of the appellant, and even from his own version of the circumstances I should consider that the evidence furnished by the deed alone should prevail. No mistake is suggested. The act on the part of the

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appellant was deliberate. The deed solemnly says the land was purchased by the respondent and no court should, in my opinion, reject its effect under such evidence as we have here. It may be asked: Why did the appellant advance money and security if he were not a joint purchaser? The evidence, as remarked by one or more of the learned judges of the Court of Appeal, amply furnishes the answer. He was the father-in-law of the respondent's brother, who, together with the respondent and another brother, lived on a small farm, of a little over a hundred acres, left them by their father to be divided between them according to value. The appellant was one of his executors and seemed to have felt the responsibility of having the land divided, which was to take place in about four years when the youngest son came of age. He too, no doubt, felt an interest in the position and prospects of his son-in-law. The farm had been let by lease, having about four years to run when the land was purchased. When the youngest of the three Sandersons came of age the respondent after the land was divided sold a part of his share to one of his brothers and the balance to the other, intending to retain and keep for himself the land conveyed to him and now the subject matter of this suit. That was, I fully believe, what was intended by the appellant when he told the respondent that he would have the deed made to him, the respondent, and that if he wanted it when the other property was divided he could have it. He expected, no doubt, that such an arrangement would benefit his son-in-law and very likely that was why he insisted in the purchase, and it is a little surprising that until after the division of the other property the appellant is not shown ever to have claimed to own an interest in the land. On the contrary it is shown he repudiated it. That division, however, having been made, and his son-in-law being no longer interested in the purchase or owner-

ship of the land in question herein, the appellant set up a claim to the title of half of it. I have thus given what the evidence shows as the intention of both parties when the deed was made. I have no difficulty in arriving at that conclusion from the admitted facts, but when we consider the testimony of Gibson, Bell and Ireland I cannot help expressing myself strongly by saying that it is conclusive. I extract for the purpose their evidence, as found in the judgment of Mr. Justice Patterson :—

There is further in support of respondent's contention the evidence of Gibson, the vendor stated by the appellant to be a respectable and truthful man, that he sold the land to the respondent alone, and that appellant said to respondent in his (Gibson's) hearing that he would help him through with the payments. Then Bell says: Appellant told him shortly after the purchase that one of the Sanderson boys was getting the place ; that appellant always said it belonged to the Sandersons, and denied that he had any claim on it and that "Bill" (respondent) would go on it when the boys settled; that is, when the division of the homestead was made. And Andrew Ireland says: Appellant told him when on the way with the deeds to get Mrs. Gibson to sign them, which must have been directly after the bargain, that "Bill Sanderson (respondent) had bought it."

The learned judge after citing this evidence very forcibly says :—

With this clear and undisputed evidence all in support of the appellant's contention, and of the conveyances themselves, it is submitted that the learned judge was unduly impressed with the importance of the acts and conduct referred to in his judgment, not one of which in view of all the circumstances was unequivocal or inconsistent with the appellant's contention, and that he should have found that the true agreement was that appellant was to be the sole purchaser, and that respondent only agreed to help him in such purchase by loaning him what money he could.

Here, then, is the positive statement of Gibson, whose veracity is vouched for by the appellant himself, swearing that he sold the land to the respondents, and to place the matter beyond any doubt, that he heard the appellant say to the respondent that he would help him with the payments. Would that be langu-

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age of a man who was a joint purchaser?

Consider then the evidence of Bell. Can anything be stronger or more conclusive? Then again the statement of Ireland that when he with the appellant were on the way to obtain Mrs. Gibson's signature to the deed that the appellant said the respondent had bought the land. The appellant was examined as to those statements of the three witnesses just referred to and he would not undertake to contradict any of them. We must conclude then that they were true. If so we have the strongest evidence that could be produced and which estops the appellant, as admissions made by himself, from saying that the land was not purchased by the respondent alone. Taking into consideration the evidence that, immediately after the statements to which Gibson and Ireland refer the appellant got the deed executed, we have, in my opinion, an issue fully and satisfactorily proved by the respondent.

The law in respect of the statute of frauds as given by Patterson, Burton and Osler, justices, as applicable to this case, is in my opinion correct, and I think it only necessary to refer to their judgment. I also agree with the learned justices named that the evidence is wholly insufficient to establish the contention that there was any resulting trust. The evidence on the part of the appellant independently of the respondents does not, in my opinion, show any such trust. The law is so fully declared by the learned justices that I need only refer to their judgment.

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

Taschereau J.—I am of opinion that this appeal should be allowed with costs and the original judg-

ment restored, for the reasons given by Hagarty C. J. dissenting in the Court of Appeal.

GWYNNE J.—There is much contradiction in the oral evidence given in this case and the learned judge who heard the evidence and saw the witnesses has expressed a strong opinion in favor of the defendant's contention, namely, that he was a co-purchaser of the land with the plaintiff and that it was as such that he paid his money, and not that he lent the money to the plaintiff as contended by the latter.

Upon a careful perusal of the evidence I cannot say that this opinion of the learned judge is erroneous and not justified by the evidence.

If the money was, as the plaintiff contends, advanced by the defendant to him as a loan, it is very singular that no terms of repayment should have been ever spoken of between them, or any security asked or offered. It is to be observed also that it was at the defendant's suggestion that the plaintiff became a party to the transaction—that the payments made by the defendant were made direct to the vendor and not to the plaintiff—and that the notes given to the vendor, securing the purchase money not paid when the deed was executed, were the joint notes of the plaintiff and the defendant, although neither the vendor required nor did the plaintiff ask the defendant to join in these notes as his surety. Why the defendant should have joined in these notes otherwise than as co-purchaser with the plaintiff no reasonable explanation appears to have been offered. These and other considerations referred to by Mr. Justice Armour, who tried the case, seem to me to lead to the conclusion that his finding upon the fact upon which the case depends is correct. But it is contended that a portion of the evidence given by the plaintiff himself is conclusive against his

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payments having been made qua-purchaser. The evidence relied upon as having this effect is that the defendant admitted that when speaking to the plaintiff about his and his brothers joining with the defendant's sons in making the purchase the following took place :—

On Saturday I asked him what his brother and our boys told him, he said he only saw my son Alexander and that Alexander told him we had as much land now as we could work and that he would be willing to go in for it only on speculation; to which defendant replied: "No matter, I will go in with you for it, and put your name down in the writings, and if you want it when you are making division of your homestead property you can have it."

It is contended that this last sentence shows that the defendant's position was not that of a co-purchaser with the plaintiff. To my mind, I must say that it conveys no such necessary conclusion, but that, on the contrary, it seems to me to be more consistent with the fact of the defendant being a co-purchaser with the plaintiff than with the fact of his being merely a lender of money to the plaintiff to enable him to make the purchase for himself alone. If the plaintiff was the sole purchaser what was the sense of the defendant saying that he would put the plaintiff's name down in the writings, and that if he should want the land, on his making a division of his homestead, he, the plaintiff, could have it?

Surely there could have been no doubt that if the plaintiff was the sole purchaser the deed would naturally be in his name without any act or permission of defendant, or that the land, *eo instanti* of the conveyance being executed and the plaintiff's purchase completed, would be his own property apart from any condition of his wanting to have it upon a future occasion when the homestead should come to be divided. What was the sense of the defendant saying that conditionally upon the plaintiff requiring

the land on a future event arising, he could have that which was already his own by the purchase? And if the plaintiff should not require the land upon the division of the homestead, where was the beneficial interest in the land to be in the meantime? Not with plaintiff for it was only conditional upon a future event arising that he was to have it.

The remark relied upon seems to be rather in the nature of a promise made by the defendant that conditionally upon the future event spoken of occurring the plaintiff should have from the defendant that which it could only be in the defendant's power to give by his being co-purchaser of the land with the plaintiff. This appears to me to be a more natural inference to draw from the remark than that it establishes the relation of borrower and lender between the parties to the conversation, and so reading this passage in the defendant's evidence it is the promise which would be void within the statute of frauds.

There was another argument used against the claim of the defendant, namely, that the land is subject to a mortgage executed by the plaintiff's vendor, which mortgage or any part thereof the defendant, as is said, is under no liability to pay, and therefore, as is contended, he cannot be heard to claim as a co-purchaser with the plaintiff. But in this respect the plaintiff is in the same position as the defendant, for neither has he entered into any obligation to pay the mortgage. He is, of course, liable to lose the land upon a bill of foreclosure being filed if he should fail to pay it, but he has entered into no obligation to pay it. Now the defendant if he be co-purchaser with the plaintiff is equally subject to the same consequence even though the bill of foreclosure and the decree therein for foreclosure should be against the plaintiff alone, and as co-purchaser with the plaintiff he could with him file

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a bill to redeem. The conveyance executed by the vendor has been a bargain and sale of the land with covenants for title against the acts of the vendor, but both the plaintiff and the defendant knew of the mortgage, the amount of which was retained to meet the mortgage and not paid to the vendor so that notwithstanding the vendor's convenant the estate conveyed was in the eye of a court of equity only the vendor's estate in the land which was subject to the mortgage. Now the plaintiff and defendant, assuming them to be co-purchasers, are both precisely in the same position as to the mortgage, that is to say, neither of them is under any obligation to pay it, but in default of their paying it they are both liable to lose their respective interest in the land, so that the fact of the defendant having entered into no obligation to pay the mortgage, affords no argument or reason whatsoever at variance with his being, as he insists he was, a co-purchaser with the plaintiff. But on the other side, if the plaintiff was sole purchaser and if he should suffer the mortgage to be foreclosed what obligation did he incur to repay the defendant those sums which the plaintiff now claims to have been loans to him? None whatever; and in such case the defendant was wholly at the plaintiff's mercy, while adopting the defendant's contention the plaintiff's interests were protected. The most reasonable conclusion to draw from the evidence is, I think, that arrived at by the learned judge who tried the case, namely, that the defendant was a co-purchaser who paid his money in that character, but took the deed in the name of the plaintiff for the sake of convenience, with a view to the possibility of the plaintiff at a future time desiring to acquire the whole property.

The appeal therefore should, in my opinion, be allowed with costs and the judgment of Mr. Justice

Armour restored.

Appeal allowed with costs.

Solicitors for appellant: *Cameron, Holt & Cameron.*

Solicitors for respondent: *Garrow & Proudfoot.*

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JOHN McKENNA AND ROBERT PETER MITCHELL (PLAINTIFFS) } APPELLANTS;

AND

F. B. McNAMEE & Co. (DEFENDANTS)..RESPONDENTS.

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*Nov. 25.
1888
*Mar. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Failure of consideration—Impossibility of performance.

When one contracts to do work for another the preparation for which involves outlay and expense, a corresponding agreement, in the absence of any express provision, will be implied on the part of the person with whom he contracts to furnish the work; but no such implication will be made where, from circumstances known to, and in the contemplation of, both parties at the date of the agreement to do the work it was, and continued to be, beyond the power of the party to carry out such implied agreement. Henry J. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Queen's Bench Division by which the verdict for the plaintiffs at the trial was set aside and the action dismissed.

The defendants had been contractors with the Government of British Columbia for the construction of the Esquimalt Graving Docks, but failing to carry on the work to the satisfaction of the Government the contract was taken out of their hands. They believed however, that its restoration could be effected, and entered into an agreement with the plaintiffs by which the latter were to complete the work and receive 90 per cent. of the profits, the agreement recit-

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

(1) 14 Ont. App. R. 339.

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ing that the defendants had agreed to take the plaintiffs into their service for the purpose of completing the contract. This course was adopted in consequence of the contract with the Government containing a clause which prohibited them from sub-letting.

The plaintiffs at the time of making this agreement were aware of the fact that the defendants had lost the contract, and had examined its various provisions, but reliance was placed on the political influence of the plaintiff, Mitchell, for its restoration. After the execution of the agreement Mitchell went to British Columbia and used every endeavor to induce the Government to restore the contract to the defendants but was finally obliged to return without accomplishing his object. The plaintiffs then brought their action claiming $100,000 as damages for breach of contract to take them into defendants' service, and $25,000 for moneys expended on the work.

The defendants claimed that the condition of their contract with the Government was known to the plaintiffs when the agreement was made; that it was made on the express understanding that it was not to take effect unless the contract was restored; and that it was not intended to create the relation of master and servant between the parties the agreement being made in the form it was on account of the clause against sub-letting.

The plaintiffs recovered a verdict on the trial which was set aside by the Queen's Bench Division and their judgment was confirmed by the Court of Appeal. The plaintiffs then appealed to the Supreme Court of Canada.

McCarthy Q.C. and *Mahon* for the appellants.

The principle governing the position of parties to a contract, the performance of which becomes impossible, is well defined in Anson on Contracts (1) citing the

(1) P. 514.

case *Jacobs* v. *Crédit Lyonnais* (1).

This doctrine is dealt with in a line of decisions beginning with *Paradine* v. *Jane* (2), and followed by *Clark* v. *Glasgow Ass. Co.* (3); *Medeiros* v. *Hill* (4); *Hills* v. *Sughrue* (5).

Other authorities bearing upon the questions involved here are *Kearon* v. *Pearson* (6); *Thiis* v. *Byers* (7); Pollock on Contracts (8); *Barker* v. *Hodgson* (9).

It is only where the continued existence of the circumstances prevailing when the contract was made is essential to its performance that the impossibility of performing it will discharge the parties. Anson on Contracts (10); *Brown* v. *Royal Ins. Co.* (11); *Jones* v. *St. John's College* (12).

The Court of Appeal decided this case against the plaintiffs on the authority of *Cunningham* v. *Dunn* (13). But that case was decided on a very different state of affairs from the one now under discussion. The jury there found that the plaintiff was aware of the disability when the contract was made and the defendant did not become aware of it until later. The court expressly decided the case on the ground that both parties were in fault. Further, *Cunningham* v. *Dunn* (13) was decided on the authority of *Ford* v. *Cotesworth* (14), which clearly is no authority for the judgment for the Court of Appeal here.

The following cases, also, were cited: *Brecknock Canal Co* v. *Pritchard* (15); *Hadley* v. *Clarke* (16); *Atkinson* v. *Ritchie* (17); *Spence* v. *Chodwick* (18); *Jervis* v. *Tomkinson* (19).

(1) 12 Q. B. D. 589.
(2) Aleyn 26.
(3) 1 MacQ. H. L. Cas. 664.
(4) 8 Bing. 231.
(5) 15 M. & W. 253.
(6) 7 H. & N. 386.
(7) 1 Q. B. D. 244.
(8) P. 364.
(9) 3 M. & S. 267.
(10) P. 314.
(11) 1 E. &. E. 853.
(12) L. R. 6 Q. B. 115.
(13) 3 C. P. D. 443.
(14) L. R. 4 Q. B. 127 and L. R. 5 Q. B. 544.
(15) 6 T. R. 750.
(16) 8 T. R. 259.
(17) 10 East 530.
(18) 10 Q. B. 517.
(19) 1 H. & N. 195.

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O'Gara Q.C. for the respondents.

Mitchell represented that his influence was sufficient to obtain a restoration of the contract, and the agreement was made in consequence of such representation.

Both parties know that the contract was out of defendants' hands, and the agreement must be construed in the light of the circumstances.

It was impossible for the defendants to carry out their agreement, and as the plaintiffs knew of the disability they are not entitled to recover. Anson on Contracts (1); Campbell on Sales (2); *Clare* v. *Lamb* (3); *Cato* v. *Thompson* (4).

McCarthy Q.C. in reply. The contract is to be construed according to its terms and not by extraneous matter. Taylor on Evidence (5).

There was a clear covenant either express or implied that the defendants would give as the work progressed and we are entitled to the benefit of it. *Samson* v. *Easterby* (6); *Salton* v. *Houston* (7); *Lainson* v. *Tremere* (8); Addison on Contracts (9).

SIR W. J. RITCHIE C.J.—Both parties knew the contract had been cancelled and, no doubt, thought the Government of British Columbia would restore the contract to McNamee. It is quite clear that the plaintiff was fully impressed with the conviction that the retention of the contract would not be persisted in. In this state of the case both parties contracted and both parties were disappointed; the Government of British Columbia refused to give the contract back to McNamee. The fulfilment of the contract on either side was, therefore, prevented, by reason of a known difficulty of which both parties were aware and which both, at the time of entering into the con-

(1) Pp. 238, 239, 249.
(2) P. 328.
(3) L. R. 10 C. P. 334.
(4) 9 Q. B. D. 619.
(5) Sec. 1201.
(6) 9 B. & C. 504; 6 Bing. 644.
(7) 1 Bing. 433.
(8) 1 A. & E. 792.
(9) P. 187.

tract, thought could be overcome.

Both parties in this case appear to have been ready and willing to perform their undertaking, and doubtless would have done so but they were prevented by the refusal of the Government of British Columbia, a power over which neither party had any control.

It is clear that unless the contract was restored by British Columbia there could be no performance on either side. We cannot shut our eyes to the state of facts thus existing and known to both parties, and with reference to which the plaintiff and defendant were negotiating with a view to arriving at a right construction of the agreement into which the parties finally entered. It is our duty to construe the contract with the aid of the surrounding circumstances, influenced in the construction not only by the instrument but also by the circumstances under which, and the objects for which, it was entered into and with reference to the intention of the parties at the time it was made. Reading the contract in the light of the surrounding circumstances I think what both parties contemplated was, an agreement based on the restoration of the contract to McNamee, which both parties thought would be obtained through their united efforts and influence; failing in this the contract necessarily fell through, because, without the fault of either party, it could be fulfilled by neither, it not, in my opinion, being contemplated that any liability should arise on either side until the restoration should be obtained through their joint endeavors. If the contract was restored then the agreement became capable of fulfilment but not before ; in other words, conditional on the restoration of the contract. The government having refused without the fault of either party, the non-fulfillment of the agreement happened without fault on either side. This was not a contract the performance of which was dependent on the con-

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tinued existence of a given state of things, but the opposite, the performance was dependent on the action of the Government of British Columbia over which neither party had any control.

In the absence, then, of any express or implied contract or warranty on either side that the consent of the Government of British Columbia would or could be obtained, a matter in which both parties were equally interested and which, from the evidence, it is obvious both parties were to use their endeavors to obtain and which the plaintiff Mitchell thought they had sufficient political influence to accomplish, can this contract be construed into a positive contract on the part of the defendant to procure such consent ? On the contrary, looking at the surrounding circumstances, must it not be construed as subject to an implied condition on both sides that it was not to take effect, as it could not, in the event of the refusal of British Columbia to give back the contract to the defendant ? Though it may appear on its face to be presently operative both parties must have known that it was not intended to operate, because it could not operate until the happening of a given event. The agreement being silent on the subject there was nothing, in my opinion, to prevent the defendant from showing by parol testimony that it was not intended to, because it could not, take effect until the happening of something else. To hold that the agreement was not to have effect if the Government of British Columbia refused to restore, neither varied nor contradicted the writing. As was said in *Wallis* v. *Littell* (1) "it but suspended the commencement of the obligation."

Therefore, in my opinion, the refusal of British Columbia was a common misfortune, so to speak, excusing both parties from the performance of the contract, and the loss must remain where it falls.

(1) 11 C. B. N. S. 369.

I do not wish to be understood as ignoring what I consider firmly established that where a party has, either expressly or impliedly, undertaken, without any qualification, to do anything and he does not do it he must make compensation in damages, though the performance was rendered impracticable by some unforeseen cause over which he had no control. *Ford* v. *Cotesworth* (1). The principles to be gathered from *Lindley* v. *Lacey*, (2) ; *Taylor* v. *Caldwell*, (3) and *Appleby* v. *Myers* (4), in my opinion clearly sustain the views I have expressed.

In *Lindley* v. *Lacey* (2). Keating J.—

The principle you are contending for was recognized in a still more recent case in this court, *Wallis* v. *Littell* (5). There, the plaintiff declared upon an agreement by the defendants to transfer to him a farm which he (the defendant) held under Lord Sydney, "upon the terms and conditions of the agreement under which the same was held by the defendant under Lord Sydney." The defendant pleaded that the agreement declared on was made subject to the condition that it should be null and void if Lord Sydney should not, within a reasonable time after the making of the agreement, consent and agree to the transfer of the farm to the defendant; and it was held that it was competent to the defendant to prove by extraneous evidence this contemporaneous oral agreement, such oral agreement operating as a suspension of the written agreement, and not in defeasance of it. In giving judgment, Erle C.J. said: "In *Pym* v. *Campbell* (6) and *Davis* v. *Jones* (7), it was decided that an oral agreement of the same effect as that relied on by the defendant might be admitted, without infringing the rule that a contemporaneous oral agreement is not admissible to vary or contradict a written agreement. It is in analogy with the delivery of a deed as escrow; it neither varies nor contradicts the writing, but suspends the commencement of the obligation." Byles J.: All these cases proceed upon the principle that extraneous evidence is always admissible to apply the agreement.

Byles J.:—

I am of the same opinion. I think there was a prior collateral oral agreement relating to the bill, which the subsequent written

(1) L. R. 4 Q. B. 127.
(2) 17 C. B. N. S. 583.
(3) 3 B. & S. 833.
(4) L. R. 2 C. P. 651.
(5) 11 C. B. (N. S.) 369.
(6) 6 E. & B. 370.
(7) 17 C. B. 625.

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agreement did not in any manner interfere with. The written agreement is altogether silent as to the payment of that bill: and there is nothing therein which is at all inconsistent with the prior agreement. The case of *Harris* v. *Rickett* (1) seems to me to be precisely in point. But, independently of that, it appears that the original agreement between the parties was, that the bill in the hands of Chase should be taken up by Lacey; and that was to be the ground work of the subsequent arrangement. That being so, *Pym* v. *Campbell* (2), *Davis* v. *Jones* (3), and two recent cases in this court, viz., *Wallis* v. *Littell* (4), and another which has not been referred to, show that evidence may be given of a prior or a contemporaneous oral agreement which constitutes a condition upon which the performance of the written agreement is to depend. If evidence may be given of an oral agreement which affects the performance of the written one, surely evidence may be given of a distinct oral agreement upon a matter with respect to which the subsequent written agreement is altogether silent; more especially if, as here, in addition to its being a stipulation it was also a condition. The justice of the case is evidently in accordance with our view of the law.

Taylor v. *Caldwell* (5). Blackburn J.:—

There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible. The law is so laid down in Roll. Abr. 450, condition (G) and in note (2) to *Walton* v. *Waterhouse* (6) and is recognized as the general rule by all the judges in the much discussed case of *Hall* v. *Wright* (7). But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied, and there are authorities which, as we think, establish that principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing with-

(1) 4 H. & N. 1.
(2) 6 E. & B. 370.
(3) 17 C. B. 625.
(4) 11 C. B. (N. S.) 369.
(5) 3 B. & S. 833.
(6) 2 Wm. Saund. 421 a. 6th ed.
(7) E. B. & E. 746.

out default of the contractor.

There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say there should be such a condition.

Appleby v. *Myers* (1). Blackburn J.:—

The whole question depends upon the true construction of the contract between the parties. We agree with the court below in thinking that it sufficiently appears that the work which the plaintiffs agreed to perform could not be performed unless the defendant's premises continued in a fit state to enable the plaintiffs to perform the work on them; and we agree with them in thinking that if by any default on the part of the defendant, his premises were rendered unfit to receive the work, the plaintiffs would have had an option to sue the defendant for this default, or to treat the contract as rescinded, and sue on a *quantum meruit*. But we do not agree with them in thinking that there was an absolute promise of warranty by the defendant that the premises should at all events continue so fit. We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties; excusing both from further performance of the contract, but giving a cause of action to neither.

STRONG J.—Apart altogether from the ground upon which the judgment of the Court of Appeal is founded I am of opinion that this appeal cannot be sustained.

It was pointed out by Mr. O'Gara in the course of his very able argument for the respondent that the indenture of the 29th of July, 1882, does not contain any covenant on the part of the respondents which, consistently with the facts in evidence, they can be held to have broken. The instrument in question contains the following recital:—

And whereas the parties hereto of the first part have agreed to take into their services the said parties of the second part and pay them ninety per cent. of the price stipulated in the said in part recited indenture of the 24th day of February, one thousand eight hundred and eighty, to be paid to them the said parties of the first part and the said parties of the second part hereby agreeing thereto for the material to be used in and the construction of the said works.

(1) L. R. 2 C. P. 659.

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It also contains the following covenants on the part of the respondents:

And the parties of the first part in consideration of the premises hereby covenant with the parties of the second part that they will be paid by the parties of the first part ninety per cent. of the amount of every estimate issued on the said works until the completion thereof, and also for all other works in excess of those in the said in part recited contract mentioned or referred to.

And an additional covenant as follows:—

And it was further agreed that they the said parties of the second part shall be paid out of every subsequent estimate by the parties of the first part ninety per cent. of such estimate until the final completion of the works in the said in part recited indenture mentioned and of all the works and material in excess thereof connected therewith.

There are no other express covenants on the part of the respondents, contained in the agreement of which it can be suggested there has been any breach.

The recital of an agreement to pay ninety per cent. of the price stipulated to be paid by the contract is restricted and limited by the subsequent express covenants (already set forth) contained in the operative part of the instrument, and according to those covenants the 90 per cent. to be paid is to be so paid out of the amount of every estimate issued, and consequently would not become payable unless estimates were actually issued. Now it is not, and cannot be, pretended that any estimate was issued subsequent to the 29th July, 1882, the date of the indenture. There has, consequently, been no breach of any of these covenants.

If it is contended, in answer to this, that a convenant on the part of the respondents to procure the forfeiture of the contract to be rescinded and the works to be restored to the respondents, in order that the appellants might be afforded an opportunity to do the work and thus earn the 90 per cent, is to be imported into the agreement by implication, the plain answer to it is that, having regard to the facts disclosed in the evidence that at the date of the agreement between the appellants and respondents the Government of British

Columbia had, pursuant to the provisions of the original contract, taken the works out of the respondents' hands, and that this fact was well known to all parties, such an implication would be warranted neither by principle nor authority. It is indeed true, as was said in *Churchward* v. *The Queen* (1), and in *Thorn* v. *The Commissioners of Public Works* (2), and as was held by this court in *McLean* v. *The Queen* (3), that if one contracts to do work the preparation for which involves outlay and expense, a corresponding agreement, in the absence of any express provision, will be implied on the part of the person with whom he contracts to furnish the work ; but no authority can be cited to show that such an implication will be made when, from circumstances known to, and in the contemplation of, both parties at the date of the agreement to do the work, it was, and has since continued to be, beyond the power of the party to comply with such a stipulation. If any implied term is to be read into the instrument it can only be one imposing on the respondents the obligation of permitting the appellants to perform the work in the event of the Government of British Columbia allowing the respondents to go on and complete their contract, an event which never happened. This point was distinctly taken by the counsel for the respondent at the trial but was overruled by the learned judge and, as I think, erroneously overruled. It seems to me to be decisive of the case.

Granting, however, that there had been such a provision as is now sought to be implied expressed in the agreement in the most clear and unequivocal terms, I should still have been of opinion, with both the courts below, that without overruling the

(1) L. R. 1 Q. B. 173. (2) 32 Beav. 494.
(3) 8 Can. S. C. R. 237.

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cases of *Cunningham* v. *Dunn* (1), *Ford* v. *Cotesworth* (2), *Bailey* v. *De Crespigny* (3), *Thorn* v. *City of London* (4), *Taylor* v. *Caldwell* (5), and *Clifford* v. *Watts* (6), it would have been impossible to have come to any other conclusion than that reached by the judgments under appeal. I do not regard these cases as establishing that circumstances such as we have here are to be considered as affording a defence by way of excuse of performance, but as showing that, in cases similar to the present, the absolute terms of the contract are to be qualified and construed as subject to the condition that their performance shall become possible.

I do not pursue this subject further for I entirely agree with everything contained in the judgment of the learned Chief Justice of the Court of Appeal, though I prefer to rest my own judgment on the ground first mentioned.

The appeal should be dismissed with costs.

FOURNIER J.—The evidence in this case shows very clearly that McKenna took the contract which McNamee had with British Columbia knowing perfectly well that such contract had been set aside. Of this fact there is no doubt. It is also very clear that McKenna undertook to exercise his influence with the Government of British Columbia to effect a restoration of the contract. He was sure of his influence with the Government and depended entirely on that. If he has not been successful in his negotiations McNamee is not to blame.

I think the appeal should be dismissed.

HENRY J.—I think this matter requires the discus-

(1) 3 C. P. D. 443.
(2) L. R. 4 Q. B. 127.
(3) L. R. 4 Q. B. 810.
(4) 1 App. Cas. 120.
(5) 3 B. & S. 833.
(6) L. R. 5 C. P. 577.

sion of certain principles, well known and acted on in many cases. One of the leading principles laid down is, that where a party undertakes to pay another, and the other sustains damage, an action lies; and if a party undertakes to do something, and engages another man to perform the work, it is no answer for the former to say "you knew I had no contract." What does the law say? It says that is no excuse. The law is that if a party undertakes to employ another to perform certain work, although he himself has not the work to do, he is liable.

Suppose a man engages another to put up a residence and the other employs men to get out stone and timber; after these are supplied the former says "I did not get the contract; you knew I hadn't it and promised to assist me; you did assist me but I did not get it;" who is liable?

What are the circumstances of this case? McNamee had a contract in British Columbia for constructing certain public works. He did not proceed with the work as fast as the government thought he should and they took the contract out of his hands. Before the government did anything on the work negotiations took place for its restoration.

If McKenna sustained no damage he has no action, but if he did under all the decisions he is entitled to compensation. I think the appeal should be allowed.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed.

GWYNNE J.—What the appellants contracted to acquire and what the respondents agreed to assign to them was, as plainly appears by the evidence, the respondents' interest in a contract which they had had with the Government of British Columbia, but which in pursuance of certain provisions contained therein

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had been put an end to by that Government, and which the appellants, and it may be also the respondents, entertained the hope that either by the influence of the appellants alone, or by their influence jointly with that of the respondents, they should be able to get restored. The indenture executed for the purpose of giving effect to the intention of the parties assumed the shape it did for the express purpose of obviating a difficulty which would have stood in the way of their getting the contract restored, for that contract contained a clause avoiding it in the case of any sub-letting of it. This indenture contains no express covenant that the contract which the respondents had had with the Government of British Columbia was still in existence in full force and effect. The insertion of such a covenant in the instrument would have been quite inconsistent with the facts known to both parties and with their manifest intention; to imply such a covenant or one to the effect that the forfeited contract would be restored by the Government of British Columbia would be equally inconsistent with the plain intention of the parties. What the appellants contracted for was the benefit such as it was of the respondents' contract with the British Columbia Government in the condition in which it then was and which was known to the appellants, and that benefit such as it was they got.

I concur therefore that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Mahon & O'Meara.*

Solicitors for respondents: *O'Gara & Remon.*

ROBERT H. KLOCK, *et al* (PLAINTIFFS) APPELLANTS;

AND

RICHARD CHAMBERLIN, *es qualité* (DEFENDANT)..... RESPONDENT.

1887 *Oct. 29.

1888 *Mar. 15.

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

Sale—By wife to secure debts due by her husband—Simulated deeds—Art. 1301 *C. C.*

Where the sale of real estate by the wife, duly separated as to property from her husband, to her husband's creditor is shown to have been intended to operate as a security only for the payment of her husband's debts, such sale will be set aside as a contravention of art. 1301 C. C. (P. Q).

Per Strong J. dissenting. The trial judge's finding in the present suit that the deeds of sale were not simulated should be affirmed.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal side) reversing the judgment of the Superior Court in favor of the appellants.

The facts of the case may be briefly stated thus:—

On the 14th of January, 1876, Robert H. Klock and his brother and then partner, James Klock, purchased from Elizabeth Richie, wife of the respondent Richard Chamberlin, by whom she was duly authorized, a certain piece of land in the township of Hull in the district of Ottawa, known as the equal third part of the south half of lot number nineteen in the second range of lots in the said township, and containing 34 acres 1 rood and 38⅓ perches of land in superficies, for the sum of one thousand dollars, the receipt of which was acknowledged in the deed in which a right of redemption (*réméré*) during three years was reserved by the

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

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seller upon her paying to the purchasers the price of sale with interest at 15 per cent.

On the 23rd February, 1877, the purchasers finding that Mrs. Richie could get more than the price they had paid agreed to add seven hundred dollars to the price, and continued the right of redemption upon payment of the original price and interest, with the additional sum of seven hundred dollars and interest at 10 per cent. per annum; and finally, on the 23rd February, 1878, the purchasers finding that Mrs. Richie could again get a larger price, again increased the price by the sum of one thousand and seven hundred dollars and ninety-one cents, which was also added with interest at ten per cent. per annum to the price of redemption, &c.

These deeds were all executed under private seal in presence of witnesses, and were duly attested and registered.

On the 29th December, 1880, James Klock transferred his share in the property to the said R. H. Klock, and on the 11th May, 1881, the latter brought an action against Mrs. Chamberlin for possession of the property, making Mr. Chamberlin a party for the purpose of assisting his wife.

To this action, besides the general issue, the defendant pleaded two exceptions, alleging that the deeds in question were simulated and that Elizabeth Richie never received the consideration money mentioned in the deeds, but that these moneys were in reality paid by R. H. and J. Klock to creditors of Richard Chamberlin, part of it being retained by them for debts due them by him, and that the alleged sales were in reality mortgages for securing the repayment with exorbitant interest of moneys advanced to her husband, and to which she was induced by him to put her signature.

The consideration mentioned in the three deeds of sale was shown to have been employed to the extent of seventeen hundred and seven dollars and ninety-one cents to secure the debts due by R. Chamberlin to the appellants and others; and in appellants' books produced at the trial it was shown that the transaction was originally entered as a mortgage.

The Superior Court dismissed the defendant's plea, and held that the deeds were not simulated deeds.

The Court of Queen's Bench considered that the defendant had proved the essential allegations of her plea and, reversing the judgment of the Superior Court, dismissed the plaintiff's action, reserving to him his recourse on the said three deeds for any sum of money which Elizabeth Richie may have received out of the consideration money mentioned in the deeds beyond the sum of $1,707.92, &c., &c.

Fleming Q.C. for appellants. The transaction was simply a contract of sale with the right of redemption, and it is solely when there is fraud against the law prohibiting usury that a contract of sale with right of *réméré* can be assimilated to a pignorative contract and because it is a disguised contract of antichresis. The wife has a right to sell her property and pay her husband's debts with the price; she can borrow money and pay her husband's debts with it. The knowledge on the part of the purchaser or of the lender that the wife says she will pay her husband's debts cannot affect the validity of the deed; in this case no such knowledge was proved. Pothier (1); Merlin (2); Troplong (3); *Bouchier* v. *McLean* (4); *Hamel* v. *Panet* (5); Merlin (6); Guyot (7); Dénisart (8).

(1) Vente Nos. 385, 413; Puissance du Mari. sect. 1 No. 3.

(2) Rep. Jur. 30 vol. sec. 7, p. 355. 363.

(3) Cautionnement, p. 158-165.

(4) 6 L. C. Jur. p. 73.

(5) 2 App. Cas. 121.

(6) Rep. de Jur. 23 vol. Vo. Pig. 302.

(7) Nouvelle's Décisions, 1 Vol. Verb. Antichrèse Nos. 1, 2, 3.

(8) 13 Vol. Vo. Pig. p. 120.

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The learned counsel then argued on the facts that the sale was not simulated and the consideration was for necessaries furnished the family for which the wife was responsible. Citing art. 1317 C.C.

St. Amand v. *Bourret* (1); *Cholet* v. *Duplessis* (2); *Paquette* v. *Lemoges* (3); *Elliott* v. *Grenier* (4); *Courselles* v. *Dubois* (5); *Leyer* v. *Lang* (6); *McGibbon* v. *Morse* (7).

Aylen for respondent. The entry in the plaintiffs' books is an admission that the debt was due by the husband and the transaction between them and the defendant, Elizabeth Richie, is a mortgage and not a sale. Moreover it is conclusive from the fact that the same property purports to have been sold by and to the same parties three times. A person can imagine three mortgages one after the other contracted by and to the same parties, and all in force at the same time, but not three sales. The fact that the plaintiff and his partner appear to have bought the second time from the defendant Elizabeth Richie is an acknowledgment that the right of property had not passed to them by the first deed. And as the whole three transactions are alike, the presumption is that the intention influenced the parties at the first two existed and influenced them at the time of the third contract. Sirey C. C., under art. 1166 (8). The whole transaction was for the purpose of evading art. 1301 C. C., P. Q.

If the premises indicate simulation, and that the deeds were not intended to convey and did not convey the right of property in the land therein described, or anything more than a mortgage thereon to the plaintiff and his partner, the defendants' plea for the dismissal

(1) 13 L. C. R. 238.
(2) 6 L. C. J. 81.
(3) 7 L. C. J. 30.
(4) 1 L. C. J. 162.
(5) 4 R. L. 284.
(6) 1 L. C. R. 223.
(7) 21 L. C. J. 311.
(8) No. 2.

of the plaintiffs' action purely and simply is (on the authority of Guyot quoted by Merlin under the word *pignoratif*, hereinbefore cited, and of numerous other jurists) well founded. See Troplong Vente, Tome 2nd, art. 1659 No. 695 *et seq.* and 1 Demolombe No. 696.

The following authorities were cited and relied on : Merlin (1); *Buckley* v. *Brunelle* (2) ; *Walker v. Crébassa* (3) ; *Bélanger* v. *Brown* (4) ; *Société de Construction* v. *Brunelle* (5) ; *Rhéaume* v. *Caille* (6).

Sirey C. C. annoté. Art. 1907, N. 31 ; Laurent (7) ; Broom's legal maxims (8).

Fleming Q C. in reply.

Sir W. J. RITCHIE C.J.—I think the transaction was not a *bonâ fide* sale by the wife but was a mere evasion of the article of the civil code 1301 whereby the plaintiffs and her husband sought to secure from the wife payment to plaintiff and his partner and other creditors of her husband the amounts of their respective debts.

The evidence of Kenny convinces me that it was a collusive transaction between plaintiff and Chamberlin the husband, and the entry in plaintiff's book under date of February 7th, in which he debits the husband with interest of $1,000 mortgage due Jan. 14th, 1879, shows that the transaction was not a sale but a loan to pay the debts of plaintiffs and the other creditors of the husband.

The unsatisfactory evidence of the plaintiff entirely confirms me in these conclusions.

STRONG J.—Was of opinion that the appeal should be allowed and the judgment of the Superior Court

(1) Rép. Verb. Senatus Consulte Velléien S. 1, T. 30 p. 354, Ed. 1828.
(2) 21 L. C. Jur. 153.
(3) 6 L. C. Jur. p. 53.
(4) 14 L. C. Jur. 259.
(5) 1 R. L. 557.
(6) 1 L. N. 340.
(7) 24 Vol, 273.
(8) 6 Ed. p. 696.

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restored for the reasons contained in the *considérants* of the judgment of Mr. Justice MacDougall.

FOURNIER J.—L'action des appelants originairement dirigée contre Elizabeth Richie, épouse séparée de biens de Richard Chamberlin, l'intimé ès qualité, est fondée sur trois différents actes de vente d'une même propriété appartenant à la dite dame Elizabeth Richie. Elle a consenti ces actes avec l'autorisation de son mari en faveur des appelants, ainsi qu'il appert par les exhibits nos. 1, 2 et 3, produits par ces derniers. Ces actes sont tous faits dans la forme d'une vente à réméré.

Les appelants demandent par leur action à se faire déclarer propriétaires et à être mis en possession de la propriété qui leur a été vendue par ces divers actes.

Elizabeth Richie, maintenant décédée, est représentée par son mari Robert Chamberlin, intimé èsqualité. Elle a plaidé à cette action par défense au fonds en fait et par deux exceptions :—par la première elle allègue que les actes en question ne contiennent pas des ventes réelles, mais qu'au contraire ces actes sont feints et simulés, et n'ont été passés dans cette forme que pour garantir le paiement d'argent avancé et prêté, et non pas dans le but de transférer la propriété, et de fait n'ont pas transféré la propriété y désignée.

Par la 2me exception, elle allègue encore que ces actes sont feints et simulés à la connaissance des appelants, et qu'ils n'ont été faits que dans le but d'éluder l'effet de l'article 1301 du code civil ; qu'à la connaissance des dits appelants, la dite Elizabeth Richie n'a consenti les dits actes que dans le but d'obtenir de l'argent pour payer les dettes de son mari envers le demandeur, l'appelant, son associé et d'autres créanciers ; que cet argent a été à la connaissance de l'appelant et de son associé et par eux-mêmes employé à payer les dettes de son mari.

La Cour Supérieure siégeant à Aylmer, appelée à décider ce litige, a donné gain de cause à l'appelant. Son jugement, porté en appel à la cour du Banc de la Reine, a été infirmé à l'unanimité des juges présents. C'est de ce dernier jugement dont il s'agit maintenant.

Les faits établis en preuve justifient pleinement le jugement de la cour du Banc de la Reine. Il ne peut pas y avoir l'ombre d'un doute que ces trois actes de vente d'une même propriété ne sont que des actes simulés et nuls, et ne contiennent pas les véritables conventions des parties. La propriété vendue appartenait à Elizabeth Richie, femme séparée de biens, dont le mari était endetté envers les appelants et vivement pressé par eux de s'acquitter. Elle ne leur devait rien. C'est dans le but d'assurer le paiement de leur créance contre le mari qu'ils se sont faits consentir les divers actes de vente en question, pour trois prix différents. Cette propriété, prouvée valoir $5,000, est vendue par le premier acte pour $1,000, par le deuxième $750 et enfin $1,000 par le troisième. Le fait de ces trois ventes successives, entre les mêmes parties, de la même propriété, pour trois prix différents, prouvent à l'évidence que l'intention des parties n'était pas de faire une vente sérieuse pour un prix déterminé d'après la valeur de la propriété. Il manque donc dans ces divers actes un élément essentiel pour qu'il y ait eu vente, d'après l'autorité suivante. Aubry et Rau (1).

Le prix doit être sérieux. Il ne saurait être considéré comme tel, lorsqu'il présente, avec la valeur réelle de la chose vendue, une disproportion telle, qu'il est évident que les parties n'ont pu y voir un équivalent réelle de cette chose. Note 26, Pothier nos. 18 et 19; Duranton XVI, 100 et 104; 1, Duvergier, 148 et suivant. Zachariæ, § 349, texte et note 23. Il ne faut pas confondre un prix non sérieux ou dérisoire avec un prix qui serait seulement entaché de vileté. La vileté du prix n'autorise pas l'action en rescision dans les cas prévus par l'article 1674. Au contraire une vente dont le prix serait dérisoire devrait être considéré comme manquant de prix,

(1) Vol. 4, p. 336.

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et par conséquent comme inexistante.

Bien que les parties aient donné à leurs transactions la forme de l'acte de vente, il est évident que leur intention n'était pas de faire une vente sérieuse. Le procédé si étrange et si absurde des trois actes en question n'est qu'un déguisement de leur véritable convention. Il est clair que l'objet des appelants n'était pas d'acquérir la propriété, mais seulement de se procurer une hypothèque pour assurer le remboursement des avances qu'ils faisaient sous forme de prix de vente en même temps que le paiement des autres créances qu'ils avaient déjà contre le mari de la dite Elizabeth Richie, considérées comme autant d'hypothèques sur une propriété qui valait beaucoup plus que les diverses sommes dues et avancées ; cette transaction présente au moins une apparence raisonnable, mais elle cesse alors d'être une vente et n'est plus qu'une hypothèque. En réalité c'est un prêt qui a été fait et non une vente. C'est aussi l'interprétation que l'appelant R. H. Klock a donné à cette transaction en en faisant l'entrée dans son livre de compte où il en fait mention comme d'un

Mortgage, 7th February, 1879, interest of $1,000 mortgage due January 4th, 1879, $150.

Il est vrai que cette entrée ne concerne que le premier acte, mais les deux autres n'étant que la répétition du premier doivent nécessairement conserver aussi le caractère de prêt et ne peuvent en conséquence justifier les conclusions de l'action réclamant la possession de la propriété.

Ces prétendus actes de vente ne sont pas seulement nuls comme entachés de simulation, mais ils le sont encore parceque à la connaissance des appelants, ils n'ont été faits par Elizabeth Richie, femme séparée de biens, que pour assurer le paiement des dettes de son mari envers les appelants et d'autres créanciers.

La qualité de femme séparée de biens d'Elizabeth Richie est admise. La preuve établit que Richard

Chamberlin, son mari, était endetté et qu'il y avait plusieurs jugements contre lui. On voit par le témoignage de W. R. Kenney, employé par R. W. Klock pour faire à Elizabeth Richie, la prétendue venderesse, la remise des diverses sommes stipulées comme prix de vente, que l'emploi qui a été fait de ces diverses sommes n'était pas à son bénéfice. Kenney, après avoir reçu l'argent de R. M. Klock et l'avoir remis, pour la forme, à Elizabeth Richie, celle-ci lui rendit immédiatement un montant suffisant pour payer le jugement de Lauzon contre son mari, environ $463.74; aussi une autre somme de $229.00, montant de la dette du mari aux appelants. La somme de $700.00 payée lors de la deuxième vente fut employée à payer une hypothèque consentie par la dite Elizabeth Richie en faveur de la société du Service Civil. La somme de $107.91, montant de la troisième vente, fut aussi remise par les appelants à Kenney, qui la remit à la dite dame Elizabeth Richie. Sur ce montant, elle lui rendit de suite $321.78 pour payer les appelants de la balance du compte que leur devait son mari, $150.00 pour intérêt dû sur la première vente, $282 pour acquitter un jugement de T. B. Poitras contre son mari, $174.13 due à R. W. Sayer, $34 due à Greenleese par Chamberlin, $42.00 montant d'un jugement contre son mari en faveur de Dame veuve C. W. Church. Il ajoute qu'il agissait comme une sorte d'agent des Klocks en remettant ces argents à la dite Dame Richie, et comme l'agent de cette dernière en faisant les paiements qu'il énumère.

Cette preuve ne laisse aucun doute sur le fait qu'une très grande partie de l'argent provenant des prétendues ventes n'a été remise à la dite Dame Richie que dans le but de dénaturer la transaction, et de tâcher de lui donner l'apparence d'une transaction faite par elle-même pour son avantage personnel et dont elle avait

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profité en touchant elle-même les deniers. Mais le voile dont on a essayé de couvrir la transaction, laisse trop clairement voir que l'argent payé n'était pas destiné à rester entre les mains de la dite Dame Richie, —car il est aussitôt repris par les appelants pour se payer eux-mêmes, et d'autres créanciers, auxquels ils s'intéressaient. Il est donc évident que les dites prétendues ventes n'ont été faites que pour en arriver à se procurer les moyens de payer les dettes du mari de la dite Dame Richie et sont par tant nulles et sans effet comme contraires à l'article 1301 du Code Civil. Cet article dit :

La femme ne peut s'obliger avec ou pour son mari, qu'en qualité de commune; toute obligation qu'elle contracte ainsi en autre qualité est nulle et sans effet.

La nullité créée par cet article est d'ordre public et a toujours été prononcée par les tribunaux chaque fois qu'il a été prouvé qu'une obligation en apparence contractée par la femme seule, était en réalité pour les affaires de son mari. La jurisprudence sur cette question est bien établie par nombre de décisions qui ne permettent pas d'élever de doute à ce sujet. Il serait tout-à-fait inutile d'entrer dans la considération des points de droit soulevés à ce sujet dans cette cause ; car on peut considérer la discussion sur les questions comme à peu près épuisée. Je me contenterai donc de référer à quelques unes des principales causés où il a été question de l'application de l'article 1301.

Une de celle où la question a été traitée avec le plus de développement et de science par les avocats qui y étaient concernés, est celle de *Buckley* v. *Brunelle et vir.* (1). L'honorable juge en chef Dorion occupait pour l'appelant et l'honorable juge Rainville pour les intimés. Dans le rapport de cette cause on trouvera tous les arguments de part et autres et une revue com-

(1) 12 L. C. J. 1353.

plète des autorités pour et contre. Cette belle et savante étude de la questien a fait dire avec justice à l'honorable juge Mondelet :

En discutant les questions, les avocats de part et d'autre ont fait preuve d'une grande habilité, et avec un luxe extraordinaire d'érudition légale, nous ont fait remonter aux sources vénérées de notre droit, jusqu'au senatus-consulte Villéien et nous ont aidé dans nos délibérations, des opinions de presque tous les commentateurs, sur cette fameuse disposition légale.

La lecture du rapport suffira pour faire voir que quels que soient les moyens détournés employés pour éluder l'article 1301, si la preuve peut porter ces faits à la connaissance de la cour, celle-ci annullera toute obligation contractée directement ou indirectement par la femme en violation de cet article.

Dans la cause de *Bélanger et cie.* v. *Brown* (1), dont les faits ont une grande analogie avec ceux de la présente, le même principe a reçu son application. Le résumé de la décision est en ces termes :—

That a deed of sale made by a wife *commune en biens* to a third party of her *propre* for a pretended consideration of $400 when the real consideration was a lease of movables by the third party to her husband, will be set aside as a contravention of C.C. 1301.

L'honorable juge Berthelot qui a prononcé le jugement dans cette cause dit au sujet de la vente du bien propre de la femme :—

La femme qui vend sont propre pour payer la dette de son mari ou pour garantir ses obligations et l'aider dans son commerce, ne s'oblige pas seulement comme commune, mais elle s'oblige directement pour son mari, et c'est ce que la loi a en vue de prohiber sous quelque forme que ce soit, pour assurer la fortune de la femme de l'atteinte des mauvaises affaires de son mari.

Le défendeur a rapporté dans son factum l'opinion qui est donnée comme celle du juge Meredith lors du jugement dans la cause de *Boudrier* v. *McLean* en appel :—

A married woman unquestionably has the power of alienating her own *propres* to pay the debt of her husband.

Si cette proposition est vraie, en droit abstraitement parlant, ce ne peut être que lorsque la femme reçoit réellement le prix de son propre, et l'emploie librement à payer la dette de son mari, mais

(1) 14 Jurist 259.

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non pas dans ce cas-ci, lorsqu'elle le vend pour faire faire commerce à son mari.

Cette maxime ne peut pas plus prévaloir dans cette cause plus qu'elle n'a prévalu dans la cause de *Boudria* v. *McLean*, auquel jugement le juge Meredith a concouru.

La preuve a établi d'une manière positive que dans le cas actuel la plus grande partie du prétendu prix de vente a été employée à payer les dettes du mari.

Dans la cause de *Walker et vir.* v. *Crebassa Junior* (1), la décision est ainsi résumée :—

1o. Que dans l'espèce actuelle la vente faite au défendeur, par la demanderesse séparée de biens, de certains immeubles qui lui sont propres, doit être rescindée sur le principe qu'aucune valeur n'a été prouvée lui avoir été payée. 2o. De plus, par la cour inférieure, que les engagements contractés à cette vente par la demanderesse l'ayant été pour les dettes de son mari, sont nuls en vertu de la 55me section du ch. 37 des statuts refondus du Bas-Canada.

Cette disposition contient le principe consacré par l'article 1301 C.C., et est conçue dans les termes suivants :

Nulle femme mariée ne pourra se porter caution ni encourir de responsabilité en aucune autre qualité que comme commune en biens avec son mari pour les dettes, obligations ou engagements contractés par le mari avant le mariage ou pendant la durée du mariage, et tous engagements contractés par une femme mariée en violation de ces dispositions seront absolument nuls et de nul effet.

Dans cette cause, comme dans celle dont il s'agit ici, la femme était séparée de biens et vendait une de ses propriétés pour payer une dette de son mari.

Dans la cause de *La Société de Construction de St. Hyacinthe* v. *Brunelle et vir.* (2), il a été jugé par l'hon. juge Sicotte : 1o. Que la femme mariée et séparée de biens ne peut s'engager en aucune manière pour les affaires de son mari, et que si elle le fait, son engagement sera cassé et annulé comme fait en fraude et en violation des lois d'ordre public. 2o. Que pour savoir si l'obligation contractée au nom de la femme seule, l'a été pour les affaires de son mari, il convient de s'enquérir de toutes les circonstances dans lesquelles l'obligation a été contractée et d'avoir égard aux

(1) 6 L. C. Jur. 53. (2) 1 R. L. 557.

présomptions qui découlent des faits prouvés. 3o. Que dans l'espèce, bien que l'obligation ait été contractée par la défenderesse seule, en faveur de la demanderesse, il résulte des faits prouvés, que la demanderesse a contracté avec le mari de la défenderesse et que cette dernière a consenti une obligation hypothécaire, en faveur de la demanderesse, pour compléter et assurer les transactions de son mari.

Dans la cause de *Rhéaume* v. *Caille et vir.* (1), il a été décidé par l'honorable juge Johnson :

> That an obligation made by a wife to repay money advanced for her husband's use is an absolute nullity; and even a representation by the wife to the lender that the money was for herself does not affect the case.

Il serait inutile de multiplier d'avantage les décisions, car elles sont toutes au même effet. Quant aux opinions des jurisconsultes on en trouvera une collection à peu près complète dans la cause de *Buckley* v. *Brunelle et vir.* (2). Le principe sur lequel reposent les décisions citées plus haut est un article du code civil sur l'interprétation duquel nos cours ont été unanimes. Pour lui donner tout son effet il suffit de prouver, quelles que soient les voies indirectes employées pour obtenir l'obligation de la femme mariée, qu'en réalité cette obligation n'a pas été contractée pour son bénéfice, mais bien pour celui de son mari. Tout se réduit donc à une question de preuve. Celle faite en cette cause n'a pas laissé de doute sur le caractère des transactions dont il s'agit. Il n'y a pas d'autres conclusions à tirer de la preuve que celle que les divers actes de vente dont il s'agit sont feintes et simulées et n'ont pris cette forme que pour dissimuler le fait que l'obligation de la femme était contractée en partie pour son mari. En conséquence, ces actes sont nuls comme contraires à l'article 1301 du Code civil et ont été justement déclarés tels par le jugement

(1) 1 L. N. 340. (2) 21 L. C. J. 133.

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de la Cour du Banc de la Reine qui doit être confirmé. Appel renvoyé avec dépens.

HENRY J.—I am of opinion that this appeal should be dismissed. There is evidence that the deeds of sale were simulated and were in truth a transaction by which the wife undertook to secure the payment of her husband's debts. The entries in the appellants' books, as well as other documentary evidence, clearly show that the alleged sale was intended to operate as a mortgage. Now the law is very plain, and although it is unfortunate for the party who pays out his money under such circumstances he cannot expect courts of justice to help him to get possession of property in contravention to art. 1301 of the civil code.

TASCHEREAU J.—Je concours dans le jugement de la majorité de cette cour. Au fond il ne s'agit que d'une question de fait, savoir : si les actes de vente consentis par madame Chamberlin en faveur de l'appelant sont simulés. La cour d'appel ainsi que trois juges de cette cour sont d'avis que ces actes ont été simulés. Je concours sur la question de fait, quant à la question de droit elle ne peut souffrir aucune difficulté. Je suis d'avis que l'appel doit être renvoyé avec dépens.

GWYNNE J.—The question in this case is simply one of fact, namely, whether the instrument of the 14th Jan., 1876, was executed as, and was intended to be, an absolute *bonâ fide* sale of the lands therein mentioned by Elizabeth Richie, or was it intended to operate by way of security only for the debts of her husband with the knowledge of the plaintiffs, while assuming the appearance of a sale for the purpose of evading the nullity imposed by article 1301 C.C.

The learned judges of the Court of Queen's Bench of Montreal, in Appeal, have rendered judgment to the

effect that it was executed with the intent of operating as such security only and with intent to evade article 1301. I see no reason for differing from, on the contrary, I entirely concur in, this judgment.

The instruments of the 23rd Feb., 1877, and 23rd Feb., 1878, which simply impose further charges upon the lands and qualify Mrs. Richie's right of redemption of the lands as expressed in the instrument of the 14th January, 1876, unless and until those further charges should be also paid, support this conclusion, and the entry in the account of Mrs. Richie's husband in the plaintiffs' books, of the item, under date Feb. 7, 1879, of $150.00 for interest on $1,000.00 mortgage, due "Jan. 14th, 1879," and for which sum the plaintiffs took additional security from the husband, puts the matter in my judgment beyond all doubt—that sum of $150.00 was a year's interest at 15 per cent. on the $1,000.00 mentioned as the consideration of the deed of the 14th January, 1876, which sum was by that deed expressed to be payable by the wife, and only in the event of her redeeming the lands under the provision in the deed in that behalf contained. The plaintiffs having subsequently taken security from the husband for a year's interest due on the 14th Jan., 1879, on the $1,000.00 mentioned in the deed of Jan., 1876, speaking of it as a mortgage in the account kept in their own books with the husband, places beyond all doubt that the deed of Jan., 1876, was executed by way of security only for the husband's debt, and the form given to that deed is explicable only as by way of evasion of the article 1301. The deed, therefore, is wholly void and, it failing, the plaintiffs can have no better title by the subsequent deeds whatever use was made of the money which constituted the consideration for them respectively, the greater part of which, however, was, with the knowledge of the plaintiffs,

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advanced by them for payment of the husband's debt to themselves and others upon the security of the additional charges, expressed in the deeds, respectively imposed by Mrs. Richie upon the lands mentioned in the deed of Jan. 14th, 1876. The appeal should therefore be dismissed with costs and the judgment below varied so as to dismiss simply the plaintiffs' action in the Superior Court with costs.

Appeal dismissed with costs.

Solicitor for appellant: *J. R. Fleming.*

Solicitor for respondents: *John Aylen.*

JOHN LYNCH AND ANOTHER (DEFENDANTS) ..... } APPELLANTS;

1887 Nov. 27.

1888 Mar. 15.

AND

FREDERIC E. SEYMOUR (PLAINTIFF)....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Written instrument—Construction of—Lease or license—Authority to work—8 Anne ch. 14 s. 1.

In an indenture describing the parties as lessor and lessees respectively the granting part was as follows: "Doth give, grant, demise and lease unto the said (lessees) the exclusive right, liberty and privilege of entering at all times for and during the term of ten years from 1st January, 1879, in and upon (describing the land) and with agents, laborers and teams to search for, dig, excavate, mine and carry away the iron ores in, upon or under said premises, and of making all necessary roads, &c., also the right, liberty and privilege to erect on the said premises the buildings, machinery and dwelling houses required in the business of mining and shipping the said iron ores, and to deposit on said premises all refuse material taken out in mining said ores." There was a covenant by the grantees not to do unnecessary damage and a provision for taking away the erections made and for the use of timber on the premises and such use of the surface as might be needed.

The grantees agreed to pay twenty-five cents for every ton of ore mined, in quarterly payments on certain fixed days, and it was provided how the quantity should be ascertained. It was also agreed that the royalty should not be less than a certain sum in any year. The grantees also agreed to pay all taxes and not to allow intoxicating drinks to be manufactured on the premises or carry on any business that might be deemed a nuisance. There were provisions for terminating the lease before the expiration of the term and covenant by the lessor for quiet enjoyment.

In an interpleader issue, where the lessor claimed a lien on the goods of the lessees for a year's rent due under the said indenture by virtue of 8 Anne ch. 14 sec. 1,

Held, per Ritchie C.J., and Henry and Taschereau JJ., that this

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

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instrument was not a lease but a mere license to the grantee to mine and ship the iron ores, and the grantor had no lien for rent under the statute. Strong, Fournier and Gwynne JJ. *contra.*

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Queen's Bench Division (2) by which a verdict for the defendants on the trial was set aside and judgment entered for the plaintiff.

This is an interpleader issue under the following circumstances:

The defendant Lynch having obtained judgment against the Hastings Iron Co., the goods and chattels in question were seized under an execution issued on said judgment. The plaintiff claimed that $2,400 was due him for rent of the premises on which the goods were seized, under the statute 8 Anne ch. 14, and the issue was brought to test his right to the goods on such claim. The defendant Barnum was made a party as being interested in said judgment.

The sole question to be determined in this case is whether the instrument under which the plaintiff claims such rent to be due is a lease or a mere license. Such instrument is as follows:—

This indenture made in duplicate this twelfth day of November, in the year of our Lord One Thousand Eight Hundred and Seventy-Eight, in pursuance of the Act respecting short forms of leases.

BETWEEN Frederick Elisha Seymour, of the Township of Madoc in the County of Hastings and Province of Ontario, gentleman, known hereinafter as the lessor of the first part, and Charles J. Pusey, of Sodus Point, in State of New York, gentleman, and A. W. Humphreys, of the city of Brooklyn, in the State of New York, gentleman, jointly and severally, and known hereinafter as the lessees of the second part.

(1) 12 Ont. App. R. 525. (2) 7 O. R. 471.

WITNESSETH: That the said party of the first part, for and in consideration of the rents and royalties to be paid, and of the covenants, agreements and conditions hereinafter named to be kept and performed by the said parties of the second part, their heirs, executors, administrators, assigns and successors hath and by these presents doth give, grant, demise and lease unto the said parties of the second part, their successors or assigns, the exclusive right, liberty and privilege of entering at all times, for and during the term of ten years from the first day of January, in the year of our Lord one thousand eight hundred and seventy-nine, in and upon that certain tract of land situated in the township of Madoc aforesaid, consisting of the west half of lot number eleven, in the fifth concession of the said Township of Madoc, containing by admeasurement one hundred acres of land, be the same more or less, reserving that portion thereof occupied or hereafter to be occupied as roadway by the Belleville and North Hastings Railway, and with agents, laborers and teams, to search for, dig, excavate mine and carry away the iron ores in, upon or under said premises, and of making all necessary roads for ingress and egress to, over, and across the same, to public roads or places of shipment; also the right, liberty and privilege to erect on the said premises the buildings, machinery and dwelling houses required in the business of mining and shipping the said iron ores, and to deposit on said premises all refuse material taken out in mining said ores. The said parties of the second part to do no unneccessary damage to said premises, and at the termination of this indenture, and for three months thereafter, as well as during its continuance, the said parties of the second part, their successors and assigns are to have the right to take down and remove their erections before named and to

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take away ores mined, and to use such timber as may be found on the premises as may be required in carrying on mining operations and such use of the surface as may be needed for all other purposes appertaining thereto.

In consideration whereof, the parties of the second part, their heirs, executors, administrators, assigns and successors agree to pay to the party of the first part, his heirs and assigns, twenty-five cents of lawful money of Canada for every ton of twenty-two hundred and forty pounds of clean and merchantable iron ore mined and taken away from the said premises by them the quantity of the iron ore so taken away to be ascertained by the scales and records of the Belleville and North Hasting Railway Company or the books of the lessees of said railway, access to whose books and records is hereby assured to the lessor, whenever desired by him in order to ascertain the quantity of ore shipped and the amount of royalty due to him. Payments of royalty are to be made quarterly on first days of January, April, July and October in each and every year at the village of Madoc, in the county of Hastings, during the continuance of this lease, the first payment to be made on the first day of April, one thousand eight hundred and seventy-nine.

Then follows certain covenants by the lessees as to getting out a specified quantity of ore each year, due payment of the royalties, payment of taxes, &c., and a provision for termination of the lease before the expiration of the term. There is also a covenant by the lessor for quiet possession and a warranty of title.

On the trial a verdict was given for the defendants, the learned judge holding that the above instrument was not a lease but a license. The Queen's Bench Division reversed this decision and on appeal to the Court of Appeal the court was equally divided and

the judgment of the Queen's Bench Division was sustained. The defendants then appealed to the Supreme Court of Canada.

Northrup for the appellant.

There is only the one question to be determined, namely, whether this document is a lease within the statute of Anne or a mere license to dig and mine.

That it cannot be held to be a lease is clear on the authority of *Doe d. Hanley* v. *Wood* (1).

In the case of *Roads* v. *Overseers of Trumpington* (2) relied on by the respondents the circumstances were very different and that case does not apply.

Clute for the respondent.—The document is called a lease by the parties and contains the usual provisions of a lease. The lessee had the exclusive right of entry. *Roads* v. *Overseers of Trumpington* (2) is strongly against the appellant.

Sir W. J. RITCHIE C. J.—(After reading the material portion of the lease his lordship proceeded as follows):

The only question in this case is as to the character of the instrument of the 12th November, 1878, made between the plaintiff of the first part and Pusey and Humphries of the second part. Was it a lease of the premises mentioned or a mere license to enter and search and take the iron ore? If a lease it is conceded that the respondent should succeed.

I think it is no lease but an exclusive license or liberty to enter on the premises mentioned in the instrument for the purpose of searching for and severing and carrying away the iron ores in, upon or under the said premises.

The intention of the parties must be collected from the terms of the instrument. The language of the

(1) 2 B. & Al. 724. (2) L. R. 6 Q. B. 56.

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statute under which it is claimed these goods are not liable to be taken, 8 Anne ch. 14, is as follows:—

No goods or chattels whatsoever lying and being in or upon any messuage, lands or tenements which are or shall be leased for life or lives for term of years at will or otherwise, shall be liable to be taken by virtue of any execution.

And in the second clause, which applies to the fraudalent removal of goods different words are used:

Any messuages, lands or tenements, upon the demise whereof any rents are or shall be reserved or made payable.

I have been unable, after a most careful perusal and consideration of the document in question, to discover evidence of any intent of the parties that the lands in question shall be leased for a term of years, in other words, that the grantor or licensor should divest himself of the possession of the premises and the licensee should come into it for a determinate period, but the contrary; all that was granted was liberty to search for and work the mines of iron ore, a grant of a smaller interest than might have been passed by the licensor. Had the parties intended that there should be a demise of the land as well as the right to enter, search for, dig and work it might have been done in simple, plain language, which I fail to see in this deed. There is a very broad distinction between a privilege to search for and obtain minerals and a sole and exclusive occupation of the land itself. *Humphrey* v. *Brogden* (1), very clearly shows that while the possession of the surface and the mine may go together the two may be separated and then they are as distinct as several closes, and in *Keyse* v. *Powell* (2), Lord Campbell delivering the judgment of the court said:—

The surface and the minerals may be dissevered in title, and become separate tenements, as appears abundantly from the cases cited; *Curtis* v. *Daniel*, (3); and *Humphreys* v. *Brogden* (4).

The deed seems to me to express, very intelligently

(1) 12 Q. B. 739.
(2) 2 E. & B. 144.
(3) 10 East 273.
(4) 12 Q. B. 739.

and but for the difference of judicial opinion I should say very clearly, what the licensor intended to grant, viz., in the language of the deed:

The exclusive right, liberty and privilege of entering at all times for and during the term of ten years from the first day of January, in the year of Our Lord one thousand eight hundred and seventy-nine, in and upon that certain tract of land situated in the township of Madoc aforesaid, consisting of the west half of lot No. 11, in the 5th concession, of the said township of Madoc, containing by admeasurement 100 acres of land, be the same more or less, reserving that portion thereof occupied or hereafter to be occupied as road way by the Belleville and North Hastings Railway, and with agents. laborers, and teams,

To do what?

to search for, dig, excavate, mine and carry away the iron ores in, upon or under said premises, and of making all necessary roads for ingress and egress to, over, and across the same, to public roads or places of shipment; also the right, liberty and privilege to erect on the said premises the buildings, machinery and dwelling houses required in the business of mining and shipping the said iron ores, and to deposit on said premises all refuse material taken out in mining said ores.

Here we have not a word as to the occupation or possession of the land except as may be necessary to the mining and shipping the ores discovered on the land authorized to be searched for, but simply a right of entry for a specific purpose and the liberty of erecting the buildings, &c., required in the business of mining and shipping the ores, and for which authority was given to search and mine and carry away; but we have a very significant intimation that the provision quoted was not to apply to the possession and occupation of the land, for the deed, after providing that the parties of the second part should do no unnecessary damage and that at the termination of the indenture and for three months thereafter, as well as during its continuance the parties of the second part should have the right to take down and remove their erections and to take away the ores mined, it then proceeds to deal with the use of the surface; after

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providing that the licensee may use such timber as may be then found on the premises as may be required in carrying on mining operations, it proceeds to provide for the limited use of the surface in these words :

and such use of the surface as may be needed for all other purposes appertaining thereto.

That is, appertaining to the mining operations. Does not this show, negatively, that the licensee is not to have the use or possession of the surface not needed for the positive purposes specified ? It appears to me to show conclusively that the possession of the surface and the mine were treated as separate and distinct closes and that the privilege of the use of the timber was confined to what might be required in carrying on mining operations and the use of the surface was confined to purposes appertaining to mining operations and to those alone, and that there was no intention to interfere with the rights of the licensor beyond what was incident to those operations, and therefore that the deed was not intended to interfere with the licensor's dealing with the surface subject always to the rights of the licensee with reference to searching for and working the mines of iron ore.

I therefore think this instrument cannot be so construed as to prevent the licensor, subject to such rights of the licensee, dealing with and using the surface of the land as if this deed had not been made, either by using it for agricultural purposes or, should a mine of coal or other mineral be discovered on this land, working such a mine or granting a precisely similar privilege or right of entry to any other parties to enter and search for coal or any other minerals and if discovered to work the mine so discovered upon the same terms and conditions as expressed in this license, not, however, interfering, by himself or his

licensees, with the rights and privileges granted under the deed in this case with respect to the iron ores, the entry under this deed being merely in reference to the iron ore no other mines or rights in other mines being available to the licensee under this license.

In consideration of the rights and privileges conferred the parties agree to pay 25 cts. for every ton of 2,240 pounds of clean and merchantable iron ore mined, payments to be made quarterly, the first payment to be made on the first of April, 1879, and the parties agree to mine, &c., in each year a certain number of tons, and the parties of the second part agree to pay all taxes and perform all statute labor assessed upon the premises and not to allow any manufacture or traffic in any intoxicating drinks upon said premises, and will not carry on any business that may be deemed a nuisance thereupon. There is a provision for the termination of the license on non-fulfilment of the conditions and covenants for quiet possession and a covenant that the licensor will warrant and secure the parties "in the rights and privileges herein granted them from all and every other person or persons whatsoever," which rights and privileges are simply, in my opinion, a license to enter and search and mine the iron ores found and not to meddle or interfere with the surface or the mines beyond the limited permission given to use the surface as before referred to. I can discover nothing in these last provisions which are calculated to interfere with the construction I have indicated or to give the licensees any other and larger rights to or interests in the lands as lessees thereof beyond what is given them by the express terms of the deed.

STRONG J.—The action in the court below was an interpleader issue directed to try the right to certain

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property seized in execution on the 7th of January, 1884, by the sheriff of Hastings under a writ of *fieri facias* tested the 7th day of January. 1884, issued out of the Queen's Bench division of the high court of justice of Ontario, upon a judgment of that court recovered by John Lynch at his suit against the Hastings Iron Company; in this issue the respondent, Frederick Elisha Seymour, was plaintiff and the appellant, John Lynch, was defendant.

The goods in question were seized on the west half of lot No. 11 in the 5th concession of Madoc.

The respondent claimed one year's rent as against the execution amounting to $2,400, under a lease bearing date the 12th day of November, 1876.

The property seized has been sold by the sheriff,and the money, $750, is now in the sheriff's hands to abide the result of the interpleader issue.

There was at the time of the seizure $6,500 due for rent under the lease.

The lease in question is set out in the report of the case before the Queen's Bench division in 7 O. R. 471.

The respondent claims the proceeds of sale of the goods to satisfy his rent under 8 Anne, ch. 14.

The appellant resists this claim upon the ground that the instrument or the 12th of November, 1878, is a license and not a lease, and that the statute of Anne does not apply. The question for determination is as to whether the instrument of the 12th of November, 1878, is a lease or a mere license.

The issue was tried before Mr. Justice Patterson without a jury, who gave judgment for the appellants the execution creditors, holding that the instrument in question was not a lease but a license. This judgment was reversed by the Queen's Bench division and that decision was afterwards affirmed by the Court of Appeal, the judges in the latter court being equally

divided in opinion, the Chief Justice and Mr. Justice Burton adopting the view of Mr. Justice Patterson, and Mr. Justice Osler and Mr. Justice Ferguson agreeing in opinion with the Queen's Bench division. The defendants in the issue, the execution creditors, have now appealed to this court.

After some hesitation and fluctuation of opinion I have come to the conclusion that the view of the Queen's Bench Division and of the learned judges who agreed with them in the Court of Appeal was correct, and that the appeal must be dismissed.

There can be no question that if we are to construe this indenture as conferring upon the lessees an exclusive right of entry upon the land—that is, a right to enter exclusive of the grantor—it amounts to a demise of the land itself. *Roads* v. *Trumpington* (1); *Chetham* v. *Williamson* (2). The words of grant or demise are as follows :—

WITNESSETH: That the said party of the first part, for and in consideration of the rents and royalties to be paid, and of the covenants, agreements and conditions hereinafter named to be kept and performed by the said parties of the second part, their heirs, executors, administrators, assigns and successors hath and by these presents doth give, grant, demise and lease unto the said parties of the second part, their successors or assigns, the exclusive right, liberty and privilege of entering at all times, for and during the term of ten years from the first day of January, in the year of our Lord one thousand eight hundred and seventy-nine, in and upon that certain tract of land situated in the Township of Madoc aforesaid, consisting of the west half of lot number eleven, in the fifth concession of the said Township of Madoc, containing by admeasurement one hundred acres of land, be the same more or less, reserving that portion thereof occupied or hereafter to be occupied as roadway by the Belleville and North Hastings Railway, and with agents, laborers and teams, to search for, dig, excavate mine and carry away the iron ores in, upon or under said premises, and of making all necessary roads for ingress and egress to, over, and across the same, to public roads or places of shipment; also the right, liberty and privilege to erect on the said premises the buildings, machinery

(1) L. R. 6 Q. B. 56. (2) 4 East 469.

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and dwelling houses required in the business of mining and shipping the said iron ores, and to deposit on said premises all refuse material taken out in mining said ores. The said parties of the second part to do no unnecessary damage to said premises, and at the termination of this indenture, and for three months thereafter as well as during its continuance the said parties of the second part, their successors and assigns are to have the right to take down and remove their erections before named and to take away ores mined, and to use such timber as may be found on the premises as may be required in carrying on mining operations and such use of the surface as may be needed for all other purposes appertaining thereto.

These words are, no doubt, to a certain extent ambiguous, for it is not clear whether it was intended to give the lessees an exclusive right of entry, with the power to excavate, mine and carry away iron ore superadded, or whether it was the intention merely to give an exclusive license to excavate and carry away the ore and for that purpose, and as incidental thereto, to enter upon the land. The respondent, of course, contends for the latter construction and the appellant for that first mentioned.

The first observation which it occurs to me to make is, that as there is a real ambiguity in the expressions used the deed is to be construed most strongly *contra proferentem*, that is, against the grantor; and we are, therefore, to ascribe to it an operation which would confer upon the grantee the largest interest which the words will admit, and this requires us to read the language used in the sense contended for by the respondent, as granting an exclusive right of entry and so amounting to a demise. If, therefore, there was nothing else in the deed confirmatory of this construction I should, upon this consideration alone, be prepared to concur in the judgment of the Queen's Bench division.

There are, however, other provisions in the instrument which seem to me to be conclusive of the question in controversy. The lessees are to be at liberty to erect on the premises buildings, machinery and dwelling

houses. Now it is not to be doubted that it was intended that these erections should be and remain, during the term, in the exclusive possession of the lessees who were guaranteed the quiet enjoyment of them, and if the exclusive possession of these houses and buildings was to be in the lessees it follows, of course, that the land on which they were erected should also be and remain in the like exclusive possession of the lessees. Then how is it possible to say that it was intended to discriminate between the land occupied by these erections and the other land comprised in the lease ? Further, the liability to pay taxes and perform statute labor is imposed on the lessees, a provision altogether inconsistent with the notion that they are to have no interest in the land beyond that of mere licensees. The lessees also covenanted not to allow any manufacture of, or traffic in, intoxicating drinks upon the premises, and this covenant they could not properly perform unless they had the exclusive occupation and possession of the land itself. They also undertook not to carry on upon the premises any business which might be deemed a nuisance, a provision which, by itself, plainly implies an exclusive occupation by them. There is also the claim of re-entry which, although if it stood alone, might have been insufficient to have stamped the character of a lease on the instrument yet, when considered with the other clauses mentioned, is a circumstance of great weight as warranting the inference that the lessees were to have an exclusive occupation.

All these provisions, although they might not be conclusive if it were not for the ambiguity before pointed out in the operative words of demise, yet, taken in conjunction with those words and with the principle of construction which requires the deed to be read most strongly against the grantor, leave in my

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mind no doubt that the Queen's Bench Division rightly held this instrument to be a lease, operating as a demise of the land itself and not a mere license to mine and take away the minerals.

There is a plain distinction between this case and that of *Doe d. Hanley* v. *Wood* (1), for in that case the instrument which was held to be a license contained no words of demise, like those we find in this indenture, of the exclusive right of entry; had there been such words there can be little doubt, from what is said by Lord Tenterden C.J. in giving the judgment of the court, that the decision would have been different.

The appeal should be dismissed with costs.

FOURNIER J. was also of the opinion that the appeal should be dismissed.

HENRY J.—I entirely concur in the views contained in the judgment delivered by the learned Chief Justice. This document must be read in connection with the surrounding circumstances and with the knowledge derived from the admissions of the parties.

The instrument undertakes to give to the parties named as the lessees, their heirs, executors, &c., the exclusive right, liberty and privilege of entering at all times. What is the meaning of that? It is the exclusive right of entering at all times on the land of the lessor. No more than that. If they were only to enter once it would have been very easy to say, in so many words, "we lease you the land for so many years on these conditions." But here the words used are "give, grant, demise and lease." These are words referring to certain absolute conveyances of land and have a well known, definite meaning which can be

(1) 2 B. & Al.724.

applied to the construction of any document. Here, under a grant or demise for ten years the grantees had an exclusive right to enter at all times. Now, as I stated before, if they were only to enter once why was it necessary to provide that they could enter at all times?

The privilege of entering at all times was given for the purpose of allowing the grantee to search for, dig, excavate, mine and carry away the iron ores, and to make all necessary roads for ingress and egress over the premises to public roads or places of shipment. But if the grantees were to have a lease of the land there was no necessity to give them this special license. They were also to have the right, liberty and privilege of erecting on the premises the buildings, machinery and dwelling houses required in the business of mining and shipping the said iron ores. That is a limited license. They were to erect buildings on the land but for a special purpose. There is no general authority under this document to put up dwelling houses, stores or barns, but a special authority to erect certain buildings required in the mining of said ores.

Then there are other provisions. The grantees were to deposit on the premises all refuse material taken out in mining said ores. These parties had a license to work, to mine, to take and carry away the ore, and here was a special authority given them to pile their refuse stuff on the premises. Again, they were to do no unnecessary damage, and were to be allowed the use of the timber on the premises for their mining operations "and such use of the surface as might be needed for all other purposes appertaining thereto." Their use, then, of the surface was limited and they were to have a special right to use such timber on the premises as might be required for their purposes.

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Now looking at the whole of this document what does it after all amount to? Could any one say that this was a lease which would deprive the lessor from working, say, a coal mine found on the land? That is the way documents of this kind are to be looked at. We must look to see what the words in it apply to, and if they only apply to the subject of license we must construe them accordingly. Words that are inapplicable should not be considered.

I would, therefore, look at this document with the construction I think the whole of it bears, taking it altogether and leaving out the effect of the two or three words "grant, demise, &c." These words we must limit, I take it, in this way—"I grant you, demise to you, etc., the special right of doing so and so for ten years." It is not a lease by which anything more than this is given.

Under these circumstances I cannot come to the conclusion that this is a lease. Under the statute referred to the grantor has no lien for rent and therefore I think the judgment should be in favor of the execution creditors. The appeal should be allowed and the judgment of the court below reversed.

TASCHEREAU J.—The question in this case, which seems to be a very simple one at first sight proves to be not so clear after all. On the trial Mr. Justice Patterson ruled that it was a license; the Queen's Bench Division held it a lease and in the Court of Appeal two judges held it the one and two the other. In this court we are divided, three to three. I am of opinion that it is a license and not a lease. Mr. Justice Ferguson calls it a lease coupled with a license.

My judgment would be to allow the appeal. I would adopt the reasoning of Mr. Justice Burton in the Court of Appeal.

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GWYNNE J.—In my opinion the indenture is a lease of the whole lot with liberty to search for and take out ore in any part of it, and the provision near the end, as to taking timber, and as to dealing with the surface, is to enable the lessee to use the timber for mining purposes and so to deal with the surface as might be necessary for mining purposes, which acts could not be done by a lessee of land as a farm; the condition of these acts being authorized being that they should be done *bonâ fide* for mining purposes.

Appeal dismissed without costs.

Solicitors for appellants: *Denmark & Northrup.*

Solicitors for respondent: *Clute & Williams.*

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*Feb. 29.

*June 14.

DONALD DOWNIE (DEFENDANT).....APPELLANT.

AND

THE QUEEN (PLAINTIFF).....RESPONDENT.

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

Criminal appeal—Indictment for perjury—Evidence of special facts—Admissibility of.

D. in answering to *faits et articles* on the contestation of a *saisie arrêt*, or attachment, stated among other things, "1st. that he, D., owed nothing for his board; 2nd. that he, D., from about the beginning of 1880, to towards the end of the year 1881, had paid the board of one F., the rent of his room, and furnished him all the necessaries of life with scarcely any exception; 3rd. that he, F., during all that time, 1880 and 1881, had no means of support whatever."

D. being charged with perjury, in the assignments of perjury and in the negative averments the facts sworn to by D. in his answers were distinctly negatived, in the terms in which they were made.

Held, that under the general terms of the negative averments it was competent for the prosecution to prove special facts to establish the falsity of the answers given by D. in his answers on *faits et articles*, and the conviction could not be set aside because of the admission of such proof.

Even if the evidence was inadmissible there being other charges in the same count which were pleaded to, a judgment given on a general verdict of guilty on that count would be sustained.

THIS was an appeal from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) maintaining the verdict and rejecting the motions for new trial, and in arrest of judgment on the following reserved case on a charge of perjury.

"At the Criminal Term of the Court of Queen's Bench, held at Montreal in the month of June last,

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

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

the defendant Donald Downie was indicted for perjury. The indictment contained two separate and distinct counts. In the first count the defendant was charged with having committed perjury in a deposition which he had given on the 1st day of April 1885, when he was examined as a witness in a case then pending in the Superior Court, wherein he, Downie, was plaintiff, and Frederick W. Francis was defendant."

"By the second count, the defendant was charged with having committed perjury on the 8th day of April 1887, when examined on *faits et articles* on the the contestation of a *saisie arrêt* or attachment made in the same cause in the hands of one Benjamin Clément."

"After the close of the case for the prosecution the first count of the indictment was withdrawn from the consideration of the jury by the court, on the ground that there was no legal proof of the swearing of the stenographer by whom the deposition had been taken, and the defendant was directed to proceed to his evidence on the second count. The assignment of perjury in this count was as follows:"

"And further the jurors of Our Lady the Queen, upon their oath present that:"

"Heretofore, to wit, in a certain suit bearing the number one thousand and eight among the records of the Superior Court for the District of Montreal, in which Donald Downie of the City of Montreal, advocate, was plaintiff, and Frederic W. Francis was defendant, upon the contestation of a writ of *saisie arrêt* after judgment issued therein by the said Donald Downie against the said Frederick W. Francis, in the hands of Benjamin Clément in his quality of curator as garnishee, whose declaration declared that he owed the said Frederick W. Francis

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a life rent which life rent the said Frederick W. Francis contended was unseizable by reason of its being an alimentary allowance, he the said Donald Downie was during the trial of the issues raised upon the said garnishee's declaration duly examined, on the part of the said Frederick W. Francis, upon interrogatories *sur faits et articles*, and was then and there duly sworn, to wit, on the eighteenth day of April 1887, before the Honorable Mr. Justice Ouimet then holding the Superior Court at the City of Montreal aforesaid, and did (sic) (the word "then" is not in the indictment,) and there upon his oath aforesaid, falsely, wilfully and corruptly depose and swear in substance and to the effect following: that he *owes* nothing either legally or morally in any way for board or other small items, all of which debts had been paid by him, the said Donald Downie *long ago*. That the said Frederick W. Francis from about the early part of one thousand eight hundred and eighty till towards the end of one thousand eight hundred and eighty-one, *owed* him, the said Donald Downie for everything which went to make up the necessaries of life, not only for the rent of his rooms, but his whole living during that period of time without any interruption *scarcely* except a day or two at a time, when he might have been elsewhere, he lived at his the said Donald Downie's expense altogether. That he the said Donald Downie always paid his own board. That he and the said Frederick W. Francis lived together during one thousand eight hundred and eighty and one thousand eight hundred and eighty-one. That the said Frederic W. Francis lived with him the said Donald Downie and depended upon him exclusively for his livelihood (sic) and the said Frederick W. Francis had no means of any kind:

The negative averments to this second count of the indictment are as follows:

"Whereas in truth and in fact the said Donald Downie did at the time of answering the said interrogatories *sur faits et articles* and does still owe for board and other small debts, and more particularly to one Madame Duperrousel and to one Larin, and all of such debts had not then and have not yet been paid and he did not pay his board wherever he lived and he did then and does now owe for that purpose; and whereas in truth and in fact the said Frederick W. Francis from the early part of one thousand eight hundred and eighty till towards the end of one thousand eight hundred and eighty-one did not owe the said Donald Downie for everything which went to make up the necessaries of life, and did not owe him for rent of his rooms and his living during the whole or any considerable part of that time, and did not during that period live altogether at the said Donald Downie's expense without any interruption scarcely, and in truth and in fact the said Frederick W. Francis did not, during the years one thousand eight hundred and eighty and one thousand eight hundred and eighty-one, depend exclusively upon the said Donald Downie for his livehood (sic) and it is entirely false that the said Frederick W. Francis had no means of any kind."

"But on the contrary during that period from the month of December, one thousand eight hundred and seventy-nine, to and including November, one thousand eight hundred and eighty (sic) (the word, he, is omitted in the indictment), received from his mother's estate divers sums of money, amounting in all to fifteen hundred and forty dollars, which he used for his support and otherwise, and during the period from February, one thousand eight hundred

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and eighty-one, to August, one thousand eight hundred and eighty-one, (at which date the said Frederick W. Francis left for the city of New York, in the United States of America, and was absent for more than one year) the said Frederick W. Francis incurred personal debts at different places and to different people for rooms and board which were charged against himself."

"And the said Donald Downie did thereby commit wilful and corrupt perjury."

In September last the defendant moved to quash the indictment as illegal, irregular, vague and insufficient in law for among other reasons.

"7thly. Because the plaintiff has not set out or alleged in said indictment clearly or legally the depositions or answers of defendant against which perjury is assigned, nor recited intelligibly any part thereof, in the manner in which he is bound to do in order that the same may be negatived by him, the matters and allegations against which perjury is assigned not being positive or precise statements and not being positively and precisely negatived by the plaintiff in the said indictment as required by law, said affirmative averments being merely relative terms and matters of opinion, not being positively negatived nor susceptible of being precisely or positively denied in the terms and manner required by law."

"This motion to quash was rejected. The defendant pleaded not guilty and at the trial which took place before me in the term of November last, the prosecution adduced evidence on both counts, but having failed to prove the first count, that count as already stated, was withdrawn from the jury, who brought in a verdict of guilty on the second count."

"The record in the case of Downie against Francis was proved, including the writ of *saisie arrêt* in the

hands of Benjamin Clément, as curator, the declaration of Clément as garnishee, the contestation of the *saisie arrêt* by Francis, the rule for *faits et articles*, the oath taken by Downie before judge Ouimet and his answers on *faits et articles*, and the signature thereto."

"The following are the most important parts of the oral evidence adduced by the prosecution to prove the other facts on which perjury was assigned."

"Frederick W. Francis, the private prosecutor. Became acquainted with Mr. Downie, the defendant in 1878. My mother was interdicted at the end of 1879 and I commenced to act as curator in 1880. I became intimate with defendant in the spring of 1880. I went to board at Mr. Downie's house. Up to that time I lived on the money I drew from the estate of my mother. From the beginning of 1880 till October 1880, I drew from that source something over $1500. Mr. Downie was aware of my circumstances from the end of May 1880. In May 1880 I was indebted to him for board. At the end of May 1880 or end of June 1880 he capiased me for the amount of about $42 or $40 odd dollars I owed him for board till that time. Mr. Mercier, the bailiff, arrested me and I settled the next morning and this settled all accounts between myself and Mr. Downie up to that time."

"In June and July of that year, I boarded at Frank Larin's and a few weeks at Mde. Duperrousel. Mr. Downie paid nothing for my board or for necessaries of life to Mr. Larin or Madame Duperrousel, during that time. I paid for my own board to these parties. During the entire month of August 1880 I was at Lachute and may have run to Montreal for a day or two, but substantially I was there all the month. Mr. Downie was there also. I returned to Montreal in the end of August or the first September. The expenses of the party consisting of Mr. Downie, his sister, two

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Misses Burroughs, Mr. C. S. Burroughs, Wm. Burroughs and myself, were paid by us all in equal shares of $10 a piece. I paid my share. After returning to Montreal, I boarded at Frank Larin's in September and October of 1880. Mr. Larin sued me for part of my board which I have not paid. To the best of my belief Mr. Downie was boarding at Larin's in September and October. He did not pay my board and was sued for his own board, at the same time that I was sued myself."

"In October I was removed from the curatorship of my mother and Benjamin Clément was appointed conseil judiciaire. From that time October till the end of 1880, I received $40 from the curator Clément. It was to Downie's knowledge, for he received $14 or $15 of the $40, and he received this $14 or $15 on an order I gave him on Clément. I paid my board or was charged with it from October 1880 to the end of 1880. Mr. Downie paid nothing for me during that time. During January, February and March, 1881, I had part of a room rented on Bleury street, at Mrs. Radford's with Mr. Downie and one Hipple. Mr. Downie paid one month, Hipple paid another month and Mrs. Radford still holds me responsible for another month."

"After March, 1881, I lived at the Victoria Hotel in this city, Latour street. In April, May, June, July and August I incurred an indebtedness for my board towards Britain proprietor of the hotel."

"Having read answers of Mr. Downie on *faits et articles* in the case of Downie, Francis & Clément, *tiers saisie*. What is stated in Downie's answers as averments of second count of the indictment is untrue."

"John Murray Smith, Manager of the Bank of Toronto, at Montreal, deposed he had paid to Francis the last witness, as curator to his mother, two dividends

of $525 each. The first was paid after the 1st December, 1879 and the second after the 1st June, 1880."

Médard Edouard Mercier, Bailiff:—"In May or June 1880, I executed a capias at the instance of Downie against Francis and arrested the latter on a claim of about $40 for board, I think, up to that time. Francis settled by giving me a cheque for debt and costs."

Benjamin Clément, said:—"I am curator to the mother of Francis. Since January, 1881, and from 15th October, 1880, I was her *conseil judiciaire*. Mary Power is the mother of Francis. After I came judicial adviser I paid Francis $5, $10, $5 and $24.76. I paid Downie on the 23rd November, 1880, on an order from Francis $7.50 on account of $15."

Eliza Osbert, femme de Aubain Duperrousel, dit:—Je connais le défendeur Downie, et Francis. Ils venaient à mon restaurant en 1880. Downie me doit de l'argent pour pension vers 1880. Il venait avec Francis pendant qu'il Downie; pensionnait chez moi. Francis ne me doit rien. Il m'a toujours payé tout ce qu'il me devait. Je ne puis dire qui m'a payé la pension mensullement, mais Francis a toujours payé les extra. Tant qu'ils ont pensionné ensemble, la pension a toujours été payée quelquefois par l'un et d'autres fois par l'autre. Il ne m'est rien dû par Mr. Downie pour ce temps."

"Une semaine ou deux après que Francis eût laissé la pension il est venu chez moi et il a payé la balance qu'il me devait. Les extras étaient toujours payés comptant et c'est Francis qui les payait."

"Transquestionné.—Downie et Francis ne sont jamais venus prendre des diners à la carte après avoir pensionné chez-moi. Downie me devait $12, et il ne revenait plus."

"A un juré.—Cette somme de $12 m'était due pour

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pension après que Francis fût parti de chez-moi."

"Chacun d'eux payait sa propre pension et jamais l'un pour l'autre."

"Francis Larin.—I know defendant Downie and Francis. I kept Princess Louise hotel in Montreal in 1880. Both boarded with me during that year. They kept separate accounts. They were boarding with me at two different periods of the year, first in the spring of 1880. Mr. Francis paid me his board and in the fall Francis did not pay his board and I obtained judgment against him for a balance of his board and I still hold him responsible for that balance. Mr. Downie never paid any thing for Mr. Francis' board."

"Mr. Downie left a balance due me for board for which I have got a judgment against him. I have not been paid, but my estate has gone into insolvency. I have never been paid, but I went into insolvency in 1883, and Mr. St-Amand, who got the judgment, has been paid since my estate went into insolvency three years ago. My judgment against Francis has not been paid and is still due to my estate. Mr. Francis paid almost all the extras they had and if Francis had no money I would charge them to him."

"Upon the application of the private prosecutor through Mr. Kerr his counsel and with the permision of the court, the addition in schedule A hereto annexed was made to the present case to form part thereof as if inserted immediately before the words, after the hearing of the motion on the present page. After the hearing of motions in arrest of judgment and for new trial made on behalf of the defendant Downie, I reserved for the decision of the Court of Queen's Bench, appeal side, under the authority of the section 259 of the revised statutes of Canada,

c. 174, the following questions:—

"1st. Was the assignment of perjury on that part of the defendant's answers on *faits et articles*, that the said Frederic W. Francis from about the early part of one thousand eight hundred and eighty till towards the end of 1881 owed him, the said Donald Downie, for everything which went to make up the necessaries of life, not only for the rent of his rooms, but his whole living; during that period of time without any interruption scarcely, except a day or two at a time, when he might have been elsewhere he lived at his the said Donald Downie's expense altogether, that the said Frederick W. Francis lived with him the said Donald Downie, and depended upon him exclusively for his livelihood," sufficiently negatived in the negative averments of the indictment as above indicated, to authorise the prosecution to prove special facts not specifically alleged in the negative averments such as that he, Francis, had paid to Downie in May or June 1880 $42 for having boarded at his house in the month of May 1880, that he had paid his board to Madame Duperrousel and part of his board to Francis Larin and was held liable by the latter for part of his board during the months of September and October 1880, that he was also held liable for part of his board at Mrs. Radford's during the months of January, February and March 1881, and by Britain for having boarded at the Victoria Hotel in the months of April, May, June, July and August 1881, and also that he, Downie, had received from Francis an order on Benjamin Clément for $15, on account of which Clément had paid him, Downie, $7.50 in November 1880."

"If the evidence of the above facts was legal the verdict should be sustained."

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"2ndly. Should the evidence so adduced be held to have been illegally allowed could a general verdict be given on the assignments of perjury based on the other facts sworn to by Downie, which assignments of perjury were properly negatived and proved but were comprised in the same count?"

"If the evidence adduced on part of the charges made in the indictment be held to have been illegally allowed, but that it is held that a general verdict could be given, there being other charges in the same count which were properly proved, then the verdict should be upheld. If on the contrary a general verdict could not be given under the circumstances, the verdict should be set aside and either the motion in arrest of judgment or the motion for a new trial which were made by the defendant should be granted."

"No sentence was passed and the defendant was admitted to give bail for his appearance at the sittings of the Court of Queen's Bench, Criminal side, on the first day of March next."

(Signed) "A. A. DORION.
C. J. Q. B."

"Schedule A—Amendment to reserved case. *Regina* v. *Downie*. Added upon application of prosecution.

"The evidence for the prosecution having been closed, the defendant, through his counsel, Mr. St.-Pierre submitted that there was no sufficient evidence to go to the jury. I ruled against him and he then produced several witnesses and among others, Jane McCandish, wife of Isaie Radford and George Britain."

Hall Q.C. for the Crown objects to the hearing of the appeal for want of jurisdiction on two grounds:

1. That from a decision of the court of crown cases reserved there is no appeal.

2. That no leave to appeal was granted or applied for. The objections were overruled.

McCarthy Q.C. and *McIntyre* for the prisoner.

The indictment was defective in not alleging the particular matters in which the perjury consisted. *Bradlaugh* v. *The Queen* (1); *Rex* v. *Hepper* (2); *Rex* v. *Parker* (3); *Rex* v. *Sparling* (4).

And this defect is not cured by the verdict *Heymann* v. *The Queen* (5); *Aspinall* v. *The Queen* (6); *The Queen* v. *Goldsmith* (7); *Rex* v. *Mason* (8).

Hall Q.C., for the crown cited *The Queen* v. *Webster* (9); *The Queen* v. *Watkinson* (10); *The Queen* v. *Adams* (11); Taschereau's Criminal Law (12).

Sir W. J. RITCHIE C.J.—Concurred with Strong J.

STRONG J.—This was a case reserved for the opinion of the Court of Queen's Bench by the learned Chief Justice of that court (who presided at the trial of the appellant on an indictment for perjury) pursuant to the Revised Statutes of Canada, chapter 174, section 259, making provision for the reservation and disposition of any question of law arising on the trial of a person who may be convicted upon an indictment for treason, felony or misdemeanor.

The Court of Queen's Bench affirmed the conviction but were not unanimous in that judgment, one of the learned judges, Mr. Justice Cross, having dissented from the majority of the court. The defendant was therefore entitled by section 268 of the act before referred to (as amended by chap. 50 of the acts of 1887) to appeal, as he has done, to this court.

(1) 2 Q. B. D. 569; 3 Q. B. D. 607.
(2) 1 R. & M. 210.
(3) 1 C. & M. 639.
(4) 1 Str. 487.
(5) L. R. Q. B. 102.
(6) 2 Q. B. D. 48.
(7) L. R. 2 C. C. 74.
(8) 2 T. R. 581.
(9) 8 Cox C. C. 187.
(10) 12 Cox C. C. 271.
(11) 14 Cox C. C. 215.
(12) 1 Ed. vol. 2 p. 353.

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The question we have to determine is of course limited to the point of law reserved by the case stated by the Chief Justice for the opinion of the appeal side of the Court of Queen's Bench, and we are not at liberty to take into consideration any other matters of law even though they may appear on the record or on the face of the proceedings stated in the case reserved.

The indictment contained two counts. The first count having been abandoned by the crown need not be further mentioned. The second count upon which the trial proceeded charged the defendant with having falsely and corruptly sworn to certain statements in answering interrogatories on *faits et articles* in a case before the Superior Court wherein the appellant was plaintiff and one Frederick William Francis was defendant. There are three distinct statements alleged to have been sworn to by the defendant on which perjury is assigned in this second count. As regards the first and third of these statements no question has been reserved, and with them we have now nothing to do, being entitled to assume upon the case reserved that the assignments as regards them were properly pleaded, and that the evidence received at the trial as relevant to those charges was legally admissible. The objection to the sufficiency of the count which we have to consider relates to the second of these statements and the assignment of perjury applicable to it.

The indictment alleges that the appellant swore that Francis from about the early part of 1880 till towards the end of 1881 owed him, the said Donald Downie, for everything which went to make up the necessaries of life, not only for the rent of his rooms but his whole living; during that period of time without any interruption, scarcely, except a day or two at a time when he might have been elsewhere, he

lived at his the said Donald Downie's expense altogether; that the said Frederick W. Francis lived "with him the said Donald Downie and depended upon him exclusively for his livelihood and the said Frederick W. Francis had no means of any kind." Upon this perjury is assigned by purely negative averments in the terms of the allegation itself, without any averment of the affirmative facts by which such negative was to be established. The questions reserved were, whether the sworn statements of the defendant so alleged to be false were sufficiently negatived in the negative averments of the indictment as above indicated to authorise the prosecution to prove special facts not specifically alleged in the negative averments, such as that he, Francis, had paid to Downie in May or June 1880 $42.00 for having boarded at his house in the month of May 1880; that he had paid his board to Madame Duperrousel and part of his board to Francis Larin and was held liable by the latter for part of his board during the months of September and October, 1880; that he was also held liable for part of his board at Mrs. Radford's during the months of January, February and March, 1881, and by Britain for having boarded at the Victoria Hotel in the months of April, May, June, July and August, 1881; and also that he, Downie, had received from Francis an order on Benjamin Clement for $15, on account of which Clement had paid him, Downie, $7.50 in November, 1880.

If the evidence of the above facts was legal the verdict was to be sustained.

2ndly. Should the evidence so adduced be held to have been illegally allowed could a general verdict be given on the assignments of perjury based on the other facts sworn to by Downie, which assignments of perjury were properly negatived but were comprised

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in the same count.

If the evidence adduced on part of the charges made in the indictment should be held to have been illegally allowed, but it should be held that a general verdict could be given, there being other charges in the same count which were properly proved, then by the terms of the case reserved the verdict should be upheld. If on the contrary a general verdict could not be given under the circumstances, the verdict should be set aside and either the motion in arrest of judgment or the motion for a new trial which was made by the defendant should be granted.

The questions thus raised are virtually questions not of evidence but of pleading. For it cannot be doubted for a moment that the evidence objected to was relevant to establish the perjury assigned in the second assignment before referred to. It is said, however, that the indictment was so vague and general on this head, that no evidence should have been admitted in support of the negative averments of perjury before set forth and that the evidence of the witnesses stated in the case should therefore have been rejected. As authorities for this proposition the appellant relied on two cases, *Rex* v. *Hepper* (1), and *Regina* v. *Parker* (2). In my opinion neither of these cases sustains the appellant's contention. The first case, that of *Rex* v. *Hepper* (1), was an indictment for perjury which had either been found in the Court of King's Bench or removed there by *certiorari* the record in which (the defendant having of course pleaded) had been sent down for trial on the civil side at the *nisi prius* sittings held before the Chief Justice, Lord Tenterden, who by reason of his powers being limited to the trial of the issue contained in the completed record sent to him to try, had therefore no juris-

(1) R. & M. 210; 1 C. & P. 608. (2) C. & M. 639.

diction to entertain a motion to quash the indictment, to admit a demurrer, or to arrest the judgment. The indictment was for perjury against an insolvent debtor for falsely swearing that his schedule contained a full and true account of all his debts and the assignment was in terms a bare negation of the oath, without any affirmative allegation showing in respect of what omitted debts the falsity consisted. The Chief Justice holding that the indictment would for its vagueness and generality have been bad on demurrer, and that a conviction if obtained would be rendered ineffectual by an arrest of judgment, refused to try the case (all he could do) and accordingly struck it out of his paper. It is to be observed that in this case of *The King* v. *Hepper*, the indictment contained but the single assignment mentioned and not other charges in respect of which the pleading would have been good as in the present case. It is to be remarked of this case that it stands alone and no similar authority has been cited or can be found. In the present case it was properly held that a demurrer would not have been sustained nor could the judgment have been arrested for the mere generality of the pleading. The decision of the learned Chief Justice on both these points has the support of the highest authority, the opinion of the judges who advised the House of Lords in the case of *Mulcahey* v. *The Queen* (1), delivered by Mr. Justice Willes, and the decision of the House proceeding on the advice so given, particularly that of Lord Chelmsford, the first being a distinct authority that after a general verdict upon a count framed as this is, the generality of the terms in which one of the three distinct charges of perjury contained in this count was assigned would be no ground for arresting the judgment and the opinion of Lord Chelmsford distinctly laying it down

(1) L. R. 3. H. L. 306.

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that there can be no demurrer to a part of one of the counts of an indictment. The consequence is that it is impossible to say that this pleading was bad. Then if the pleading is to be considered as sufficient, the only other remaining objection can be that of relevancy. No case can be produced in which relevant evidence has been rejected upon the trial of an indictment after a plea of not guilty upon the ground of the insufficiency of the pleading. The force of this was felt by Lord Chief Justice Tindal in *Regina* v. *Parker*, the other case cited by the appellant, who told the counsel objecting to the evidence that he ought to have demurred, and that not having done so he did not see how the evidence could be excluded. It is true that in that case the Chief Justice afterwards prevailed upon the prosecution to withdraw the evidence objected to, but that was no ruling or decision, but merely an appeal to the sense of justice and fairness of the counsel for the crown. Lord Chief Justice Tindal's observation in this case that one of the assignments might have been demurred to separately from the other assignments contained in the same count is most distinctly over-ruled by Lord Chelmsford's observations in *Mulcahey* v. *The Queen* where he says:

> I have always understood that a demurrer must be to the entire count or plea and not to a part of it.

It is therefore apparent that the *King* v. *Hepper* is not an authority sufficient to sustain this appeal, and further, that upon principle and apart from authority the appellant must fail since the only possible objection to the admissibility of the evidence in question could be that it was irrelevant to the issue raised by the plea of "not guilty," a proposition which could not possibly be for a moment entertained. Further, the objection that this mode of pleading is vicious as being too vague and general whether regarded as one of a substantial or a technical character is, I think,

met by the following language of Mr. Justice Willes in delivering the opinion of the judges in *Mulcahey* v. *The Queen* already alluded to. That very learned judge there said:

> Moreover, and this is the substantial answer to these objections, an indictment only states the legal character of the offence and does not profess to furnish the details and particulars. These are supplied by the depositions and the practice of informing the prisoner or his counsel of any additional evidence not in the depositions which it may be intended to produce at the trial. To make the indictment more particular would only encourage formal objections upon the ground of variance which have of late been justly discouraged by the legislature.

These observations certainly throw much doubt on the case of *Rex* v. *Hepper* if they do not actually discredit it as an authority, but it is sufficient for the present purposes to say that the last named case does not, for the reasons given, apply to the question raised on this appeal and apart from it there is not a shadow of authority to support the defendant's pretension.

The conviction must be affirmed.

FOURNIER J. was of opinion that the appeal should be allowed for the reasons given by Mr. Justice Cross in the Court of Queen's Bench.

GWYNNE J.—The only question before us is that which was reserved under sec.259 of ch. 174 of the Revised Statutes of Canada, namely, whether in an indictment for perjury the perjury charged was sufficiently assigned to authorise the prosecution to give evidence of certain particular facts which were tendered and received in evidence for the purpose of establishing the perjury as assigned in the indictment.

The indictment charged that the defendant Downie in a certain suit among the records of the Superior Court for the district of Montreal, in which the said Downie was the plaintiff and one Frederick W. Francis was defendant upon the contestation of a writ of

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saisie arrêt after judgment issued therein by the said Downie against the said Francis in the hands of Benjamin Clement in his quality of curator as garnishee whose declaration declared that he owed the said Francis a life rent, which life rent the said Francis contended was unseizable by reason of its being an alimentary allowance, he the said Downie was during the trial of the issues raised upon the said garnishee's declaration duly examined on the part of the said Francis upon interrogatories *sur faits et articles*, and was then and there duly sworn, &c., &c., and did upon his oath falsely, wilfully and corruptly depose and swear in substance, and to the effect following (1).

This being the defendant's oath as stated in the indictment the perjury charged was assigned as follows (2).

Now the evidence, as to the admissibility of which the question was reserved, was that of persons with whom Francis had boarded during different parts of the periods named in the assignment of perjury, namely, between the months of December, 1879, and November, 1880, and between the months of February and August, 1881, for the purpose of establishing that during those periods Francis was supplied with board and lodging by those persons at his own charge and not at all at the charge and expense of Downie, and also evidence of Downie having, in November, 1880, received from Clement, the curator of Francis' mother's estate the sum of $7.50 on account of a draft for $15, made by Francis upon Clement in Downie's favor, and also that Francis having been arrested by Downie about June, 1880, paid to him $42 for boarding in Downie's house in May, 1880.

The evidence was, in my opinion, clearly admissible. The case is very different from that of *Rex* v. *Hep-*

(1) See p. 360. (2) See p. 361.

per (1) to which it has been likened. In that case the indictment charged that the defendant had in an oath taken by him in the Insolvent Debtor's Court falsely, wilfully and corruptly sworn that a schedule filed by him in the court contained a full, true and perfect account of all debts due to him at the time of presenting his petition to the Insolvent Court, and the assignment of the perjury was that in truth and in fact the said schedule did not contain a full true and perfect account of all debts due to him at the time, &c., in naked negation of the terms of the oath without averring wherein the schedule was untrue, imperfect and defective. The defendant thus was in effect charged with having falsely, wilfully and corruptly omitted to insert in the schedule something which was within his knowledge and which it was his duty to insert, the omission of which made the schedule which he had sworn was a true statement of all debts owing to him to be false, without pointing out what was the particular matter omitted which made the statement in the schedule to be false. The indictment in the present case is very different; the perjury assigned in it is not a simple negation of the truth of the defendant's oath, although that, perhaps, would have been sufficient, having regard to the nature of the oath which, in substance, was that Francis owed Downie, from the early part of 1880 until towards the end of 1881, for everything which went to make up the necessaries of life, not only for the rent of his rooms but his whole living during that period of time without interruption scarcely—that he, Downie, and Francis lived together during the years 1880 and 1881, and that Francis had no means of any kind, but depended upon him, Downie, exclusively for his livelihood. And the assignment, besides

(1) Ry. & M. 210.

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denying all this to be true, points out in the paragraph beginning with the words "but on the contrary &c., &c.," the particular parts which are relied upon as false, wherein it is alleged what means Francis had, and that during certain named periods he supported himself at his own cost and was not at all supported by Downie: and the evidence given (the admissibility of which is under consideration) was in support of the averments contained in that paragraph. It was not at all necessary that in order to be allowed to prove the averment that Francis had supported himself during certain named periods or any part of such periods the indictment should have gone further and stated where Francis lived during those periods and, if at hotels or lodging houses, the names of such hotels and lodging houses and of the proprietors of them and the amounts which accrued due to each, the utmost that the defendant could have any right to be informed of was that during certain periods the prosecutor intended to prove that Francis had maintained himself at his own cost and charges and that he was not maintained by Downie as the latter had sworn he had been.

Appeal dismissed without costs.

Solicitor for appellant: *S. Pagnuelo.*

Solicitor for respondent: *Geo. Duhamel.*

ROMEO H. STEPHENS..... .....APPELLANT ; 1888

AND

* March 2.

CHARLES CHAUSSÉ.....RESPONDENT.

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

Elevator—Negligence of employees—Liability of landlord—Damages—Art. 1054, *C. C.—Vindictive damages—Cross-appeal.*

On the 13th April, 1883, C. an architect, who had his office on the third flat of a building in the City of Montreal, in which the landlord had placed an elevator for the use of the tenants, desiring to go to his office went towards the door admitting to the elevator and seeing it open entered, but the elevator not being there, he fell into the cellar and was seriously injured. In an action brought by C. against R., the landlord, claiming damages for the suffered injury and loss, it was proved at the trial that the boy, an employee of R.. in charge of the elevator, at the time of the accident had left the elevator with the door open to go to his lunch leaving no substitute in charge. It was shown also that C. had suffered seriously from a fracture to his skull, had been obliged to follow for many months an expensive medical treatment and had become almost incapacitated for the exercise of his profession. C. had been in the habit of using the elevator during the absence of the boy. The trial judge awarded C. $5000 damages, and on appeal to the Court of Queen's Bench (appeal side) P. Q. that amount was reduced to $3000 on the ground that C. was not entitled to vindictive damages. On appeal to the Supreme Court of Canada ;

Held, affirming the judgment of the court below, that R. was liable for the fault, negligence and carelessness of his employee (1), and that the amount awarded was not unreasonable.

Held also, that the sum of $5000 awarded by the Superior Court was not an unreasonable amount and could not be said to include vindictive damages, but as no cross-appeal had been taken the judgment of the Superior Court could not be restored.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, rendered on the 30th of Sep-

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

(1) Art. 1054 C. C.

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tember, 1887, by which the judgment of the Superior Court of the 30th June, 1885, for $5,000 was reformed and the damages awarded respondent reduced to the sum of $3,000 with interest and costs.

This was an action of damages brought by the respondent against the appellant under the following circumstances:

The respondent, who is an architect residing in the city of Montreal, was lessee of two apartments in the building known as the Ottawa Hotel, of which building the appellant is proprietor. By the lease it was stipulated that the respondent should have the right to use the elevator in the premises.

On the 18th April, 1883, during the existence of the lease, the respondent entered the building from the street, and desiring to go to his office went towards the door of the elevator, and not seeing the appellant's employee, but seeing the door of the elevator open which indicated that the elevator was at its place to receive him, the respondent advanced to enter the elevator and fell through the opening to the cellar, where he was afterwards picked up unconscious and nearly dead. He was immediately taken to the hospital, and remained for many days between life and death. His skull was fractured and he was incapacitated from attending to his business for about a year.

To the respondent's action the appellant pleaded: That if the said plaintiff met with the accident and suffered injury and loss, as set out in the said plaintiff's declaration, it was through his gross negligence and wilful acts;

"That the said plaintiff without any right so to do was in the habit of bursting open the door leading to the elevator in question and of removing the fastenings to the same, and of making use of said eleva-

tor, notwithstanding the protestations of the said defendant and notwithstanding that defendant frequently notified the plaintiff to cease from interfering with and making use of said elevator."

At the trial in addition to the facts above stated it was proved that the elevator was in the care of an employee of the appellant, a lad aged fourteen years, and that on the 18th of April, 1883, the boy left the elevator on the level of the ground floor with the door open, and went out to take his lunch, and during his absence the accident happened.

As to damages it was proved that the respondent had suffered for many months and was obliged to undergo medical treatment for a period of over a year; had paid to one physician alone the sum of one hundred and eighty dollars, had been left an invalid and lost the sense of hearing in his right ear; had lost his *clientéle* and had been kept away from his business, (which had been bringing him an income of about $2000 a year) for a period of over twelve months.

The Superior Court presided over by Mr. Justice Jetté condemned the defendant to pay to the plaintiff the sum of $5000 by way of damages, but the Court of Queen's Bench sitting in appeal reduced the damages to the sum of $3000, on the ground that appellant was not liable to any vindictive damages, but only to such actual damages the respondent had suffered, and that such damages should, under the circumstances, have been established at such reasonable amount as would idemnify the respondent for his loss.

Carter for appellant.

The only point which I can press upon the court is that there was contributory negligence on the part of the respondent who was an architect. The evidence shows that the respondent was in the habit of making use of the elevator without the use of the boy who was

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in charge. Every person ought to be on their guard when using an elevator. Wharton on Negligence (1); Dalloz, Rep., Gen., Vo. Imprudence, (2).

Saint Pierre for respondent was not called upon.

Sir W. J. RITCHIE C. J.—We do not think it necessaro to call upon the counsel for the respondent in this case. A grosser case of negligence could not be submitted for the opinion of the court. Considering the public and extensive use of elevators I think that we would be giving a most unjust judgment if we allowed this appeal. It is much like the case where a person opens his store and leaves a trap door open at the entrance. If a customer came in and fell into the trap could it be said he was guilty of contributory negligence? The appeal should be dismissed with costs.

STRONG J.—I should be prepared in this case to restore the judgment of the Superior Court, but as the other members of the court are of a different opinion I concur in simply dismissing the appeal with costs. I am quite satisfied that this is a case in which negligence is established beyond all question. It is the duty of the proprietors of elevators to see that they have in their employ careful and competent employees, and if they omit this duty they are responsible to those who in lawfully using the elevators may suffer from their neglect. There is not the slightest evidence of contributory negligence. I am of opinion that the appeal should be dismissed with costs.

FOURNIER J.—As there has not been a cross-appeal taken I am of opinion that the judgment of the Court of Queen's Bench should be confirmed.

HENRY J.—If there had been a cross-appeal, I might

(1) P. 300 and notes. (2) Vol. 4, P. 226, Nos. 91-92.

have been disposed to restore the judgment of the Superior Court. I think there was negligence here for which the appellant was liable. It is very much like the case of a man leaving his horse on the street unguarded, in such a case if damage results the owner is responsible. The evidence in this case fully justifies the verdict and the appeal should be dismissed with costs.

GWYNNE J.—I entirely concur with my brother judges. I think that the amount awarded by the superior court was not unreasonable. $5,000 damages can by no means in such a case as the present be said to be vindictive damages. It is a misapplication of the term.

Appeal dismissed with costs.

Solicitors for appellant: *Kerr, Carter & Goldstein.*

Solicitors for respondent: *Saint Pierre, Globensky & Poirier.*

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*Mar. 17.
*June 14.

EDWIN JOHN (PLAINTIFF IN ERROR).....APPELLANT;

AND

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

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Criminal law—Procedure—Indictment for rape—Conviction for assault with intent—Attempt—R. S. C. c. 174 s. 183—Punishment.

An assault with intent to commit a felony is an attempt to commit such felony within the meaning of sec. 183 of R. S. C. c. 174 (1).

On an indictment for rape a conviction for an assault with intent to commit rape is valid.

On such conviction the prisoner was held properly sentenced to imprisonment under R. S. C. c. 162 s. 38 (2).

APPEAL from a decision of the Supreme Court British Columbia, affirming a conviction against the appellant for an assault with intent to commit rape.

This is an appeal from the judgment of the Supreme Court of British Columbia on a writ of error, a single

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

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

(1) R. S. C. c. 174 s. 183. If on the trial of any person charged with any felony or misdemeanor it appears to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the indictment. * * *

(2) R. S. C. C. 162 s. 38. Every one who assaults any woman or girl with intent to commit rape is guilty of a misdemeanor and liable to imprisonment for any term not exceeding seven years and not less than two years.

question of law being involved, namely, whether on an indictment charging that the prisoner "violently and feloniously did make an assault, and her, the said R., then violently and, against her will, feloniously did ravish and carnally know against the form, etc.," there could be a conviction of "assault with intent to commit rape." On such conviction the appellant was sentenced to two years imprisonment.

The Supreme Court of British Columbia affirmed the conviction by a divided court, the Chief Justice and Mr. Justice Crease giving judgment for, and Gray and Walkem JJ. against it. The prisoner then appealed to the Supreme Court of Canada.

Christopher Robinson Q.C. for the appellant referred to R. S. C. c. 162 ss. 34, 36, 38; c. 174 ss. 183, 191; c. 181 s. 24 Subs 2; and cited the following authorities, *Reg.* v. *Thomas* (1); *Reg.* v. *Collins* (2); *Reg.* v. *Dungey* (3); *Reg.* v. *Smith* (4).

Dr. *McMichael* Q.C. for the respondent cited R. S. C. c. 162 ss. 8 to 13, and s, 38., *Reg.* v. *Marsh* (5); *Reg.* v. *Watkins* (6); *Reg.* v. *Huxley* (7); Bishop's Cr. Proc. (8).

The judgment of the court was delivered by Mr. Justice Strong as follows—

STRONG J.—This is an appeal from the decision of the Supreme Court of British Columbia upon a writ of error brought by the present appellant Edwin John who, having been indicted and tried for a rape on the person of one Mary Ann Radford, had been acquitted of the felony but found guilty of the misdemeanor of having assaulted the prosecutrix with intent to commit the offence charged. The verdict of the jury as

(1) L. R. 2 C. C. 141.
(2) L. & C. 471.
(3) 4 F. & F. 99.
(4) 34 U. C. Q. B. 552.
(5) 1 Den. C. C. 505.
(6) Car. & M. 264.
(7) Car. & M. 596.
(8) 3 Ed. sec. 82.

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rendered was in the following terms: "The prisoner is not guilty of the felony whereof he stands indicted but is guilty of assault with intent to commit rape." The prisoner's counsel upon this verdict being returned contended that the jury could not find such a verdict upon an indictment for the felony, that although they might have convicted the prisoner of an attempt to commit the felony under sec. 183 of R. S. C., ch. 174, yet a conviction of an assault with "intent" to commit rape was not a conviction for an "attempt" as warranted by that enactment. The Chief Justice of British Columbia, before whom the prisoner was tried, refused to reserve the point under the statute and sentenced the prisoner to two years' imprisonment. The prisoner then brought his writ of error. The court on the argument of the writ of error being composed of four judges was equally divided, the Chief Justice and Crease J. being of opinion to affirm the conviction and Gray and Walkem JJ. being of opinion that it ought to be quashed. In order to allow an appeal to this court Mr. Justice Gray withdrew his judgment.

I am of opinion that the decision appealed against was right and ought to be affirmed. It is, of course, beyond question that at common law a proceeding such as this, a conviction for a misdemeanor upon an indictment for felony, would be wholly unsustainable. Some statute must, therefore, be invoked as sanctioning such a departure from the ordinary course of the common law. The statute upon which the conviction is rested is that already referred to "The Criminal Procedure Act," R. S. C., ch. 174 by the 183rd sec. of which it is enacted:—

If on the trial of any person charged with any felony or misdemeanor it appears to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to com-

mit the same; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the indictment; and no person tried as lastly mentioned shall be liable to be afterwards prosecuted for committing or attempting to commit the felony or misdemeanor for which he was so tried.

This, as it appears to me, is the only enactment to which this conviction can be referred. Section 191 of the same act (ch. 174) authorises the conviction of any person, indicted for a felony which includes an assault against the person, of the assault alone although the assault may not be charged in terms, the accused being acquitted of the felony. This, however, means only a common assault and not an assault such as that the jury have in terms found the prisoner guilty of here, viz., "an assault with intent to commit rape." The question is therefore really reduced to this: Is an "assault with intent to commit rape" an attempt to commit the felony charged within the meaning of section 183? I am of opinion that *primâ facie*, and unless there is some other enactment shewing a contrary intention and therefore calling for a narrower construction of section 183, that it clearly is so. This opinion is founded on the considerations that an indictment for the common law misdemeanor of an attempt to commit a felony always alleged the particular overt act of which the attempt consisted and, further, that inasmuch as an attempt to commit a crime is, as Mr. Justice Stephens defines it (1) "an act done with intent to commit that crime and forming part of a series of acts which would constitute its actual commission if it were not interrupted" (a definition which has the support of ample judicial authority as the learned author shews in the illustrations appended to his text,) so the converse holds good that an assault with intent to commit rape is an attempt to commit that offence. I have not the slightest doubt, therefore, that if the

(1) Stephen's Digest Cr. Law 4 Ed. p. 38 art. 49.

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present conviction depends on the construction to be placed on section 183 alone that we ought to hold it good.

Then the other statutory provisions material to be considered are the following. Section 24, sub-section 2 of Chap. 181 R. S. C. enacts that

> Every one who is convicted on indictment of any misdemeanor for which no punishment is specially provided shall be liable to five years imprisonment.

And section 38 of chapter 162 enacts that

> Every one who assaults any woman or girl with intent to commit rape is guilty of a misdemeanor and liable to imprisonment for any term not exceeding seven years and not less than two years.

This last provision, no doubt, declares that an assault with intent to commit rape shall be a misdemeanor, but this was already the law, for an assault with such intent was, as before shewn, an attempt to commit the felony which was by itself always a common law misdemeanor, in addition to which the mere assault, independently of the aggravation, was also a common law misdemeanor. The only purpose and effect, therefore, of this section 38 was, as it seems to me, to affix a new and precise punishment to this particular species of the misdemeanor of attempting to commit a felony, viz. imprisonment with a maximum limit of seven years and a minimum limit of two years. Therefore nothing contained in this section 38 took this particular species of offence out of the category of attempts to commit felonies in which it was obviously before included at common law, so as to make it a new statutory misdemeanor in which there could not be a conviction upon an indictment for the felony ; on the contrary the whole object of the section manifestly was to define the punishment for an offence which always constituted a misdemeanor at common law, and for which the 183rd section of the Procedure Act had provided there might be a conviction on an indictment for the felony.

Then if this is so the 24th section, sub-section 2, of the Punishments Act, chap. 181, can have no bearing on the question of the validity of the conviction. As already shown it provides for the punishment, by a lesser degree of imprisonment than is affixed to the offence of an assault with intent to commit rape, of misdemeanors for which no punishment is specially provided.

But a different punishment is specially provided for the offence of an assault with intent to commit rape, and according to section 183, if the case comes within that section, the punishment so specially affixed is that which is to be awarded when a party is convicted on an indictment for the distinct and substantive offence of attempting to commit the felony. The question, therefore, really comes back to this: Is an assault with intent an attempt within the meaning of section 183, of which a party can be convicted on an indictment for rape? And having regard to the older authorities and precedents, to the definitions given by Mr. Justice Stephens, and to what seems to me to be an incontrovertible proposition requiring no demonstration that an assault with intent to commit rape is *ex necessitate* an attempt to commit that offence, I must hold that sec. 38 of ch. 162 and section 183 of the Procedure Act both apply and that the conviction must be, therefore, affirmed.

Appeal dismissed with costs.

Solicitor for appellant: *Theodore Davie.*

Solicitor for respondent: *Paulus Æmilius Irving.*

1887
*Nov. 24.
1888
*June 14.

JAMES GARDNER (DEFENDANT).....APPELLANT;

AND

CHRISTIAN KLŒPFER & CHARLES WALKER (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Assignment—In trust for creditors—Creditor attacking—Effect of—Right to participate in after.

A creditor is not debarred from participating in the benefits of an assignment in trust for the general benefit of creditors by an unsuccessful attempt to have such deed set aside as defective.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court (2) and ordering the verdict for the defendant to be set aside and judgment entered for the plaintiffs.

The plaintiffs and defendant were, respectively, creditors of a firm trading as McKenzie & McKinnon, which firm had executed an assignment of all their real and personal property to the defendant in trust for the general benefit of their creditors. Prior to the assignment a meeting of the creditors of the firm was held at which the plaintiff Klœpfer was present, and he assented to the assignment and was appointed an inspector of the estate.

The plaintiffs subsequently obtained a judgment against the said firm of McKenzie & McKinnon and issued an execution under which a portion of the good assigned to the defendant was seized. The defendant having claimed the goods under the assignment, an interpleader order was issued on the trial of which the plaintiffs endeavored to impeach the vali-

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

(Henry J. was present at the argument but died before judgment was delivered.)

(1) 14 Ont. App. R. 60. (2) 10 O. R. 415.

dity of the defendant's deed. It was held, however, that the plaintiffs having assented to the deed were estopped from disputing its validity, and judgment was given for the defendant.

After this decision the plaintiffs filed a claim against the insolvent estate, and on declaring a dividend their claim was included; another creditor of the estate then formally notified the defendant not to pay a dividend to the plaintiffs who, the notice alleged, had forfeited their right to participate in the benefit of the assignment by attacking the deed. The plaintiffs brought an action for their dividend.

On the trial judgment was given in favor of the defendant, which was affirmed by the Divisional Court. The decision of the latter court was afterwards reversed by the Court of Appeal. The defendant then appealed to the Supreme Court of Canada.

McLennan Q. C. for the appellant.

The Court of Appeal has decided that a creditor may attempt to destroy an assignment by the debtor and failing to do so may still claim the benefit of the deed which was the subject of such attempt. It is submitted that the authorities are against such a right. *Field* v. *Lord Donoughmore* (1), *Watson* v. *Knight* (2), *Re Meredith* (3).

McCarthy Q.C. for the respondent referred to the following authorities: *Ellison* v. *Ellison*, (4); *Harley* v. *Greenwood* (5); *Thorne* v. *Torrance* (6); *Spencer* v. *Demett* (7); *Clough* v. *London and North Western Ry. Co.* (8); *Jewett* v. *Woodward* (9).

(1) 1 Dr. & War. 227.
(2) 19 Beav. 369.
(3) 29 Ch. D. 745.
(4) 1 White & Tudor L. C. 5 ed. 289.
(5) 5 B. & Al. 95.
(6) 16 U. C. C. P. 445; 18 U. C. C. P. 29.
(7) 13 L. T. N. S. 677.
(8) L. R. 7 Ex. 26.
(9) 1 Ed. Ch. (N.Y.) 195.

1888

GARDNER v. KLŒPFER.

Ritchie C.J.

Sir W. J. RITCHIE C.J.—I think the respondent had a perfect right to test the validity of the assignment, and on its being established to come in and claim their share of the estate under it.

STRONG, J.—The facts of this case which are few and simple are contained in documentary evidence and the admissions of the parties, no oral evidence of witnesses having been adduced at the trial. They may be shortly stated as follows:—

On the 4th of May, 1883, the firm of McKenzie & McKinnon, carrying on business at the town of Meaford, executed a deed of assignment for the benefit of creditors whereby they assigned to the appellant all their stock in trade, goods, chattels, debts, lands and other property upon trust, to sell and convert the estate and get in the debts and, after paying the costs and expenses attending the execution of the trust, to apply the residue of the fund "in or towards the payment of the debts of the said debtors in proportion to their respective amounts without preference or priority." The respondents Gardner & Walker, a partnership firm carrying on business at Guelph, were creditors of the assignors for a considerable amount over $3000.00, their debt being the largest in amount of the assignor's liabilities.

This deed appears to have been communicated to the respondents and they acquiesced in it. Mr. Justice Osler before whom the interpleader issue, to be hereafter mentioned more particularly, was tried, has found that Kloepfer, acting for his firm, attended a meeting of creditors called by the appellant as assignee under the deed, on the 14th of May 1883, and assented to a resolution appointing him one of the trustees to act on behalf of the creditors in assisting the assignee to wind up the estate, and further that he acted as such trustee in inspecting and reporting on the stock, and that he was also present and did not

dissent when a resolution was passed to pay certain arrears of wages to the men employed in the manufactory which had been carried on by the assignors. A few days afterwards, however, the respondents brought an action against the assignors, recovered judgment by default, issued execution thereon, and caused the property assigned to be seized thereunder, contending that the assignment was invalid because it contained unreasonable conditions to which creditors were not bound to assent. Thereupon, the appellant having claimed the property seized, the sheriff applied for an interpleader order which was made by the master in chambers. By this order an issue, in which the appellant was the plaintiff and the respondents defendants, was ordered to be tried in order to ascertain whether the property in the goods seized was in the appellant at the time of the seizure by the sheriff. It was further ordered that in default of security being given by the claimant (the appellant) the goods should be sold and the price paid into court and this was accordingly done. The interpleader issue came on to be tried before Mr. Justice Osler without a jury at the autumn assizes in 1883, when the learned judge found the facts before mentioned as to the respondents' conduct in acting under the deed of assignment, and upon that held the respondents estopped from impeaching the deed as execution creditors, and determined the issue in favor of the appellant. Thereupon, the appellant having prepared a "first dividend sheet" and having by it collocated the respondents as creditors entitled to a dividend on their debt to the amount of $962.64, James Cleland, one of the largest creditors of the insolvents, served the appellant with a written notice not to pay the dividend upon the ground that the respondents "had forfeited their right to share in the estate through their having endeavored to destroy the trust." The ap-

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pellant then having refused to pay over the dividend, the respondents brought this action to compel payment, to which the appellant set up as a defence the proceedings already mentioned under the respondents' execution. The action was tried before the late Chief Justice of the Queen's Bench Division without a jury, when no evidence having been taken, but the before mentioned facts being admitted, that learned judge found for the defendant in the action, the present appellant. An order *nisi* subsequently obtained to enter the verdict for the plaintiff was after argument before the Queen's Bench Division discharged, Mr. Justice O'Connor dissenting. The respondents then appealed to the Court of Appeal, by which court the judgment of the Queen's Bench Division was reversed, and judgment was ordered to be entered for the plaintiffs in the action (the present respondents) for the full amount of their claim. From this last judgment the present appeal has been taken.

The judgment of the Queen's Bench Division, which is reported in the 10th volume of the Ontario Reports, appears to have proceeded upon the grounds that the respondents had by their conduct forfeited their *primâ facie* rights under the deed; and the cases of *Field* v. *Lord Donoughmore*, (1); *Watson* v. *Knight*, (2); *Meredith* v. *Facey*, (3), were relied on as authorities for this position. The dissenting judgment of Mr. Justice O'Connor puts in forcible language what he considered to be an unanswerable objection to the reasoning upon which the opinion of the majority of the court was founded, namely, that the respondent having in the interpleader issue been met by the deed, and held to be bound by it, could not afterwards be deprived of the benefit of the trusts contained in it. The judgment of the Court of Appeal which was delivered by Mr. Justice Osler, rests the case on two distinct

(1) 1 Dr. & War. 227. (2) 19 Beav. 369.
(3) 29 Ch. D. 745.

grounds, the first ground being that the respondents having been originally entitled as *cestuis que trusts* under the deed irrespectively of any acts of acquiescence on their part, could not by reason of any subsequent conduct involving a repudiation of the trusts be considered to have forfeited their rights to the benefits secured to them in common with the general body of creditors. The other ground taken by the Court of Appeal was that put forward by Mr. Justice O'Connor in the Queen's Bench Division, that the appellant having in the interpleader issue set up the deed and the respondents' acquiescence in it to defeat the execution, could not afterwards be permitted to withdraw from the respondents the benefits which it assured them.

It appears to me that on both these grounds the judgment of the Court of Appeal is correct and ought to be sustained. The deed appears on its face to be a perfectly good and valid deed of assignment for the benefit of creditors, such as is expressly excepted from the avoidance of preferential assignments and other deeds intended to defeat and delay creditors contained in the Revised Statutes of Ontario chapter 118 sec. 2. The respondents were therefore bound by it and had no alternative but to accept the benefit of the trusts created in favor of the general body of creditors or to forego their rights altogether. In this state of things it is out of the question to say that by taking proceedings in repudiation of the deed, or by any course of conduct adverse to it, they can be deemed to have worked a forfeiture of their rights under it. A court of equity never proceeds *in pœnam*, and to enforce such a forfeiture would be nothing less than to inflict a penalty upon the respondents as a punishment for their conduct.

If instead of the respondents having been originally bound by the deed, and therefore entitled to the bene-

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fits conferred by it, their right to claim under it had been dependent on their election to take under or against it, and then having first rejected it they had sought to be let in to participate in the trusts, the case would have been different, and as in the cases cited they could justly have been met by the objection that having chosen to act adversely to the trust they were not entitled to claim benefits which they had thus distinctly repudiated.

In all the cases referred to in the judgment of the Queen's Bench Division the parties seeking to come in under the assignment had not been originally parties to the deed, and having had the option of either accepting or rejecting the terms, and having in the first instance chosen the latter alternative, were asking the court to give them the benefit of that which they had formerly disclaimed; in other words they were asking relief inconsistent with the position which they had deliberately chosen to assume, seeking to "approbate" that which before they had "reprobated," a course which the law will not permit. The difference between such cases and the present is obvious and consists in this, that in the case now before us the creditors had no liberty of choice, but were bound by the deed *ab initio.*

But aside altogether from this, the principal ground upon which the Court of Appeal have rested their judgment, I am of opinion that the reasoning upon which Mr. Justice O'Connor's judgment proceeded and which is also adopted by the Court of Appeal affords a conclusive answer to the appellant's contention. The objection now made to the respondents' claim to be paid in common with the other creditors their proportionate share with the insolvents' estate is that they attempted to enforce their execution, but in this attempt they were defeated by the deed and their previous acceptance of the trusts contained in it. Who ever heard

of a party being held bound by a deed so far as to be barred from setting up claims adverse to it, and yet being at the same time deprived of advantages secured to him by the same instrument? It is a universal principle of law, common to all systems, and founded on the most obvious principles of justice and reason, that a party who is compelled to accept a disadvantageous position shall nevertheless be entitled to any incidental advantages which he can claim consistently with that position. The maxim of law is: *Qui sentit commodum sentire debet et onus*, but the converse maxim, *Qui sentit onus sentire debet et commodum*, (1), is also true, and the principle which the respondents invoke in this case, is summed up and comprehensively included in this general rule of law. To say that the respondents, in the circumstances in which they have been placed, are not to be permitted to participate in the division of the trust estate would be indeed to compel them to bear the *onus*, but to withhold from them the advantages of the situation which the appellant has placed them in.

It therefore follows that even if the respondents were not originally bound by the deed, as I think they were, they are now, by reason of their adoption of it before bringing their action, and by reason of the effect which has been given to it at the instance of the appellant in the interpleader proceeding, concluded by it, and being thus concluded they are entitled to share its advantages like any other creditor.

The appeal must be dismissed with costs.

FOURNIER J.—I am in favor of dismissing this appeal for the reasons given by Mr. Justice Osler in the Court of Appeal.

TASCHEREAU and GWYNNE JJ. concurred in the

(1) Brooms maxims (Ed. 5th) 712.

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reasons given by Strong J. in favor of sustaining the judgment of the Court of Appeal.

Appeal dismissed with costs

Solicitors for appellant: *Wilson & Evans.*

Solicitors for respondents: *Coffee, Field & Wissler.*

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*Nov. 23.

SAMUEL SHOREY AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

THOMAS R. JONES AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Assignment—For benefit of creditors—Obtained by Duress—Improper use of criminal process—Stifling criminal charge.

S., a trader in Yarmouth, N. S., had a number of creditors in Montreal. J., one of such creditors, preferred a criminal charge against S., sent a detective to Yarmouth with a warrant, caused such warrant to be indorsed by a local magistrate and had S. brought to Montreal, when the other creditors there issued writs of *capias* for their respective claims. The father of S. came to Montreal and in consideration of the release of S. on both the civil and criminal charges transferred all his property for the benefit of the Montreal creditors, and S. was released from gaol having giving his own recognizance to appear on the criminal charge. In the settlement to the claims of the creditors was added the costs of both the civil and criminal suits. In a suit to set aside the transfer as being obtained by duress and to stifle the criminal prosecution, the evidence showed that the creditors, in taking the proceedings they did, expected to obtain the security of the friends of S.

Held, affirming the judgment of the court below, that the nature of the proceedings and the evidence clearly showed that the criminal process was only used for the purpose of getting S. to Montreal to enable the creditors to put pressure on him, in order to get their claims paid or secured, and the transfer made by the father under such circumstances was void.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the hearing in

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* PRESENT: Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

(1) 20 N. S. Rep. 378.

favor of the plaintiffs.

One Melbourne J. Sheehan, a trader doing business in Yarmouth, N. S., became insolvent and made an assignment to the defendant Thomas W. Johns in trust for the benefit of his creditors. Sheehan had a number of creditors in Montreal, one of whom caused a criminal charge to be preferred against him and sent a detective to Yarmouth with a warrant for his arrest on such charge. The warrant having been indorsed by a magistrate in Yarmouth, Sheehan was arrested and conveyed to Montreal where he was kept in gaol for several weeks. While there several of the other creditors issued writs of *capias* against him.

The plaintiff Sheehan, father of the said Melbourne J. Sheehan, went to Montreal in obedience to a subpœna issued by the prosecutor on the criminal charge, and after a consultation with his son he had an interview with the creditors who agreed to release the son on the civil suits, and use their influence to procure his release on the criminal charge, on condition of a release in favor of the creditors of the father's preferred claim in the assignment by the son to Johns and the payment by the father of the costs, both in the civil and criminal suits, the latter to be secured by the assignment of a mortgage held by the father. This was assented to and the necessary deeds were executed by the father and the son was released from gaol, the criminal matter being satisfied by his own recognizance.

The plaintiff Sheehan subsequently transferred his said preferential claim and mortgage to the plaintiff, Thomas R. Jones, as security for a debt of his son, and an action was brought by Jones and Sheehan to have the transfers in favor of the Montreal creditors set aside as having been obtained by duress, and in pursuance of an agreement to stifle the said criminal charge. At the hearing one of the creditors in giving evidence

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said that in taking proceedings against the son it was expected that his friends would come to his aid, that it was understood he had a father who was worth money.

At the trial all the issues were found in favor of the plaintiffs and such findings were confirmed by the full court. The defendants then appealed to the Supreme Court of Canada.

Greenshields for the appellants contended that the evidence showed no dealings by the Montreal creditors with the criminal charge. They only undertook to release their own claims against the son. They were entirely within their right in issuing the writs of *capias*. C. C. P. art. 798.

It cannot be said that there was any stifling of the criminal charge for the charge is still pending, the prisoner being on bail.

Harrington Q.C. for the respondents was stopped as the court was unanimous that the appeal should be dismissed with costs.

Sir W. J. RITCHIE C. J.—I think it very clear that the defendants used the criminal process for the purpose of extorting from this old man the transfer of his property, and I think that no court having proper respect for itself would sanction such a proceeding.

STRONG, TASCHEREAU and PATTERSON JJ. concurred.

GWYNNE J.—The whole proceedings of the appellants by which they obtained the assignment which the court in Nova Scotia has avoided were, in my judgment, a monstrous outrage upon justice and the appeal, therefore, should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *S. H. Pelton.*

Solicitors for respondents: *Harrington & Chisholm.*

WM. PREEPER AND JANE DOYLE.....APPELLANTS;

AND

HER MAJESTY THE QUEEN..... RESPONDENT.

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*Oct. 6 & 8.

*Dec. 15.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Criminal law—Felony—Jury attending church—Preacher's remarks —Influence on jury—Expert testimony—Admissibility.

In the course of a trial for murder by shooting the jury attended church in charge of a constable and the clergyman directly addressed them, referring to the case of a man hung for murder in P. E. I., and urging them, if they had the slightest doubt of the guilt of the prisoner they were trying, to temper justice with equity. The prisoner was convicted.

Held, affirming the judgment of the Court of Crown Cases reserved in Nova Scotia, that although the remarks of the clergyman were highly improper it could not be said that the jury were so influenced by them as to affect their verdict.

A witness was called at the trial to give evidence as a medical expert and in answer to the crown prosecutor he said, "there are *indicia* in medical science from which it can be said at what distance small shot were fired at the body. I have studied this —not personal experience, but from books." He was not cross-examined as to the grounds of this statement and no medical witnesses were called by the prisoner to confute it. The witness then stated the distance from the murdered man at which the shot must have been fired in the case before the court, and on what he based his opinion as to it, giving the result of his examination of the body.

Held, Strong J. and Fournier J. dissenting, that by his preliminary statement the witness had established his capacity to speak as a medical expert, and it not having been shown by cross-examination, or other testimony, that there were no such *indicia* as stated, his evidence as to the distance at which the shot was fired was properly received.

APPEAL from a decision of the Court of Crown Cases Reserved for the Province of Nova Scotia affirming the conviction of the prisoners (appellants) for murder.

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

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The defendants, William Preeper and Jane Doyle, were jointly indicted for the murder of one Peter Doyle, and two questions were reserved under c. 174, s. 259 R. S. C. for the consideration of the justices for crown cases reserved in the Province of Nova Scotia.

1 As to certain observations made by a clergyman in his sermon in the presence and hearing of the jury.

The learned judge says—"It was my instruction to the jury, and the officers in charge of them, that they should not separate while out of court nor permit any person whatever to converse with them on the subject of the trial. These instructions were repeated several times during the course of the trial, and particularly on the adjournment of the court on the evening of Saturday the 7th day of April aforesaid."

On the morning of Sunday, the 8th day of April aforesaid, the whole twelve jurors attended service at a church known as the Grafton Street Methodist Church in the City of Halifax, being accompanied by, and in charge of, the deputy sheriff. What occurred while such jury was present in such church is set out in the affidavit of Mr. F. H. Oxley, which is as follows:—

The jury who tried the above cause attended the said service, and the Reverend William Brown was the officiating clergyman and preached a sermon on the said occasion.

The subject of the said sermon was the parable of the "Prodigal Son," and the principal argument of the preacher was to point out the justice and certainty of punishment for wrong doing.

The preacher also stated that all persons were free agents and had the opportunity of choosing their course in life, and if they did wrong the merited punishment would follow as a result of their own act.

As an instance, illustrating his argument, he referred

to the case of Millman, a prisoner then under sentence of death for murder in the Province of Prince Edward Island.

He also stated that he observed in his audience the men of the jury, who for several days had been separated from the community considering the fate of the prisoners accused of the murder of Doyle, and that although he realized it was not for him to instruct them in the matter yet he felt it was his duty to remind them that unless they were clearly satisfied of the guilt of the prisoners their judgment should be tempered with equity.

The question whether the verdict can stand after such an address made to the jury, tending as it does to interfere with the administration of justice and from which inferences might be drawn by the jury hostile to the prisoners, is one of the questions reserved by the trial judge.

2. One Norman McKay, a doctor of medicine, was produced as a witness on behalf of the crown and gave evidence establishing his competency to speak as a medical expert but not as an expert in any other particular. In his capacity of medical expert he gave evidence of the character of the injuries, the organs involved, the cause of death, etc. The death of deceased was caused by a charge of shot from a shot gun, which gun was found so lying in relation to the body as to render it material to be known at the trial what distance from the body of deceased the muzzle of the gun was at the moment the fatal shot was discharged. In the course of Dr. McKay's direct examination he was asked the following question by the counsel prosecuting for the crown :—

"From your knowledge of medical science in this respect, and from your examination in this case, at how great or less a distance would the muzzle of the

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gun be from a human body at the time of the discharge?"

This question was at once objected to by counsel for the prisoners but allowed by the judge. The answer given by the witness was as follows:—

"Judging from what I saw, from the nature of the wound, and its appearance, I would say that the muzzle of the gun was not nearer than twenty inches, and not further away than three feet, when it was discharged."

The question of Dr. McKay's competency to be asked and to answer the above question was also reserved.

A copy of the notes of the whole of the testimony of said Dr. McKay given on said trial was appended to the reserved case.

By these notes it appears that after stating that he was a medical man of the Nova Scotia Medical Board, and a graduate of the University of Halifax and Royal College of Surgeons, England, and had conducted an autopsy on the body of Peter Doyle, after describing minutely the examination he made and the wound and shot he found, and the probing of the wound and the upward course pursued by the shot in the body, the witness proceeds to state that—

"There are *indicia* in medical science from which it can be said at what distance small shot were fired at the body. I have studied this—not personal experience—but from medical works. I examined the wound of deceased for the purpose of discerning this fact. Mr. Weeks asks witness: "From your knowledge of medical science in this respect, and from your examination in this case, at how great or how less a distance would the muzzle of the gun be from a human body at the time of the discharge?"

Mr. Henry objects to this question and it was

allowed subject to the objection. The witness answered:—

"Judging from what I saw, from nature of wound and appearance, I would say that the muzzle of the gun was not nearer than twenty inches, and not further away than three feet, when it was discharged. The carrying capacity of the gun, and the nature of the charge, and the condition of the gun as regards cleanliness and the shape of the hole would modify the distance as given by me. There are cases on record where the gun at a much greater distance than I have described produced such a wound as I have described. Death would be instantaneous from such a wound as I have described. In my opinion it would be impossible for a man after receiving such a wound to walk six feet, turn and sit down. If a man had been shot standing upright, and I found him at a distance of six feet sitting down after such a wound as I have described, I would expect to find blood all down his legs and pants and into his shoes, and probably on the ground, if it were possible for a man to do that, for with such a wound the heart would cease to beat instantly, after such a wound.

Cross-examined: I never witnessed a case from wound to the heart: I speak entirely from books and experience of other men: I mean that a party shot in this way could not make a step in the sense of walking: one reason I have for saying the gun was not nearer than twenty inches was that I saw no traces of burning: when a man is clothed with shirt and under shirt would not expect any burning at all: in giving my opinion as to distance of muzzle I do so on assumption there was no clothing on: independently of burning altogether I can say that it could not have been nearer than twenty inches: I never saw in any work on the subject a statement of the number of

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inches which might intervene between muzzle of gun and wound: in reference to burning I based my opinion as to distance, not so much as to the absence of burning as from the size of the wound and the jagged nature of the edge.

The Court of Crown Cases Reserved affirmed the conviction, McDonald C.J. and Mr. Justice McDonald dissenting. The prisoners then appealed to the Supreme Court of Canada.

Henry Q.C. and *Harrington* Q.C. for the appellants: We will first deal with the question of expert evidence reserved in the case. It is stated in the case and admitted that this evidence is most material. There are two primary objections to the evidence. First, that the subject upon which Doctor McKay was examined was not in itself a subject of expert testimony, but was a matter of ordinary knowledge.

2. If it were the witness has not given such evidence as would show that he was skilled in the science to which it relates.

As to the first objection the following authorities were referred to: Wharton on Crim. Ev. (1); *Carter* v. *Boehm* (2); *Milwaukee & St. Paul Ry. Co.* v. *Kellogg* (3); *Campbell* v. *Rickards* (4).

As to the first question reserved the learned counsel cited *Commonwealth* v. *Roby* (5); *United States* v. *Gibert* (6); *The King* v. *Wooler* (7).

Longley, Atty. Gen. of Nova Scotia, for the respondent referred on the question of expert evidence to Rogers on Law and Medical Men (8); Lawson on expert Evidence (9); Roscoe on Crim. Ev. (10); Taylor on Ev. (11);

(1) 9 Ed. sec. 405.
(2) 1 Smith L.C. 9 Ed. at p. 523.
(3) 9 4 U. S. R. 469.
(4) 5 B. & Ad. 840.
(5) 12 Pick. 517.
(6) 2 Sum. 81, 83.
(7) 6 M. & S. 367.
(8) Pp. 112 *et seq.*
(9) Ch. 3 at p. 461 and p. 128.
(10) 10 ed. Pp. 147-8.
(11) 8 ed. Vol. 2 pp. 1212-14.

Archbold's Cr. Pl. (1); *McNaghten's Case* (2); *Rex.* v. *Wright* (3); *Collier* v. *Simpson* (4); *Rowley* v. *London & North Western Ry Co.* (5); 1 Taylor's Med. Jur. (6.)

On the first question reserved the learned Attorney General cited *The Queen* v. *Kennedy* (7).

Henry Q. C. in reply cited *New England Glass Co.* v. *Lovell* (8); *Kennedy* v. *The People* (9); Taylor on Med. Jur. (10); Rogers on Law and Medical Men (11); Wharton & Stillé's Med. Jur. (12).

Sir W. J. RITCHIE C. J.—After stating the points reserved and the substance of the judges' notes at the trial, his lordship proceeded as follows :—

As to the first point, that the observations of the clergyman caused a mis-trial, there can be no doubt, I should think in the minds of all right thinking persons, that in referring, in the presence of the jury, to the trial and the jury, the clergyman entirely mistook his duty and laid himself open to the very grave charge of interfering with the administration of justice. But though his interference was most improper and unjustifiable, and worthy of the severest censure, I am constrained to agree with the court below that the observations made were not necessarily adverse to the prisoner or calculated to bias the minds of the jury against the prisoner, nor do I think the result of the trial was influenced by what the jury heard. The irregularity, therefore, is not, in my opinion, sufficient to invalidate the trial and verdict.

As to the second question reserved, if the objection to the question was to the competency of the witness to answer it it was a preliminary question for the

(1) 20 Ed. P. 313.
(2) 10 C. & F. 200.
(3) R. & R. 456.
(4) 5 C. & P. 73.
(5) L. R. 8 Ex. 221.
(6) 3 Ed. p. 686.
(7) 1 Thompson (N. S.) 203.
(8) 7 Cush. (Mass.) 319.
(9) 39 N. Y. 245.
(10) Vol. 1 pp. 698-9.
(11) P. 116.
(12) Vol. 3 Ch. 7 p. 731.

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judge with reference to which the prisoner's counsel might have cross-examined the witness or offered evidence to establish the witness's incompetency.

In this case the witness does not appear to have been cross-examined and no evidence was offered on the prisoner's behalf to show a want of capacity.

The case states that Dr. McKay was produced as a witness on behalf of the crown, and gave evidence establishing his competency to speak as a medical expert but not as an expert in any other particular, and he was not, it appears to me, asked to speak in any other capacity than as a medical man.

In the absence, then, of any cross-examination as to the witness's capacity or qualification, or any evidence before the question was answered to establish, as a preliminary question to be decided by the judge, that the question was not one of medical or surgical skill, and therefore Dr. McKay was not an expert, agreeing as I do with the learned judge who tried this case that the presiding judge must form his opinion of the witness's capacity to speak as an expert from the testimony before him, I think on the *primâ facie* evidence before the judge he was justified in allowing and could not properly have refused to allow the question to be answered because it was distinctly put to the witness as a question of medical science or skill. This the question and answer beyond all doubt established, for the question is:

From your knowledge of medical science in this respect and from your examination in this case, at how great or how less a distance would the muzzle of the gun be from a human body at the time of the discharge?

This was the question objected to and the answer to it was:

Judging from what I saw, from the nature of the wound and its appearance, I would say that the muzzle of the gun was not nearer than twenty inches, and not further away than three feet when it was discharged.

If the question was open to objection at the time it was put, it seems to me such objection was removed by the course pursued at the trial and it is not now open to the prisoner.

The prisoner's counsel did not confine his cross-examination to the competency of the witness, but appears to have interrogated as to the reasons the witness had for saying the muzzle of the gun was not nearer than 20 inches, one of which was that he saw no traces of burning and he says:

Independently of burning altogether I can say it could not have been any nearer than twenty inches.

And again:

In reference to burning I based my opinion as to distance not so much as to the absence of burning as from the size of the wound and the jagged nature of the edges.

Here the witness was clearly speaking as a medical expert, and thus the counsel brought out the very evidence he had, at a previous stage of the case, himself objected to. Had he intended to rely on the objection previously taken in my opinion he should, on cross-examination, have refrained from bringing out the very same testimony to which, on the direct examination, he had objected, thus making it his own.

Under all these circumstances I think the appeal should be dismissed.

STRONG J.—In this case I am compelled to differ from the Chief Justice and, I believe, from the majority of the court. I am of opinion that the judgments of the Chief Justice and of Mr. Justice McDonald in the court below were correct and that the question objected to was improperly allowed.

There can be no doubt as to the rule established in practice and by incontrovertible authority, that no evidence of matters of opinion is admissible except where the subject is one involving ques-

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tions of a particular science in which persons of ordinary experience are unable to draw conclusions from the facts. The jury must, as a general rule, draw all inferences themselves and witnesses must speak only as to facts.

The only ground on which the ruling of the learned judge at the trial, as to the admissibility of this evidence, could be sustained is that the matter is one involving experience and skill in medical science. I cannot agree in the opinion that it is. Following the line of argument of the Chief Justice of Nova Scotia I think the evidence depends on other considerations than those of medical science, namely, the description of the gun, the size of the bore, the charge of powder and other facts, none of which came within the range of that peculiar observation and study which qualifies a medical expert to pronounce an opinion. It appears to me very obvious that a person familiar with the use of fire-arms, for instance a gun-maker or an instructor of musketry accustomed to test and use such weapons, would be more competent to pronounce an opinion on a point of this kind than a medical man, and that, in the absence of evidence from such a source, the jury should have been left to draw their own conclusions from the facts.

The admissibility of the witness as an expert, competent to state an opinion on the point in question, was, of course, entirely a question for the judge, and it was for him to say, in the first instance, whether Dr. McKay's testimony on this head came within the required condition. But this ruling of the learned judge, though on a question of fact, is open to review on appeal.

The witness himself says that he had no personal experience in the use of fire-arms, which I think is conclusive against the admissibility of his evidence,

for I cannot agree that the witness is to be considered as establishing his own competency by merely stating that there were *indicia* known to him from his professional studies, from which he was enabled to form a judgment as to the distance from the deceased at which the gun which inflicted the fatal wound was fired.

As regards authority it is remarkable that no English case in point is to be found. This, it seems to me, is in the prisoner's favor since, if such evidence was admissible, the reports would have contained records of, at least, some instances in which it had been admitted.

American authority is in the prisoner's favor for although there is no case in which the facts are precisely similar the cases of *Kennedy* v. *The People* (1); *Cooper* v. *The State* (2); *Cook* v. *The State* (3) are all decisions which lay down principles at variance with those enunciated by the court below and establish that the evidence ought not to have been admitted.

As to the other question I entirely agree with the observations of the Chief Justice with reference to the impropriety of the clergyman's address, and also in the opinion that it did not affect the regularity of the proceedings.

My conclusion is that the appeal should be allowed and the conviction quashed.

FOURNIER J.—I think the evidence of Dr. McKay, produced as an expert, should not have been allowed. His knowledge of the matters as to which he testified was very slight. He was brought as an expert to speak, from his own experience and knowledge, as to what distance the gun must have been from the body when fired. This is what he says himself:—

There are *indicia* in medical science from which it can be said at

(1) 39 N. Y. 245. (2) 23 Texas 331.
(3) 24 New Jersey (C.L.) 852.

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what distance small shot were fired at the body. I have studied this—not personal experience—but from books.

This being a matter of opinion, and not a fact at all, unless he was really an expert should not have been allowed. The character of the evidence must have had great weight with the jury.

I agree with the opinion expressed by Chief Justice McDonald in the court below, and I think the conviction bad on this ground.

There is another objection as to which I agree with the observations made by all the judges in both courts. It was certainly a great indiscretion on the part of the clergyman to make the remarks he did in the presence of the jury, but the remarks were of such a general character that I do not think the jury could have been influenced by them. I agree with the observations censuring such conduct.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed.

As to the first objection raised by the appellant, that is to say, the one relating to what the Rev. Mr. Brown said in the course of his sermon, in the presence of the jury, there is nothing in it. The reverend gentleman, far from saying anything hostile to the prisoner, actually appealed to the mercy of the jury in his favor. But even if he had expressed himself in terms that might have been construed against the prisoner that would not nullify the verdict. The case of *The Attorney General* v. *Wright* (1), is altogether against the appellant on this point.

The second point is whether the answer of Dr. McKay to the following question was rightly admitted in evidence:—

From your knowiedge of medical science in this respect, and from your examination in this case, at how great or how less a distance wonld the muzzle of the gun be from a human body at the time of the discharge ?

(1) 11 Cox 372.

The answer was as follows:—

Judging from what I saw, from the nature of the wound and its appearance, I wonld say that the muzzle of the gun was not nearer than twenty inches, and not further away than three feet, when it was discharged.

The contention is, that this was a question which could only have been put and answered by an expert, and that the witness was not shown to have been an expert on that subject.

The witness further said:—

There are *indicia* in medical science from which it can be said at what distance small shot were fired at the body. I have studied this—not personal experience—but from books.

In cross-examination he says:—

I based my opinion as to the distance, not so much as to the absence of burning as from the size of the wound and jagged nature of the edge.

I am of opinion that this evidence was admissible for the reasons given by my brother Gwynne, whose elaborate notes I have read. I could add nothing to his reasoning on the subject.

GWYNNE J.—The appeal in this case must, in my opinion, be dismissed. As to the point reserved in relation to the observations made by the minister in his sermon to his congregation knowing the jury who were charged with the case of the accused to be present, it is obvious that the case of the appellant could not have been prejudiced by such observations for, however unseemly it was for the minister to assume to address any observations to the jury under the circumstances, the particular observations were in the interest of the accused and substituting the word "mercy" for "equity" were such as might have been addressed to the jury by the judge who tried the case.

The other point reserved relates to the propriety of the surgeon who made the *post mortem* examination of the deceased being permitted to express his opinion as to certain facts which he observed on the *post mortem* examination.

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After he had given evidence of the injuries which he found upon the body of the deceased—of the nature of the wound (a gun shot wound) which was the cause of death—of its external appearance and its internal effects—and having stated that he had examined the wound particularly with a view of discerning the distance which the gun might have been from the deceased at the time of the infliction of the wound he was asked—

From your knowledge of medical science in this respect, and from your examination in this case, at how great or how less a distance would the muzzle of the gun have been from the body at the time of the discharge?

To this question although objected to (the objection having been overruled) the witness replied as follows,

Judging from what I saw—from the nature of the wound and its appearance I would say that the muzzle of the gun was not nearer than twenty inches and not further away than three feet when it was discharged. The carrying capacity of the gun and the nature of the charge, and the condition of the gun as regards cleanliness and the shape of the hole would modify the distance as given by me. There are cases on record where the gun was a much greater distance than I have described and produced such a wound as I have described. In my opinion it would be impossible for a man after receiving such a wound to walk six feet, turn, and sit down. If a man had been shot standing upright and I found him at a distance of six feet sitting down after such a wound as I have described, I would expect to find blood all down his legs and pants and into his shoes and probably on the ground, (if it were possible for a man to do that) for with such a wound the heart would cease to beat instantly after such a wound.

Assuming the admission in evidence of this opinion to have been an irregularity, the verdict of the jury does not for that reason become necessarily vitiated. It is not every irregularity that will vitiate a verdict, but only such an one from which it clearly appears, or can at least be reasonably affirmed that the case of the accused has been or may have been unjustly prejudiced thereby.

Now, it is difficult to conceive how such prejudice could have arisen in the present case, by reason of this

opinion of the surgeon who had made the post mortem examination, for he stated fully the facts observed by himself, upon which his opinion was founded as to the particular fact inferred from those which he had observed ; if those facts did not justify the opinion the attention of the jury could not have failed to have been drawn thereto both by counsel for the prisoner and by the judge, and that this was done by the prisoner's counsel appears from the cross-examination of the witness. If the opinion was well founded I cannot see how it can be said that any injustice was done to the prisoner by its admission, and if upon cross-examination or otherwise it could have been shown to have been founded on insufficient facts it is not likely to have had any effect upon the jury. The contention, however, is not that the opinion was not well-founded, but that the question which the jury had to decide, namely, as to the guilt or innocence of the prisoner, should have been left to them without the aid of the opinion of the witness upon the fact as to which he gave the opinion, and that the mere admission of the opinion as evidence constituted such an irregularity as in point of law avoids the verdict. No case directly in point has been cited in support of this proposition and, in my opinion, it is not one for which the ends of justice demand that a precedent should be made. But the admission of the opinion in evidence did not, in my judgment, constitute any irregularity ; the opinion was one the admission of which was justified by precedent as coming within a recognized exception to the general rule. It is not necessary to discuss here how far the authority of *Carter* v. *Boehm* (1), *Durrell* v. *Bederley* (2), and *Campbell* v. *Rickards* (3), has been shaken by modern decisions, for the opinion given by the witness in the present case was not upon a question which was

(1) 1 Smith. L. C. 9th Ed. p. 522. (2) Holt, 283.
(3) 5 B. and Ad. 840.

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the very one which the jury had to decide, as were the questions upon which the opinions of the insurance broker were offered in evidence in the above cases.

The questions in these cases were—whether, in the opinion of the witnesses offered, certain matters not disclosed to underwriters were material to have been and should have been disclosed and whether, if they had been disclosed, the policies would have been entered into. This was the very point which the juries in those cases had to decide. Here the case is very different; the question which the jury had to pass upon was the guilt or innocence of the prisoner in respect to the felony with which he was charged. This was not the question upon which the opinion of the surgeon in the present case was called and given. His opinion was formed upon facts observed by himself on the autopsy which he had made on the body of the deceased, and was given as to another fact deducible from the facts which had come under his direct observation and which, although it may have been as material to enable the jury to arrive at a just conclusion upon the question they had to decide as any other fact in evidence in the case was material to that purpose, still his opinion so given can by no means be said to have been one upon the very point the jury had to decide so as to make it inadmissible upon that ground.

The contention, however, is that, and it is no doubt in general terms true that, facts only should be stated to the jury and the inferences to be drawn from those facts should be left to them, and that therefore the witness's evidence should have been confined to the facts which came under his observation, leaving the jury to draw from his narrative of those facts their inference as to the other fact if it was material: but the object of all judicial enquiry is to elicit truth, and when a medical man gives evidence upon the trial of

an indictment for homicide as to matters observed by him upon a *post mortem* examination of the deceased his evidence from the nature of the case must for the most part be given in the form of his opinion; and when an inference as to the existence of a fact not seen is to be drawn from the facts which were observed by himself on the *post mortem*, his opinion as to the inference is not at all in the nature of a decision on a fact to the exclusion of the jury, but is evidence of a new fact not to admit which, if the fact inferred be relevant to the point in issue and which the jury have to decide, would be to reject what was essential to the investigation of truth; the fact which was sought to be established by the opinion of the surgeon who made the *post mortem* was as to the distance which the gun from which was discharged the charge of shot which caused the death of the deceased may have been from his body when discharged; that may have been an important fact which, in connection with other facts appearing in evidence, may have materially aided in enabling the jury to arrive at a sound and just conclusion upon the question they had to decide, namely, the guilt or innocence of the prisoner.

Now the external appearance of the wound, its shape and the jagged nature of the edge as well as the internal effects found, were matters which gave to the skilful anatomist and professional observer exceptional opportunity and peculiar knowledge enabling him to arrive at a correct judgment as to the fact to establish which the question was put to him, which no one but an actual and competent observer of the wound, its character and its effects, could possibly have had, and which no narrative of the appearance of the wound could convey to a jury who had no opportunity of seeing the wound itself even if they had the skill to observe its internal effects. The opinion, therefore, of

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the surgeon who did observe the wound and who, as he says, examined it for the express purpose of forming an opinion upon the fact as to which the question was put to him was evidence which was admissible as to the fact inferred, and which was proper to be submitted to the jury; indeed the case of *Kennedy* v. *The People* (1) upon which the learned counsel for the appellant chiefly relied is an authority in support of this view, for there it was held by the Court of Appeals for the State of New York that the opinion of the surgeon who made the *post mortem* as to the amount of force necessary to produce the wound which he found upon the deceased was properly received in evidence. Now in the present case the question objected to was one pointing precisely to the degree of force necessary to make with a charge of shot the wound which the witness found upon the deceased, the force in such case being to be estimated by the distance which the gun from which the charge of shot came may have been from the body in order to make the wound such as he found it to be. Mr. Wharton, in his work on criminal evidence, gives very many instances of the admission of the opinions of witnesses as evidence under circumstances similar to the present as, for example, among others that certain hair upon a club was in the opinion of the witness human hair and resembled the hair of the deceased—that a certain substance was hard pan—that a certain person appeared to be in fear—that on being held to answer he looked as if he felt badly—that the appearance of a blood-stain indicated that the spirt came from below; and he lays it down as a general rule, in the justice and propriety of which I entirely concur, and in support of which he cites several authorities of the courts of the United States, namely, that it is not necessary for a witness to

(1) 39 N. Y. 245.

be an expert to enable him to give an opinion as to matter depending upon special knowledge when he states the facts upon which he bases his opinions. In *Alcock* v. *The Royal Exchange Ins. Co.* (1), the Court of Queen's Bench, consisting of Lord Denman C. J., Coleridge, Wightman and Erle JJ., held that in an action for a total loss of an insured vessel, the captain having abandoned her, and the defence being that there had been no total loss, a witness might be asked whether from what he had observed of the captain's habits in "A" before the voyage he could form any judgment as to his general habits of sobriety or intoxication.

So in an action for words spoken or written a witness may be asked whether there had taken place any thing which gave a peculiar character to the expressions used; and if there had he may then be asked what in his opinion was the meaning intended by the expressions. It is quite a common practice that a surgeon who has made a *post mortem* examination of a deceased person on a case of homicide, should be asked whether a wound which he found to be the cause of death had been in his opinion caused by a blunt or a sharp instrument, whether a particular instrument produced and shown to the jury could or could not, in his opinion have inflicted the fatal wound (2).

Now, any intelligent person provided he had examined the wound could form a sound judgment upon questions of this nature, but the opinion of an intelligent surgeon who had made the *post mortem* examination and who had applied his skill and judgment in ascertaining the precise extent of the injury internally as well as externally is no doubt the most competent person to give light upon the points to a jury who had

(1) 13 Jurist 445.

(2) *Daines* v. *Hartley* 3 Ex. 200.

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no opportunity, and had not, perhaps, skill sufficient to enable them intelligently to examine the wound if it could have been shown to them and to observe the extent of its effects.

So in the present case there can be no doubt that a skilful surgeon who had carefully observed not only the external appearance of the wound but the intensity of its internal effects had exceptional advantages and knowledge which the jury could not have had for estimating at what distance the gun when discharged may have been from the deceased in order to have inflicted a wound of the nature, extent and intensity which he found the wound to be which caused the death of the deceased, and as the jury were entitled to have laid before them the best evidence which can be procured upon all matters relevant to the determination of the issue they had to decide, the evidence was, in my opinion, quite proper to have been received, and to have been submitted to them for such weight as they might think it to be entitled to after a cross-examination of the witness and after hearing such other evidence, if any, as had been adduced calling in question the soundness of the opinion of the witness as resting upon the facts upon which he said he had based it, and hearing the comments of counsel.

Appeal dismissed with costs.

Solicitor for appellant: *H. McD. Henry.*

Solicitor for respondent: *Attorney General for Nova Scotia.*

OSIAS BRISEBOIS.....APPELLANT;

AND

THE QUEEN.....RESPONDENT.

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Oct. 11.
Dec. 15.

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

Crown case reserved—Ch. 174 *secs.* 246 *and* 259 *R. S.C.—Construction of—Juror—Personation of—Irregularity—Cured by verdict.*

B. having been found guilty of feloniously having administered poison with intent to murder moved to arrest the judgment on the ground that one of the jurors who tried the case had not been returned as such.

The general panel of jurors contained the names of Joseph Lamoureux and Moïse Lamoureux. The special panel for the term of the court, at which the prisoner was tried, contained the name of Joseph Lamoureux. The sheriff served Joseph Lamoureux's summons on Moïse Lamoureux, and returned Joseph Lamoureux as the party summoned. Moïse Lamoureux appeared in court and answered to the name of Joseph and was sworn as a juror without challenge when B. was tried. On a reserved case it was

Held, per Ritchie C. J., and Taschereau and Gwynne JJ., that the point should not have been reserved by the judge at the trial, it not being a question arising at the trial within the meaning of sec. 259 ch. 174 R. S. C.

Held also, per Taschereau and Gwynne JJ. affirming the judgment of the Court of Queen's Bench, that assuming the point could be reserved sec. 246 ch. 174 R. S. C. clearly covered the irregularity complained of. Strong and Fournier JJ. dissenting.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada on a case reserved by Mr. Justice Henri Taschereau at the Criminal Assizes of the district of Terrebonne, January, 1888.

The case reserved was as follows:

The indictment in this cause found by the Grand Jury alleged that the accused on the 29th of August,

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

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1887, in the Parish of St. Benoit, District of Terrebonne, had feloniously administered to Francois Xavier St. Denis, one ounce of a certain poison called "Paris Green," with the intent then and there to commit murder, on the person of the said Francois Xavier St. Denis.

The trial of the accused took place on the 14th, 16th & 17th of January instant, and terminated in a verdict of guilty rendered by the petty jury sworn for the trial.

After the rendering of the verdict, the advocate for the accused made the following motion in arrest of judgment:

"Motion of the said Osias Brisebois, for arrest of judgment in this cause and that the verdict rendered against him on the 17th day of January instant be set aside and annulled and that the said Osias Brisebois be, if not liberated and discharged, at least afforded a new trial, to be held immediately, or at the approaching criminal assizes for this district, for among other reasons the following:

"Because it appears by the record and the minutes of this court that during the trial in this cause Joseph Lamoureux a resident of the Parish of St. Monique, in the said district, duly qualified and found on the list of petty jurors duly revised for the district of Terrebonne, deposited in the office of the sheriff of this district, and, further, found and mentioned on the panel of petty jurors bound to serve and to act as such during the trial of the said Osias Brisebois, did not answer himself in person to the calling of his name, but that another person, of the name of Moïse Lamoureux, also a resident of the said Parish of St. Monique, in said district, answered falsely and illegally to the calling of the said name of Joseph Lamoureux and did serve and was sworn as a petty juror under the name of Joseph Lamoureux in the trial of the said Osias

Brisebois, instead and in place of the said Joseph Lamoureux."

On this motion the advocate of the prisoner and the deputy of the Attorney General produced respectively affidavits and documents by means of which the following facts are established:

The general list of persons qualified as jurors contains at the same time the names of Joseph Lamoureux and of Moïse Lamoureux, both described as farmers of the Parish of St. Monique, concession of La Côte des Saints.

The special panel of petty jurors bound to serve during the term contained the name of Joseph Lamoureux, farmer, St. Monique.

Although the properties of the said two persons are situated in the said concession of La Côte des Saints, it appears that Moïse Lamoureux only had his residence on the road in front of the said concession, while Joseph Lamoureux had built on the road in front of the neighbouring concession of La Côte St. Jean.

The sheriff went himself to make the service on the petty jurors and going to the domicile of Moïse Lamoureux and without ascertaining his Christian name asked him if he was the only Lamoureux living in this concession. On the reply being in the affirmative by the said Moïse Lamoureux who believed, and who still appears to believe, that Joseph Lamoureux belongs to the concession of La Côte St. Jean, the sheriff gave to the said Moïse Lamoureux personally the summons intended for Joseph Lamoureux. Moïse Lamoureux obeyed this summons, answered during all the criminal term, and in particular at the trial of the accused, to the name of Joseph Lamoureux, was sworn as a juror in the said trial of the accused in the absence of any challenge, and thus formed part of the

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jury which rendered against the accused a verdict of guilty.

It is further in evidence that the accused at the time of the trial, and before, knew Moïse Lamoureux, although he did not know his Christian name.

The evidence and these documents produced do not show that the prisoner had any cause of challenge against Moïse Lamoureux who served under the name of Joseph Lamoureux.

The special panel for the term did not contain the name of Moïse Lamoureux.

On this motion and in view of these facts I did not pronounce sentence against the accused, who was remanded to prison, and I thought it my duty to reserve the question for the consideration of the judges of the Court of Crown Cases Reserved; although an important precedent exists in the matter, reported in the 3 vol. of the Q.L.R., p. 212, *Reg.* v. *Fiore*, and although the 246th sec. of ch. 174 of the Revised Statutes of Canada appears applicable to the case, I have found the question sufficiently special to merit the consideration of the honorable tribunal to which I have referred it.

The Court of Queen's Bench, Mr. Justice Tessier dissenting, refused to interfere with the verdict and the prisoner then appealed to the Supreme Court of Canada.

Leduc (*Belcourt* with him) for appellant.

F. X. Mathieu for respondent.

The points and cases relied on by the counsel are fully reviewed in the judgments hereinafter given.

Sir W. J. RITCHIE C.J.—This was a case reserved under the Revised Statutes ch. 174 sec. 259 which enacts that every court before which any person is convicted on indictment for any treason, felony or misdemeanor, and every judge within the meaning of

"The Speedy Trials Act," trying any person under such act, may, in its or his discretion,. reserve any question of law which arises on the trial, for the consideration of the justices of the court for crown cases reserved, and thereupon may respite execution, &c."

I am of opinion this was not a question arising at the trial, but it was an objection raised subsequent to the trial, and which could only be determined on a writ of error and could not be reserved and disposed of in a summary manner on affidavits. I am therefore of opinion that as this was not a question arising on the trial which could be reserved, the Court of Queen's Bench in Montreal had no jurisdiction to adjudicate on the case and consequently we have none, the prisoner's remedy, if any, being by writ of error. Mr. Justice Gwynne has permitted me to peruse what he has written and will read on this point, and as he has discussed the point so fully and I entirely agree with what he has written and with the conclusion at which he has arrived I have nothing further to add. I do not wish it, however, to be understood that there should be a writ of error granted in this case, or to express any opinion as to what should or would be the result, if a writ of error was granted.

It has been also contended that this case comes within and is covered by sec. 246 of ch. 174 of the R. S. C. which enacts *inter alia*: "Judgment, after verdict upon "an indictment for any felony or misdemeanor shall "not be stayed or reversed * * for any misnomer or "mis-description of the officer returning such process "(jury process), or of any of the jurors,—nor because "any person has served upon the jury who was not "returned as a juror by the sheriff or other officer." If I am right in the view I take upon the first point the determination of this question is not necessary for the disposal of this case, therefore without expressing a

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positive opinion I may say I incline very strongly to the view that if this case does not come within the very words of the act it is within the spirit and scope of the enactment and within the intent, policy and object if the legislature or, as Lord Coke expressed it, to suppress the mischief and advance the remedy.

STRONG J.—I am of opinion that we ought to allow this appeal, quash the conviction and order a new trial.

The prisoner was indicted for a statutory felony—administering poison with intent to commit murder—and was convicted. At the conclusion of the trial and before sentence, it was discovered that Moïse Lamoureux, one of the jurymen by whom he had been tried, had not been returned on the panel, but had either by mistake or design, which it does not appear, answered to the name of Joseph Lamoureux, a juryman who had been duly returned on the panel, and thus by personating the latter had been sworn in his place. The learned judge before whom the trial took place reserved the case for the opinion of the Court of Queen's Bench on its appeal side pursuant to section 259 of the Criminal Procedure Act. The case having been argued before the Court of Queen's Bench, that court affirmed the conviction; one of the learned judges however, Mr. Justice Tessier, having differed from his colleagues, the prisoner was enabled to appeal to this court, which he has done,

I am of opinion that Mellor's case (1), which has been relied on as a conclusive authority against this appeal, has no application here. In the first place, the learned judges who there held there had been no mis-trial, did so on the ground that William Thorniley, who by mistake appeared and was sworn in answer to the name of Joseph Henry Thorne,

(1) 1 Dears. & B. 468.

the person actually called, was himself a juror, whose name was contained in the panel duly returned by the sheriff. The prisoner in that case was not able to make the objection that he was tried by a jury, one of whom had no authority to try him. The case there was merely one where one juror was mistaken for another, and it is upon this circumstance that the judgments of those judges who held there had been no mis-trial were principally rested, as will be seen from the clear statement of the argument from that point of view presented in the judgment of Mr. Justice Byles. The same argument is not available here, in answer to the prisoner's objection that he has been illegally tried, for it is manifest that only eleven out of the twelve jurors who had the prisoner in charge had authority to try him.

Next, I cannot agree with the learned chief justice of the Queen's Bench in the opinion that this is an objection covered by the 246 section of the Criminal Procedure Act, (R. S. C. cap. 174). That section is a transcript, so far as the clause is concerned which enacts that a verdict shall not be "stayed or reversed because any person has served upon the jury who was not returned as a juror by the sheriff or other officer," of the English Statute 7 Geo. 4 c. 64 s. 21. This enactment was not referred to in Mellor's case for the very obvious reason that it did not apply since both the juror called and the juror who presented himself and was sworn in his stead had been legally "returned as jurors by the sheriff," and therefore, the case did not come within the terms of the statute. Here, however, the person sworn on the jury was not duly returned and therefore it has been said that the statute applies. There is, however, in the present case something more than the irregularity which the statute was designed to cure, the mere serving on the jury of a person not

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duly returned by the sheriff to serve. Not only was the juror who illegally served here not duly returned, but he personated one who was duly returned, and in that way a wrong has been practised on the prisoner, a wrong which, if done knowingly, was undoubtedly a high contempt of court and an indictable offence, and if done innocently and by mistake may nevertheless have greatly prejudiced the prisoner on his trial. If section 246 covers a case like this, so it would also cover a case where the personation of the juror was the result of a deliberately planned fraud, a conspiracy between the juror actually summoned and a stranger personating him, with the very purpose and design of introducing upon the jury a person whose object it might be corruptly to convict the prisoner. It is impossible to suppose that the statute could apply to validate the trial in such a case, and if it would not it must also be inapplicable in the present case.

The whole tenor of the reasoning of the judges who thought there was no mis-trial in Mellor's case favors this view.

Further Mellor's case can be no authority against the prisoner on the question of mis-trial. Of the fourteen learned judges who composed the court in that case, two, Chief Baron Pollock and Mr. Justice Williams, gave no opinion on this point, but rested their judgments exclusively on the ground that the court had no jurisdiction to entertain the question reserved. The remaining twelve judges were equally divided on this point—six, including Lord Campbell C.J., Cockburn C.J., Coleridge and Wightman JJ., and Watson and Martin BB., holding distinctly that there had been a mis-trial, whilst the remaining six judges were of a contrary opinion. It is evident, therefore, that on this point of the nullity or validity of the trial Mellor's case can be of no decisive authority, and we are

thrown back on the preceding authorities and on the reasons, apart from authority, for and against the view contended for on behalf of the prisoner, reasons which are stated with great force and lucidity in the opposing judgments delivered in Mellor's case. As regards the effect which this case of Mellor ought to have upon our decision on this appeal, I cannot, however, refrain from saying that although their judgments were neutralized by the voices of an equal number of judges on the opposite side, yet the weight of high authority and of great names is decidedly with the six judges who pronounced for the prisoner, and I more especially refer to the two most distinguished judges whose names head the list, who successively filled the office of Lord Chief Justice of England, and whose pre-eminence as great common law judges cannot be questioned,—Lord Campbell and Sir Alexander Cockburn.

The only authority in which the facts resemble those in the present case, where a juryman whose name was on the panel and who had been duly summoned in his proper name was personated by a stranger whose name was not on the panel and who had received no summons to serve, is the civil case of *Hill* v. *Yates* (1), where the Court of Queen's Bench did certainly refuse a rule *nisi* for a new trial on this ground. I consider that case, however, to be virtually disposed of in the judgment of Lord Campbell in Mellor's case where its unsoundness is most conclusively demonstrated. The reasons thus given by Lord Campbell are in the main the same as those which I have already stated as being an answer to the argument raised on behalf of the crown that the prisoner's objection in the present case was met by the 246th section of the Criminal Procedure Act, viz., that if the irregularity were to be con-

(1) 12 East 229.

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sidered as a ground of challenge only, and as not invalidating the trial, the consequence would be, that there would be no remedy, where the wrongful substitution of a stranger for a juror took place with the deliberate and malicious intent of prejudicing the prisoner on his trial. These reasons seem to me unanswerable in a case like the present, where the juror regularly called has been personated by one who was not himself on the panel whatever weight they ought to have in a case like Mellor's where the person substituted was himself a juror, duly summoned and on the panel, and thus legally selected and having authority for the trial of the prisoner subject only to the latter's right of challenge. I am of opinion, therefore, that we ought not to consider ourselves bound by *Hill* v. *Yates*, more especially as that case was not a decision of a Court of Error or Appeal but of a court of first instance only, and moreover a decision pronounced in a civil cause and on a motion for a new trial.

As regards the comparative weight of the reasoning, apart from authority, upon which the respective views of the learned judges in Mellor's case are supported, it seems to me that the reasons of Lord Campbell and the judges who agreed with him far outweigh the arguments put forward by those who held opposite opinions.

In Mellor's case the arguments against the prisoner on the point of mis-trial appear to have been principally of two kinds, first those which depended on the important circumstance, which distinguishes that case from the present, that the person who was there substituted for the juror called was himself a juror, whose name was regularly upon the panel, a consideration which makes all the reasons so based entirely inapplicable here, and secondly arguments deduced

from considerations of public policy, and the inconvenience of a judicial decision which might open the door to a class of frivolous, technical objections tending in some instances to a failure of justice in the administration of the criminal law. That public inconvenience may possibly be occasioned by holding the objection now raised by the prisoner a ground for invalidating the conviction, may to a certain extent be true but that does not constitute a sufficient reason why a prisoner should be deprived of a fair trial, as he certainly might be if the contrary rule should now be enunciated by authority. The fallacy in the argument thus derived from public policy and convenience is that those who advance it contemplate that this species of fraud on the law, by the personation of jurors in criminal cases will only be perpetrated in the interest of prisoners, whereas it is apparent that it may also be resorted to by those who may seek to injure and prejudice prisoners in their trials, and so long as the last alternative is possible an argument derived from the mere probability that such an abuse of justice will be more frequently practised on behalf of accused persons than against them ought not to prevail. In other words, there is no higher policy known to the common law of England than that which seeks to assure to every person brought under criminal accusation an absolutely fair and impartial trial. The courts have it in their own power to protect themselves, at least in a great degree, against any misapplication of a rule of procedure, involved in a decision of this appeal in favor of the prisoner, by enforcing greater caution and diligence on their own officers, by seeing that proper accommodation is provided for jurymen summoned on the panel so that they may be kept apart from the crowd of mere spectators who throng the courts, and by enforcing exemplary punishment when a case of wilful personation is

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discovered; by these means the anticipated evil which, after all, is probably chimerical, will seldom be likely to cause a failure of justice. But even though the danger were a hundredfold greater it ought not, in my judgment, to weigh for a moment against the sacred right of a prisoner to have a fair trial, a right which it is impossible he can in the future enjoy if the judicial sanction of a court of appeal is now given to proceedings by which the prisoner was not only deprived of his right of challenge but possibly tried and convicted by a juror who may have introduced himself upon the jury for the express purpose of prejudicing the trial against him. Lord Campbell, in his judgment in Mellor's case, answers this argument from public inconvenience thus conclusively:

> There may certainly be a dread that frivolous objections to procedure in criminal cases may be encouraged by our decision; but it is no frivolous objection that the prisoner on a trial for murder was, without any fault of his own, deprived of his right to challenge one of the jurymen who tried him, and I hope the judges may safely rely upon their own efforts, and, if necessary, upon the aid of the legislature, to repress mere technicalities, which seek to screen guilt instead of protecting innocence.

Sir Alexander Cockburn in his judgment is equally pronounced against this argument derived *ab inconvenienti*. We have therefore these great chief justices, both of whom were most experienced criminal lawyers and who had both served in the office of Attorney General before their promotion to the bench, repudiating in the most clear and emphatic manner this argument by which it was sought to infringe on a prisoner's right to a fair trial. I have never read or heard that either of the chief justices was liable to be influenced by sentimental considerations in favor of prisoners; the traditions of the profession are, as I have always heard, rather to the contrary; we may therefore safely assume, that in a case like the present they would have considered the nullity of the trial beyond all doubt or question. In short Mellor's case, so far

from being an authority against the prisoner on this point as to the validity of the trial, is in truth a strong one in his favor, inasmuch as the opinions of the six judges (including the two chief justices) who there pronounced for the prisoner are, *a fortiori*, applicable here, whilst the opinions of the six judges, who were there against the prisoner applied to an irregularity of a totally different kind from that which occurred on the trial now under consideration. I am, therefore, of opinion that there was such a miscarriage in the trial of the appellant that at common law the whole proceeding was a nullity. Further, I hold that the trial having thus been illegal and void at common law, the 246th sec. of the Criminal Procedure Act does not, for the reasons before stated, cure such irregularity and that it has therefore no application whatever to the case.

Next it is argued for the crown that the 259th sec. of the Criminal Procedure Act providing for the reservation of questions of law arising on the trial of indictments does not apply, and Mellor's case is again invoked as an authority for this proposition also. Here, again, I have to determine against the crown. The great argument against the jurisdiction in Mellor's case was that there was no power conferred on the court to issue a *venire de novo*, so that if the conviction should have been quashed the prisoner must have gone free. The court there, like the court for crown cases reserved under the present statute, was a purely statutory court, and had no authority save such as was conferred upon it by the express words, or by necessary implication from the express words, of an act of Parliament. Had the facts been as here showing indubitably that there had been a mis-trial, and had the statute conferred the powers now given by sec. 268 of the Criminal Procedure Act, and which applied to the Court of Queen's Bench as well as it applies to this

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court, authorizing the granting of a new trial, (a substitution for the common law remedy of a *venire de novo*) where "the conviction is declared bad for a cause "which makes the former trial a nullity so that there "was no lawful trial in the cause;" had, I say, the English statute conferred such a power as this the principal ground of the argument against the jurisdiction in Mellor's case would have entirely failed. As the act of parliament now enables the courts here to do justice by remanding the prisoner for a new trial, I can see no objection to holding that the Court of Queen's Bench had jurisdiction to entertain this objection to the validity of the conviction as "a question arising on the "trial," as I feel assured the English court would also have done in Mellor's case, had the opinion of Lord Campbell and those who agreed with him, that there had been a mis-trial, prevailed and had the statute in terms conferred the power to order a *venire de novo*, or the power which this court and the Court of Queen's Bench now possess of ordering a new trial.

I am of opinion that the trial of the appellant should (in the words of the statute) be declared to have been a "nullity," that the conviction should be quashed and a new trial ordered.

FOURNIER J.—Aux assises du district de Terrebonne, tenues en janvier dernier, Osias Brisbois a subi son procès pour avoir félonieusement administré un certain poison à F. X. Denis dans l'intention de commettre un meutre, et un verdict de coupable a été prononcé contre lui. Après ce verdict, le prisonnier a fait, par le ministère de son avocat, une motion en arrêt de jugement pour faire annuler le verdict, ordonner sa mise en liberté, ou pour un nouveau procès.

L'unique raison donnée à l'appui de cette motion est que le nom de Moïse Lamoureux, qui a fait partie du petit jury qui l'a trouvé coupable, ne se trouve pas

sur la liste des jurés assignés pour le terme pendant lequel le prisonnier a subi son procès. Le nom de Joseph Lamoureux, son frère, s'y trouve; mais celui-ci n'ayant pas été assigné, a, comme de raison, fait défaut chaque fois que son nom a été appelé comme juré. A chacun de ces appels, Moïse Lamoureux, qui avait reçu, par erreur, l'assignation destinée à Joseph, s'est présenté à la place de celui-ci et a illégalement prêté serment comme juré, siégé comme tel, pris part au verdict—sous le nom de son frère—sans avoir prêté serment sous son nom, ni révélé son identité en aucune manière. Cette étrange irrégularité n'a été découverte qu'après le verdict, mais avant que aucune sentence n'eût encore été prononcée. C'est en se fondant sur ce fait que le prisonnier demande l'arrêt du jugement et l'annulation du verdict.

L'honorable juge H. T. Taschereau, qui présidait au procès de l'accusé, après l'exposé des faits contenus dans la motion et après leur vérification par affidavits, en a fait rapport à la cour du Banc de la Reine, réservant à cette dernière cour la décision de la question ainsi soulevée.

La majorité de la cour du Banc de la Reine a rejeté cette motion pour le motif qu'elle considérait l'irrégularité invoquée comme insuffisante pour faire annuler le verdict. En conséquence de ce renvoi, appel à cette cour.

La question à décider est donc de savoir si le fait de Moïse Lamoureux, dont le nom n'était pas sur la liste des jurés, appelé et répondant au nom de Joseph Lamoureux, dont le nom se trouvait sur cette liste, prêtant serment et siégeant sous le nom de Joseph Lamoureux, sans avoir lui-même prêté serment sous son propre nom, constitue une irrégularité suffisante pour faire déclarer le procès nul (*mis-trial*).

Cette question n'est pas nouvelle. Elle a été soulevée bien des fois en Angleterre. L'honorable juge

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Ramsay dans ses notes sur la cause de *Feore* (1), en a cité plusieurs cas d'où il a conclu :

I take it, therefore, that before the passing of the statute 21 of Jac. 1, the serving as juror of any person not a juror, or one juror for another, or by a name not his, or by a false addition, or of any disqualified person, would make the trial null, and that is only modified in the provinces by the statute of Jac. 1, and by the section of our Criminal Procedure Act, 32 and 33 Vic., ch. 29, sec. 79.

Cette dernière section est maintenant remplacée par la 246me section du chapitre 174, Statuts revisés du Canada, déclarant que nul jugement après verdict ne sera arrêté, ni infirmé pour diverses raisons et entre autres la suivante :

Ni à raison de ce qu'une personne aura servi sur le jury, bien qu'elle n'eût pas été mise au nombre des jurés sur le rapport du shérif.

Comme on le voit, le texte qui concerne la question soulevée ici se borne à dire que le jugement ne sera pas arrêté parce qu'une personne dont le nom n'était pas sur la liste des jurés aura servi comme tel. Ce serait bien de faire application de cette disposition, si Moïse Lamoureux, dont le nom n'était pas sur la liste, eût été soit par méprise ou par une erreur quelconque, appelé par son véritable nom à faire partie du jury. Une telle irrégularité aurait été sans doute couverte par la section 246. Mais les choses sont loin de s'être passées de cette manière. Joseph Lamoureux dont le nom se trouvait régulièrement sur la liste étant appelé, c'est Moïse qui se présente à sa place et le personnifie. Il prête serment sous un nom qui n'est pas le sien et s'ouvre ainsi l'entrée du jury par un faux serment. Il répète cette imposture à chaque fois que Joseph Lamoureux est appelé, et il a le soin de si bien cacher son identité qu'elle n'est découverte qu'après le verdict. Est-ce une de ces irrégularités couverte par la clause 246? Evidemment non ; la loi présume que le juré dont le

(1) 3 Q. L. Rep. p. 228.

nom n'est pas sur la liste a dû être appelé par son nom. Elle ne peut certainement pas s'interpréter de manière à couvrir le cas de celui qui a faussement pris le nom d'un autre et jure faussement qu'il est un tel, tandis qu'il est une autre personne. C'est grâce à deux offenses criminelles bien graves: au faux serment et à la personnification, que Moïse Lamoureux a réussi à pénétrer dans le jury. Peut-on dire que la loi entendait traiter comme simple irrégularité le fait dont Moïse Lamoureux s'est rendu coupable? Par cette supercherie, il a empêché le prisonnier de se prévaloir de son droit de récusation. Il pouvait n'avoir aucun motif de récuser Joseph, mais il pouvait en avoir contre celui qui cachait son nom sous celui de Joseph et s'introduisait d'une manière aussi extraordinaire dans le jury. Quel pouvait être ses motifs d'en agir ainsi? Nous les ignorons; mais l'étrangeté et l'illégalité de sa conduite ne font présumer rien de bon en sa faveur. On ne devrait pas en être réduit à des suppositions pour s'assurer si le prisonnier a eu un procès régulier et impartial.

On a invoqué contre la position prise par le prisonnier l'autorité de la décision dans la cause de *Mellor* (1), dans laquelle une question analogue s'est soulevée Cette décision a été citée et discutée dans la cour du Banc de la Reine de Québec, dans la cause de *Regina* v. *Feore* (2), mais la majorité de la cour n'a pas considéré qu'elle devait avoir toute l'importance d'un précédent, parce que sur la question à décider par la cour du Banc de la Reine, les juges anglais s'étaient trouvés divisés également, six d'un côté et six de l'autre. Deux des juges qui furent d'avis de maintenir le verdict, s'abstinrent de décider la question de savoir si l'objection eut été soulevée d'une autre manière, elle eût été fatale ou non. Je ne crois pas, pour les raisons données par

(1) 1 *Dears* v. *Bell* 468. (2) 3 Q. L. R. 219.

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l'honorable juge Ramsay, que l'on doive non plus donner à la décision dans la cause de *Mellor* l'autorité d'un précédent applicable à celle-ci. Les questions en débat, il est vrai, ont été traitées avec beaucoup de science et de développement, mais pour répondre aux arguments employés par les juges de la majorité, il n'y a qu'à se servir des arguments encore plus solides donnés par la minorité.

A l'objection faite, que la cour n'a pas juridiction pour adjuger sur une question réservée, qui n'a été soulevée qu'après le verdict, je répondrai par l'argument de l'honorable juge Ramsay sur la même question dans la cause de *Regina* v. *Feore*. Dans la présente cause, l'objection a été faite et réservée après le verdict, il est vrai, mais avant qu'aucune sentence n'eût été prononcée. L'honorable juge s'exprima ainsi :

With regard to the first of these points it does not arise in this case, for the question was raised before the end of the trial, that is before sentence. But in any case it would be a very narrow mode of interpreting an enactment such as that permitting the reservation of Crown cases, to say that a question did not arise at the trial because it was not insisted upon then. The question took its rise at the trial, although only noticed after. Again, if under the statute the judge had not power to reserve the question, he certainly could not have entered the difficulty on the record, and the accused would have been without remedy, whether he suffered injustice or not, thus effectually avoiding all the inconveniences so much dreaded by Lord Ellenborough. The jurisprudence in this province is to give the fullest possible scope to the enactment permitting the reservation of questions of law, and I think our jurisprudence is more consistent than that in England on the point.

Pour tous ces motifs, je suis d'opinion que l'appel devrait être accordé.

TASCHEREAU J.—The appellant having been found guilty of feloniously having administered poison with intent to murder, moved to arrest the judgment on the ground that one of the jurors who tried the case had not been returned as such. As this irregularity did not appear on the face of the record it could,

clearly, not constitute a ground for a motion in arrest of judgment. A case having, however, been reserved by the judge presiding at the trial, and determined by the full court of Queen's Bench, we have, I presume to consider it as properly before us on the facts as stated in the court below, assuming, here, of course, that the case could be reserved.

These facts are as follows. The general panel of jurors contained the two names of Joseph Lamoureux and of Moïse Lamoureux. The special panel for the term of the court at which the prisoner was tried contained only the name of Joseph Lamoureux. The sheriff, however, served Joseph Lamoureux's summons on Moïse Lamoureux, but returned Joseph Lamoureux as the party summoned. Moïse Lamoureux appeared in court, as a juror, during the whole term answering to the name of Joseph Lamoureux, and on this Brisebois', trial, went in the box without challenge, having likewise answered to the name of Joseph Lamoureux.

I am of opinion that this appeal should be dismissed on the ground, taken by the Court of Queen's Bench at Montreal, viz.: "that section 246, ch. 174 of the Rev. Stat. clearly covers the irregularity complained of by the appellant here." This section in express terms enacts that judgment shall not be stayed or reversed because any person has served upon the jury who was not returned as a juror by the sheriff. Now, here, the only irregularity complained of is that Moise Lamoureux has served upon the jury, though not returned as a juror by the sheriff.

This is precisely what the statute says will not be a ground for staying or reversing the judgment. The reason that in *Mellor's* case (1), the corresponding Imperial enactment, 7 Geo. IV, c. 64, sec. 21 was not cited

(1) 1 Dears & B. 468.

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is that the enactment had, in that case, no application. There no question arose of a party serving as a juror who had not been returned by the sheriff as such. *Reg.* v. *Feore* (1) has also been relied upon by the appellant, but that case does not bind us, did it apply to the present one. The case of *Dovey* v. *Hobson* (2) is in point, and would conclude this case even without the above clause of our statute.

As to the question whether the point raised was one which could be reserved by the judge at the trial, I am of opinion with the Chief Justice and Mr. Justice Gwynne, that it was not one which could be reserved. I am of opinion that this appeal should be dismissed.

GWYNNE J.—In Mellor's case (3), the Court of Criminal Appeals in crown cases reserved, upon the opinion of eight judges against six, affirmed the conviction. Seven of the eight were of opinion that the point submitted, which was similar to that submitted in the present case, did not come within the jurisdiction of the court for hearing crown cases reserved; and that it could only be raised, if at all, upon a writ of error, as error in fact not error in law. Five of the seven held that if so raised, the irregularity which was complained of, constituted no mis-trial, in which opinion the eighth also concurred, but he gave no opinion as to the jurisdiction of the court further than that he doubted its having any jurisdiction to award a *venire de novo*; and the other two gave no opinion upon the question of mis-trial or no mis-trial, because the point was not properly before them, not coming up on a writ of error. Of the other six who were of opinion that the court had jurisdiction, and that the irregularity complained of did constitute mis-trial, two namely, Cockburn C.J. and Watson B. expressed themselves as having arrived

(1) 3 Q. L. R. 219. (2) 2 Marsh 154.
(3) 1 Dears & B. 468 & 4 Jur. (N.S.) 214.

at this opinion with great doubt and a third Martin B. rested his judgment upon the principle which he laid down, namely, that in these cases of questions of law reserved under the statute for the opinion of the court of crown cases reserved, the statement of the judge as to the facts upon which the question of law submitted by him depends must be received by the court as absolute verity. If the questions which can be reserved under the statute are limited to questions upon matter appearing on the record, as in arrest of judgment, and questions of law arising during the progress of the trial which the judge presiding at the trial might have judicially determined himself if he had been so minded, the principle that the judge's statement of the facts upon which he wished to submit a question of law to the opinion of the court should be received by the court as absolute verity seems to be perfectly sound; but if the statement of facts made by the judge is, in all cases submitted under the statute to be received as absolute verity, that to my mind affords a conclusive argument against the question which was submitted in Mellor's case and that which is submitted in the present case being within the contemplation of the statute; for, in the absence of any provision in the statute authorizing or enabling a judge to collect material after verdict, upon which to make a statement of facts for the purpose of submitting thereon a question of law, the decision of which, may affect the verdict, I cannot recognize the principle upon which such a statement should be received as absolute verity; or why either the prisoner or the crown should be deprived of their right to dispute the truth of the facts as stated by the judge, or if true of displacing them by other facts proposed to be put in course of judicial enquiry as they would have the right to do in the case of a writ of error in fact; which appears to be the only proceeding by which the

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truth of the facts relied upon as being sufficient to vacate the verdict, or of other facts pleaded or relied upon as displacing the effect of the former, assuming them to be true, can be judicially established. The decision in Mellor's case has never been questioned that I have been able to find except in the case of *The Queen* v. *Feore* (1), in which case, with great deference I say it, the learned judges who set aside the verdict do not seem to me to have correctly appreciated the grounds upon which the judgments of the learned judges who affirmed the conviction in Mellor's case proceeded.

The case is cited as law in the edition of Roscoe's Criminal Evidence by Horace Smith of 1884 (2), and in a note to Chitty's Statutes, 4th edition by Lely (3). The reasoning of those learned judges upon both points is to my mind most conclusive. Pollock C.B. says:

Apart from the statute which created this tribunal 11-12. Vic. ch. 78, the objection, if any, could not have been taken except on a writ of error, and the error, if error it be, is error in fact and not error in law. In my judgment the statute was clearly not intended to supersede the Court of Error and to confer upon this court all its functions

And again:

The authority and jurisdiction of the court is, in my opinion, limited to matters of law occurring upon the trial, of which the judge can take judical notice, and in providing for giving effect to the decision of this court and the certificate founded thereon, there are express directions given as to what shall be done in each case. It appears to me that the statute contemplated the final determination of the matter and never contemplated any new trial or any *venire de novo.*

After reading the terms of the statute which I may here observe are substantially identical with ours, the learned Chief Baron proceeded:

It appears to me that the statute never contemplated any new trial, and I think that will be clear when we come to consider what are the provisions made in the act, for they are very express and direct as to what shall be done upon the certificate going down to

(1) 3 Q. L. R. 219. (2) P. 217.
(3) Vol. 2, p. 253.

the court in which the point arose.

Referring then to the words of the statute that the court is:—to make such other order as justice may require, he referred to *Regina* v. *Faderman* (1); in which it was held that those words only enable the court to order a party to be let out on bail or to do any other thing of the like kind which justice may seem to demand, and he adds:

If this part of the act which enables us to make "any other order such as justice may require," is to be taken to apply to a case like the present I should be glad to know why, if we can award a *venire de novo*, we cannot grant a new trial in any case where improper evidence has been received, but which in reality was not calculated to have any influence upon the verdict. If we are to award a *venire de novo*, because the prisoner may have lost some benefit, of which there is no suggestion before us, then I would ask, in a case where, in the opinion of this court, improper evidence has been received and where an entry upon the record would be that the evidence having been so received the accused party was improperly convicted, what does justice require in such a case? Why, manifestly that the prisoner, guilty of some atrocious crime, should not thereby escape justice, and yet, I apprehend it will be conceded on all sides (and I do not imagine from the communications which have taken place among us that one single member of this court is of a different opinion) that however much we might all think that justice would require a new trial we should be incompetent to grant it. The act of Parliament provides expressly what shall be done where the conviction is vitiated: We cannot order a new trial in such a case; we cannot order a *venire de novo* to issue, we can only vacate the conviction. And now I come to the second point, that of providing for giving effect to the decision of the court and the certificate founded upon it. I shall read the very words of the act.

The learned Chief Baron read from the statute which, it may be observed, is substantially identical with our own sec. 262 of ch. 174, which is as follows:—

And the said certificate shall be sufficient warrant to such sheriff or gaoler and all other persons for the execution of the judgment as so certified to have been affirmed or amended and execution shall thereupon be carried out on such judgment, or if the judment has been reversed, avoided or arrested the person convicted shall be discharged from further imprisonment, and the court before which

(1) 1 Den. C. C. 565.

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he was convicted shall at its next session vacate the recognizance of bail if any.

The Chief Baron then proceeds—

This difficulty may arise; if we send back a certificate that this conviction is bad, I am not sure that the man would not be entitled to a *habeas corpus* to know why he is detained, and why the sheriff does not instantly discharge him; and it might be a most serious question whether he ought not, from the plain, manifest and clear words of the act, instantly to be discharged * * there is provision for everything which is really contemplated by the act. The sheriff is called on to discharge the prisoner if the conviction is avoided. In the event of the judgment being affirmed and amended then execution is to issue upon the judgment so affirmed and amended, But there is not a syllable in the act that points to any power in the sheriff, or anybody else to detain the prisoner or in any court to try him in the event of a *venire de novo* issuing. On these grounds, in my judgment, this court is not competent to award a *venire de novo*, and, I think, that the remark, in a case I have already cited, that the prisoner ought not to be deprived of his writ of error, applies with equal strength to the prosecution.

And he concludes his most exhaustive judgment thus:

In my judgment the prisoner ought to be left to his writ of error, and as that is my opinion in point of law, giving to the statute my most anxious and deliberate consideration, I abstain from giving any opinion whether a writ of error ought, or ought not, to be granted, or what ought to be the result of a writ of error if it were granted, assuming the facts to be true. These matters are not in my judgment properly now before the court and I think it best to abstain from giving any opinion upon them. In my judgment this court has no authority to interfere, and I am clearly of opinion without the slightest doubt or hesitation that this court has not any power to award a *venire de novo* and, in that way, grant a new trial. I think the awarding of a *venire de novo* belongs exclusively to a court of error. This court by otherwise construing the words which have been referred to "to make such order as justice may require" would not be expounding the act, which alone it has the province to do; but would, in fact, be legislating and taking to itself an authority which the legislature never intended to confer upon it.

The judgment of Erle J. is pronounced with equal force, that the objection taken constituted neither ground of error upon a writ of error, nor had the court under the statute constituting it a court for the con-

sideration of crown cases reserved, jurisdiction to entertain it. He says:

It is alleged that the prisoner may have intended to challenge Thorniley and have lost the opportunity because Thorne was called, and that this possible loss of challenge is error vitiating the trial. No authority,

He proceeds:

has been adduced to shew that such a mistake has ever been held to be a ground of error.

He then reviews all the civil cases wherein a similar mistake had occurred and thus states the conclusion to be deduced from them.

According to these authorities a misnomer appearing on the record is always ground of error if not amended, but it is no ground of new trial if the person who was sworn was a person that was summoned and no injustice was done. The cases further shew that if a person not summoned was sworn in the name of one who was summoned, it might or might not be ground of new trial according to the discretion of the the court,

or

if a person not on the panel answers to the name of a person on the panel, such personation may or may not be ground of new trial according to the discretion of the court.

As however all these cases were civil cases he adds:

As they relate to verdicts at *Nisi Prius* they differ materially from a verdict under a commission of *Oyer* and *Terminer*; with respect to such a verdict one case only has been found, namely, the case of a juryman (1), where Joseph Currie answered to the name of Robert Currie on the panel and the conviction was affirmed by twelve judges unanimously, the summons having been served on Joseph Currie and the bailiff intending he should serve. This unanimous opinion (he says) of the whole body of judges is a decision against the principle relied on for the prisoner, viz: That the variance between the name of the person called and the name of the person sworn may have misled him in his challenge.

And again:

The possible hardship of having lost a challenge from ignorance is no ground for vitiating a verdict as was said in *Rex* v. *Sutton* (2); where an alien was sworn on the jury without the knowledge of the defendant.

And again:

(1) 12 East 231.

(1) 8 B. & C. 418.

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Thus far I have considered the question as if the court was in the present state of the record legally qualified to decide whether a *venire de novo* should be granted, but that writ is not lawful without an entry on the record shewing a valid ground for issuing it. See *Corner* v. *Shew* (1). If in this case it issued without legal ground appearing on the record the new trial would be erroneous, and the verdict thereon no ground for judgment. It is therefore necessary to see what entry could be made.

And upon this point he says:

The entry must be according to the supposed fact and ought to be traverseable so that the truth should be legally ascertained. That entry is essential for a judgment in error, and I cannot assent to the notion that every judicial officer who tries an indictment may receive a rumor and if he believes it, make an entry accordingly, to vitiate a record otherwise correct and so bind other parties and courts by an assumption which may be disputed; thus in point of substance there is no ground of error and in point of form no ground of error appears on this record.

Then as to the statute under which the court of criminal appeal for hearing reserved cases sat, he says:

The provisions of 11-12 Vic., ch. 78 are in terms confined to judgments after conviction, there is no authority given to alter the verdict in any way—none to treat a verdict as a nullity and to grant a new trial. The anthority is express to vary the judgment in any way, and even to enter an adjudication that the prisoner ought not to have been convicted, but the verdict is to be left to stand notwithstanding such entry. It is true there is a general power to make such order as justice may require; but this general power follows after specific powers relating to judgments only, and the general words, are to be restricted by the proceeding words and construed to be *ejusdem generis*.

Williams J. was also of opinion that the point reserved did not come within the statute 11-12 Vic., ch. 78. The questions contemplated by the statute as authorized to be reserved were, in his opinion,

questions of law which the judge before whom the case is tried may reserve in his discretion, but he cannot reserve a point which he could not have decided finally. If, he says, the alleged mis-trial could have been cured by a verdict, it would have been helped by the verdict which has been given; I only mention this, he says, to show that the point as it stands before us must be regarded as oc-

(1) 4 M. & W. 167.

curring after verdict. If that be so it seems to me to follow that it is not a question of law which has arisen at the trial, within the meaning of the statute. Now, he continues, in the present case, if the point had been one which could have formed ground for arrest-ing judgment the presiding judge might have decided it, for I do not mean to say that such a point may not be regarded as arising at the trial within the meaning of the statute; but a point like the present could not be raised in arrest of judgment. It could only in the ordinary course of law be made the subject of a writ of error in fact; and I am of opinion that it was not intended by the statute to substitute this court for a court of error, as to errors in fact. I do not see any thing in the statute that enables the presiding judge to collect the materials for such a tribunal. It is said the point was brought to the attention of the judge while he was still acting under the commission in the assize town; but I am at a loss to know what power his commission gave him to act in the matter. I think he might just as well have acted after as during the assizes. There is no doubt that if his object were only to recommend the prisoner to the crown for a pardon, on the ground that he had not been fairly tried, the judge might collect information for the purpose at any time, and from any source on which he though it right to rely. But when the object is to ascertain whether a *venire de novo* ought to be awarded on the ground that there was error in fact, constituting a mistrial I can see no function the presiding judge whether at or after the assize has to perform in the matter or which it was meant by the statute to transfer from him to this court in any event.

The learned judge was further of opinion that it was unnecessary for him to consider the question whether, if the point was before the court expanded on the record on a writ of error, there ought to be a *venire de novo*, as to this he says—

It would be unbecoming in me, aware, as I am, of the conflicting opinions of my brother judges, to treat this question other than as a very doubtful one. I will only observe that if the facts stated for our consideration had been assigned as error in the ordinary course the question might have assumed a very different aspect if the crown had pleaded in answer to them (as perhaps it might,) that the juryman, William Thorniley, was personally well known to the prisoner, and was seen by him to go to the book to be sworn, and that he never had any intention or wish to challenge that man.

Crompton J. was of opinion that there was no ground which, in point of law, justified the court to interfere with the conviction. He says:

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The present seems to me one of those cases where an irregularity has occurred in the course of the proceedings which does not necessarily vacate the verdict, but where the court in which the record is, in a civil action, or the crown in the exercise of its prerogative may interfere if any unfairness or real prejudice has occurred but where such interference is only matter of discretion. And, again, the argument for the prisoner is that he may have been prejudiced by supposing, from the fact of the name of the other persou having been called, that the juryman he had the opportunity of challenging was the person whose name was really called, aud so that he may have lost the opportunity of challenging the one whom he would have wished to challenge. I think the case is the same in principle as that of the juryman in the note to *Hill* v. *Yates* (1). If, (he says further) the case is not precisely one of misnomer the alleged prejudice to the prisoner seems to me precisely the same. I am not aware of any authority or case in which the fact that a prisoner has been ignorant of some matter which might have caused him to challenge a person who came to the book to be sworn, has been held to vitiate a verdict in point of law, and I apprehend that it would not do so even if it appeared that the prisoner had been purposely misled, though it would be matter for the consideration of the court in a civil case, in exercising their discretion in granting a new trial, or for the advisers of the crown in the exercise of the prerogative of mercy. It would be, he adds, most mischevous if every irregularity of this nature, however happening, and even if contrived by or assented to by the prisoner or his friends would, necessarily vacate a verdict; if it would neces-sarily have that effect the same principle would apply to the case of an acquittal, even thongh the irregularity were caused by the prosecution. I am not aware that any case has carried the doctrine so far as would be necessary to support the objection in question and in no criminal cases has any similar objection prevailed that I am aware of.

As to awarding a *venire de novo* he says,

The books are full of authority to show that no *venire de novo* can issue except on matter appearing on the record sufficient to justify such award, and if it be improperly awarded it is error.

And, again,

I will not undertake to say how far any such objection as the present could properly be put upon the record if a writ of error were brought, and the judgment and proceeding had to be formally entered on the record.

And, again,

In Hales's Pleas of the Crown (2) it appears that if a juryman be returned as sworn, it cannot be assigned for error that he was not

(1) 12 East 230. (2) P. 296.

sworn.

And again:

But here we should be proceeding on the alleged fresh discovery of facts after judgment without anything on the record to justify us.

And again:

In the case of a writ of error and error in fact being assigned, the crown in the case of a conviction, or the prisoner in the case of an acquittal, would have the right of traversing the matter so alleged and so questioning its truth. I feel great difficulty in seeing how we can act without there being some such opportunity afforded to the parties or, at all events, without the matter being on the record.

Crowder J. was of opinion that the case did not come within the statute but, assuming it to do so, that there had been no mis-trial and that, before he could arrive at the conclusion that the verdict was a nullity, for the objection taken he must be satisfied that there exists some stringent and inflexible rule of law which goes the length of avoiding every criminal trial when such a mistake (however unattended with the slightest mischief) has occurred, and if there were any such rule of law which would render such a mistake *per se* fatal, he should contemplate with the utmost alarm the awful consequences which might ensue from it to the administration of criminal justice throughout the country. Prisoners if convicted might have another chance of escape or if acquitted might have their lives and liberty again imperilled, for that if such a mistake be fatal it is equally so whether the accused be acquitted or convicted and whatever might be the nature of the crime with which he should be charged. "But," he says, "I can find no such rule of law." Then, referring to the case of a juryman, he says:

It was contended that there was a mis-trial, but held by all the judges that there was not but only a misnomer which did not invalidate the trial.

But he adds:

As regards the main ground on which it was contended before us that there had been a mis-trial the case of a juryman is directly in point. It is said that Mellor's right to challenge was presumably

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prejudiced because he may have desired to challenge the name of William Thorniley but not that of Joseph Henry Thorne and may have known neither of them personally, and so in the case of a jury man the prisoner might have had cause of challenge against Robert Currie and thus the prisoner might have had his right of challenge curtailed if he knew neither of the men personally—the trial, however, was held valid by all the judges.

Willes J. as to the construction of the statute concurred in the judgment of the Lord Chief Baron Pollock, and in the review of the cases relied upon by the prisoner he concurred with the judgment of Erle J. and he adds:

If a foreigner had been on the jury unknown to the prisoner the conviction would have been unobjectionable even though the prisoner were proved to have disliked foreigners, and to be sure to have challenged one if he knew to him to be so; citing *Rex* v. *Sutton* (1). Again, if the juryman had been described on the panel by a wrong Christian name, and had been called merely in court and sworn upon the jury the conviction would have been valid. Yet such a mistake might, equally with that in question, have misled the prisoner and prevented him from challenging.

And again:

If this was a mis-trial, the prisoner having been convicted, it would equally have been a mis-trial in case of acquittal; but to order a *venire de novo* in the latter case would be scandalous and oppressive. It is not suggested that the prisoner has not had a fair trial, nor that he has sustained any prejudice. Far from its appearing that he was deprived of his challenge it is even consistent with the facts that he may have known who was about to be sworn and advisedly abstained from objecting to him.

Channell B. was of opinion that there was no mis-trial, and he concurred in the opinion of Erle J. and in the reasons upon which that opinion was formed—and he adds that he was unable to distinguish the case from the case of a juryman upheld and supported as he considered it was by *Hill* v. *Yates* (2). He says:—

The case of a juryman was the case of a capital felony. *Hill* v. *Yates* was a civil action; but it is clear from the report that the court in the last case had in its mind criminal as well as civil cases, and that the objection was considered with reference to both classes of cases. I conclude that in the case of *Hill* v. *Yates*, in the year 1810,

(1) 8 B. & C. 417. (2) 12 East 231.

the then 12 judges fully recognized and sanctioned the opinion of the 12 judges their predecessors in the case of a juryman come to 27 years before. With great deference to the Lord Chief Justice, I cannot bring myself to doubt that the subject was in these cases fully considered, or that they are to be treated otherwise than cogent authorities upon the question now before us. Assuming that there has been an irregularity or a mis-trial, it seems to me the objection would only be ground of error.

As to the jurisdiction of the court under the statute to entertain the question, he says:—

By the statute referred to, the court is empowered with respect to questions of law reserved to hear and finally determine the same and therefore to reverse, affirm or amend any judgment, or to avoid such judgment and order an entry to be made that the party ought not to have been convicted, or to arrest the judgment, or order judgment to be given at some other session of Oyer and Terminer if no judgment shall have been previously given, or to make such other order as justice may require; it seems to me that the statute contemplates a final decision of the case without any ulterior proceedings except such as may be necessary to give effect to the judgment of this court, and that it did not contemplate or authorize any proceedings in the shape of a *venire de novo* or in the nature of a new trial.

He did not, he said, attach much weight to the objection as to the time at which the discovery of the alleged irregularity was made, and to the consequent objection that the question raised was not reserved at the trial.

Byles J., while expressing no opinion upon the construction of the statute beyond expressing considerable doubt whether it authorized the court to grant a *venire de novo*, entertained a clear opinion that the irregularity complained of did not constitute a mis-trial.

It is, he said, an old and rational rule of law that where the parties to a transaction or the subject of a transaction are actually corporeally present, the calling of either of them by a wrong name is immaterial, *presentia corporis tollit errorem nominis.* In this case there was, as soon as the prisoner omitted the challenge and thereby in effect said "I do not object to the man standing there" a compact between the crown and the prisoner that the individual juryman there standing corporeally present should try the case.

And again:

A mere possibility of prejudice cannot vitiate the trial, the case in

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the note of *Hill* v. *Yates* (1) seems to me to confirm this view and to be a solemn decision by all the judges seventy five years ago, that notwithstanding some earlier cases a mistake of this nature is no mistrial. If another rule is once introduced, new trials in criminal cases will come in like a flood.

In *Reg.* v. *Feore* (2) the learned judge who pronounced the judgment of the majority of the court seems to have been of opinion that the ground upon which the majority of the court in Mellor's case rested their judgment that the question there raised

was not a question of law which arose at the trial

was that the question was not raised until after sentence had been passed; for he says that this point did not arise in *Reg* v. *Feore* (2), for the reason that in that case

the question was raised before the end of the trial, that is before sentence.

and here he treats the trial as not ended by the verdict. But from the extracts above quoted from the judgments delivered by the learned judges in *Mellor's Case* (3) it is apparent that none of them rested his judgment upon any such ground. The grounds upon which they proceeded as most clearly and emphatically expressed by them were: That the jurisdiction of the court was limited by the statute to questions of law arising upon the trial, either out of matter appearing upon the record or in the evidence brought to the judge's notice during the trial, which question of law the judge might himself have judicially determined finally, or might in his discretion reserve for the consideration of the court instead of determining it himself—that the statute does not apply when the judgment of the court upon the question submitted by the judge who tried the case would not finally dispose of the case or where anything remained to be done beyond giving effect to such final decision; that after verdict the judge before whom the case had been tried had no jurisdiction or authority whatever to collect

(1) 12 East. 231. (2) 3 Q. L. R. 228.
(3) 1 Dears. & Bell 468.

material—that is, to receive information in any manner of any matters alleged to be facts, upon which as established facts to make a statement for the purpose of submitting thereon a question of law—that the statute does not point to any power in any body to try the prisoner again, or empower the court to dispose of any matters not judicially ascertained to be facts, or directly or by implication deprive the crown of the right and opportunity it would have upon a writ of error to aver and prove that the allegations upon which the contention that there had been a mis-trial was rested were not founded on fact, or to displace the effect of such allegations, if true, by submitting to judicial inquiry other facts pleaded—as for example that the prisoner had not been deprived of an opportunity to challenge the juryman of whose presence on the jury he complains, for that in point of fact the prisoner knew the juryman personally, and that he never intended or wished to challenge him, and that upon the juryman being presented to him personally, the prisoner well knowing him, voluntarily accepted him as a juror upon his trial, and declined challenging him—that the statute gives no jurisdiction over a case of mis-trial—none to alter a verdict—none to treat a verdict as a nullity or to grant a new trial—either by means of a *venire de novo* or otherwise—that the authority conferred by the statute is confined to judgments after conviction, which judgments may be affirmed, amended or avoided, but that the affirmance, amendment or avoidance must be a final disposition of the case—that the statute never contemplated substituting the Court of Criminal Appeal for a Court of Error, as to errors in fact—and that the irregularity complained of, if objectionable at all, was so only as error in fact which could only be enquired of on a writ of error.

These were the grounds upon which the judgments

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of the majority of the learned judges in Mellor's case proceeded, and not as suggested in *Reg* v. *Feore* (1) that the question did not arise upon the trial because of the objection not having been taken until after sentence had been passed. Now in the case as submitted by the learned judges to the Court of Queen's Bench on its appeal side, which is the court for crown cases reserved in the Province of Quebec, the learned judge says that after verdict counsel for the prisoner moved in arrest of judgment not upon any matter appearing on the record but stated in an affidavit or affidavits, and that the verdict rendered against the the prisoner should be set aside and annulled, and that the prisoner if not liberated and discharged should be afforded a new trial upon the grounds stated in the affidavits. The learned judge further says that by affidavits and documents produced to the court upon behalf of the prisoner on the above motion and by the deputy of the Attorney General certain facts were established which the learned judge states to be as follows (2):—

Now as to this statement it is to be observed: 1st. that the matter complained of does not constitute ground for arrest of judgment and therefore the learned judge could not upon the ground suggested have entertained the motion in arrest of judgment.

2ndly. As a motion in arrest of judgment can be entertained only upon matter appearing upon the record, affidavits stating new matter not appearing upon the record cannot be received upon such a motion; in so far, therefore, as arrest of judgment was concerned the matter stated in the affidavits was not judicially before the learned judge.

3rdly. The learned judge had no jurisdiction to grant a new trial or to hear and determine the motion so far as it asked for the discharge of the prisoner or

(1) 3 Q. L. R. 228. (2) See p. 423.

for a new trial; the matter stated in the affidavits therefore was not judicially before the learned judge for any of the purposes for which the motion was made or, indeed, for any purpose, and here applies one of the reasons so strongly pressed by the learned judges constituting the majority in *Mellor's Case* (1):—that the learned judge could not reserve a question of law which he could not himself have finally determined, or a question founded upon facts which did not appear judicially before him upon the trial nor had he any jurisdiction after verdict to collect material—or to receive information in any manner of any matter alleged to be facts upon which, as if they had been judicially established, he should submit a question of law to the court.

4thly. That the matters stated by the learned judge to have been established by the affidavits and the documents therein referred to were only cognizable in a court of error as error in fact, and that there is nothing in the statute to deprive the crown of the right to dispute the truth of such matters or to displace them, assuming them to be true, by pleading that the prisoner had lost no challenge or opportunity of challenge, for that he personally knew Moïse Lamoureux and had no intention or wish to challenge him, and that he was given an opportunity of doing so which he knowingly and voluntarily declined to avail himself of; the truth of which, as appears by the learned judge's statement assuming it to be correct, could readily have been established.

In fact the case is almost identical with the case of *The Juryman* (2) for Moïse Lamoureux was the person served with a summons to attend as a juryman during the court. He was duly qualified. He was served with the summons by the sheriff at his dwell-

(1) 1 Dears. & Bell 468. (2) 12 East 231.

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ing house situate in the concession from which the sheriff appears to have been summoning the jurors. We may assume without prejudice, although it is not expressly stated in the case, that the summons with which he was served was addressed to Joseph Lamoreux, a fact which probably Moïse did not know, for he may not have been able to read the summons, &c. The case then is simply this, that Moïse Lamoureux, a qualified juryman was summoned by the sheriff to attend the court as a juryman, and was placed upon the panel in, and answered to, the name of Joseph, thus shewing a plain case of misnomer precisely, as appears to me, within the decision of the case of *The Juryman* (1). He was well known personally to the prisoner, whether the latter knew his christian name or not. It is plain, therefore, from the statement of the learned judge that there was no mis-trial and that the prisoner suffered no prejudice whatever. Indeed, it seems highly probable from the manner in which the motion was made and the form of the motion supported by affidavits that Moïse's christian name was known to the prisoner or that at least he was known not to be Joseph, to which name he answered, and that he was accepted by the prisoner as a juror to sit upon his trial with the reserved intention in the mind of the prisoner or of his friends in case of conviction to have the motion made which was made; but however that may be, it appears to me to be clear upon principle and the authority of Mellor's case that the court of crown cases reserved had no jurisdiction to entertain the question, and that it only could be raised upon a writ of error in fact; and that, upon principle and the authority of *The Case of a Juryman* (1), there was no mis-trial.

I am clearly of opinion also that the case comes precisely within sec. 246 of ch. 174 of the Revised Statutes

(1) 12 East 231.

which enacts that:

Judgment, after a verdict upon an indictment for any felony or misdemeanor, shall not be stayed or reversed as for any misnomer of any of the jurors, nor because any person has served upon the jury who was not returned by the sheriff or other officer.

In *Mellor's Case* (1) the act 7th Geo. 4, ch. 64, sec. 21 from which the above sec. 246 of ch. 174 R. S. C. originally was taken did not apply because both Thorne and Thorniley were duly returned by the sheriff and entered upon the panel in their own proper names respectively, and the mistake there was that one answered when the other was called, but here Moïse Lamoureux who was summoned to attend was not entered on the panel and he answered to the name of Joseph Lamoureux, who had not been summoned but whose name was upon the panel, and thus Moïse who was not returned by the sheriff served upon the jury —the identical case mentioned in the statute.

For the above reasons, I am of opinion that the appeal should be dismissed,—the conviction affirmed and the case remitted.

Appeal dismissed.

Attorney for appellant: *J. D. Leduc.*

Attorney for respondent: *F. X. Mathieu.*

(1) 1 Dears. & Bell 468.

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*Nov. 2.

*Dec. 15.

EDOUARD GUILBAULT (RESPONDENT) APPELLANT;

AND

ANTHYME DESSERT *et al.* (PETITIONERS) ..... } RESPONDENTS.

ON APPEAL FROM THE JUDGMENT OF MR. JUSTICE HENRI T. TASCHEREAU, SITTING FOR THE TRIAL OF THE JOLIETTE CONTROVERTED ELECTION CASE.*

*Election petition—Commencement of trial—Order of judge staying proceedings during session of parliament—Power to adjourn—Recriminatory charges—*49 *Vic. ch.* 9 - *Sec.* 31, *s.s.* 4, *sec.* 32, 33, *s.s.* 2; *and secs.* 35 & 42 - *Bribery by agent.*

After the trial of an election petition has been commenced the trial judge may adjourn the case from time to time, as to him seems convenient.

Where the proceedings for the commencement of the trial have been stayed during a session of parliament by an order of a judge, and a day has been fixed for the trial within the statutory period of six months as so extended, on which day the petitioners proceeded with their *enquête* and examined two witnesses after which the hearing was adjourned to a day beyond the statutory period as so extended to allow the petitioners to file another bill of particulars, those already filed being declared insufficient.

Held, there was a sufficient commencement of the trial within the proper time and the future proceedings were valid under sec. 32 of The Controverted Elections Act R. S. C. ch. 9.

In an election petition claiming the seat for the defeated candidate, recriminatory charges were brought against the defeated candidate and the trial judge, after having found that the election of the sitting member should be set aside for corrupt practices, fixed a day for the evidence upon the recriminatory charges. Thereupon the petitioners withdrew the claim to the seat and the judge gave judgment avoiding the election.

Held, That section 42 of chapter 9 R. S. C. no longer applied and the judge was right in refusing to proceed upon the recriminatory charges.

Per Gwynne J.—That it would have been competent for the trial judge to have received evidence on the recriminatory charges but his refusal to do so it was not a sufficient ground for reversing the judgment avoiding the election.

* PRESENT: Sir W. J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson, JJ.

APPEAL from the judgment of Mr. Justice H. T. Taschereau declaring the election of the member of the House of Commons for the electoral district of Joliette void by reason of corrupt practices by agents.

The appeal was from the judgment upon the merits of the petition in the case and from two decisions delivered by the judge on the 12th of December, 1887, and one on the 30th January, 1888, on the application of the appellant to have the petition declared abandoned and at an end and to have the said petition dismissed out of court with costs, and said appellant declared duly elected by reason of the trial of the said petition not having been commenced within six months from the time said petition had been presented.

The material dates and proceedings in the case are the following:

On the 15th February, 1887, the nomination of the candidates took place.

On the 22nd of February the election was held and appellant was returned as the member duly elected.

On the 9th April the petition complaining of the undue return of the appellant and claiming the seat for the defeated candidate was presented.

Parliament met on the 13th day of April, 1887, and was in session until the 23rd day of June, 1887, on which day it was prorogued. On the 12th day of April, 1887, the appellant moved the court to have all proceedings suspended as well on preliminaries as on the merits during the session of the then Parliament.

Mr. Justice Gill granted the motion.

A plea to the merits was fyled on the 20th September, 1887, answer to said plea on the following day, and on the 22nd of September 1887 an application was made by petitioners to have a day fixed for the trial of the election petition.

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The trial for the election petition was fixed for the 22nd November, 1887.

On the 22nd November, 1887, the petitioners proceeded with their *enquête* before Mr. Justice Taschereau and examined two witnesses: A. M. Rivard, the returning officer, and Urgele Faust, and the case was by the honorable judge presiding at trial continued to the 5th December following (1887), in order to allow petitioners to file another bill of particulars; the particulars then fyled being declared insufficient.

On the 3rd of December, the defendant presented two motions to have the petition declared abandoned, and the defendant confirmed in his seat.

These two motions were taken *en délibéré*, and the court adjourned to the 12th of December and on that day rejected these two motions.

The defendant took exception to these two judgment, and the court further adjourned to the 5th of January, 1888.

On that day the defendant presented another motion contending that the petition having been presented on the 9th of April, 1888, more than six months, even excluding the session, had elapsed without any trial being fixed and held.

On that motion another *délibéré* was taken and the court was adjourned to the 30th January.

On that day the trial judge rejected the defendant's motion and ordered the trial to be proceeded with, and evidence was given on the following charges *inter alia*:

"Dans le cours de la dite élection, savoir, entre le premier janvier et le vingt-deux février dernier, le défendeur par lui-même directement ou indirectement et par ses agents et notamment par son agent le dit Adélard Barrette a donné, fourni, et a promis diverses sommes d'argent s'élevant à la somme de huit piastres

à Joseph Ratelle, fils, cultivateur de la ville de Joliette, dans le but de l'induire à voter en sa faveur ou de s'abstenir de voter contre lui.

"Dans le cours de la dite élection, savoir, entre le premier janvier et le vingt-deux février dernier, dans la dite paroise de Sainte-Mélanie, le défendeur par lui-même directement ou indirectement et par ses agents et notamment par le dit Adélard Barrette, a donné, fourni, prêté et a promis diverses sommes d'argent s'élevant à cinq piastres à François Xavier St-Jean, cultivateur et électeur de la paroisse Sainte-Mélanie, dans le but de l'induire à voter en sa faveur ou à s'abstenir de voter contre lui.

"Dans le cours de la dite élection, le defendeur par lui-même et par son agent le dit Adélard Barrette à Sainte-Melanie susdit, a donné, fourni, prêté ou est convenu de donner, fournir, ou prêter, promis des récompenses, des sommes d'argent s'élevant à dix piastres, des mets, boissons et autres considérations appréciables à prix d'argent à Nazaire Lapierre, cultivateur et électeur de la Paroisse de Sainte-Mélanie susdit, dans le but de l'induire à voter en sa faveur, ou de s'abstenir de voter contre lui.

"Dans le cours de la dite élection, savoir, entre le premier janvier et le vingt-deux février dernier à Sainte-Mélanie susdit, le défendeur lui même et par ses agents et notamment par les dits Adélard Barrette, et Joseph Edouard Perrault, deux de ses agents, a donné, prêté ou convenu de donner, prêter, a offert ou promis la somme de cinq piastres à Joseph Beaudry, cultivateur et électeur de Sainte-Mélanie susdit, dans le but de l'induire à voter en sa faveur on de s'abstenir de voter contre lui."

On the 1st February the court having decided that corrupt practices had been practiced by A. Barrette, an agent of the appellant, upon seven voters, and that

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seven votes should be deducted from the appellant's votes, leaving the defeated candidate with a majority of seven votes, the sitting member be allowed to proceed with his recriminatory charges on the 16th February.

On the 11th February the petitioners fyled a declaration withdrawing their claim to the seat.

On the 20th of February, the judge sent a written judgment to the clerk of the court at Joliette, declaring the election void by reason of corrupt practices by agents of the appellant, but without his knowledge.

Cornellier Q.C. and *Ferguson* for appellant contended: That the order granted by Mr. Justice Gill was not made upon an application to have the time extended for the commencement of the trial under sections 32 and 33 of ch. 9, R.S.C., but upon an application to delay proceedings under section 64, and therefore such order did not deprive the appellant of the right of claiming that in computing the time within which the trial of the present petition should have commenced the time of the session of Parliament should be included.

But, even if the time of the session should be excluded, the trial did not actually commence until the 30th January, because what took place before the judge on the 22nd November, 1887, was a nullity, the court having declared that the particulars which, according to the rules of practice, had been fyled six days before the commencement of the trial, were insufficient, and that as a matter of fact the evidence in the case was given in support of particulars fyled subsequent to the 22nd November.

On this branch of the case the learned counsel relied upon the *Glengarry case* (1).

As to merits the learned counsel admitted bribery, but contended that the evidence of Barrette's agency was

(1) 14 Can. C. S. R. 453.

insufficient; and finally in any case the judgment was incomplete, because without notice the judge had deprived the appellant of the right of proving his recriminatory charges, a right which he had under sec. 9 of ch 9, R.S.C., and of which he was deprived by the judgment. The case should be remitted back to the court below as was done in the *Bellechasse case* (1).

Choquette and *Dugas* with him for respondent contended:

That the order granted by Mr. Justice Gill was one which in effect delayed all proceedings, including the fixing of the trial, and that the appellant who had applied for it could not now be allowed to ask that the time of the session should be included. As to what took place on the 22nd November, it was clear, that the trial then commenced; the trial judge was present and two witnesses were examined, and the trial was adjourned from time to time in order to complete the particulars, and if what took place on the 22nd November, the day fixed for the trial could, be said to have been illegal then the evidence of these witnesses which was to be found in the appeal book should not have been printed.

But as a matter of fact the judge who was present on the 22nd November was the trial judge, and when he delivered judgment he relied as much on the evidence taken on that day as on the subsequent days.

As to allowing evidence on the recriminatory charges there was nothing to be gained by it. These charges were put in and the judge allowed the evidence because, after the hearing of several witnesses, he came to the conclusion that bribery had been committed by an agent of the appellant on a sufficient number of votes to affect the majority and allow the defeated candidate to claim the seat, but upon the declaration

(1) 5 Can. S. C. R. 91.

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being fyled that we abandoned that portion of the conclusion of our petition by which we claimed the seat for the defeated candidate, all the judge had to do was to give effect to the decision he had arrived at at the closing of the *enquête*, viz: declare the election void by reason of corrupt practices.

As to the merits there was sufficient evidence of Barrette's agency in the appellant's own evidence to support the judge's finding. For he admits that he knew he was working for him and that all he desired was that he should not commit any illegal act. It is a finding of fact and the court does not reverse such a finding if there is any reasonable evidence to support it.

Cornellier Q.C. in reply: The petition and counter petition can only be disposed of together. If not it is in the power of any petitioner to defeat the right given to a candidate whose election is contested.

Sir W. J. RITCHIE C.J.—The nomination of candidates was held on the 15th February, 1887, the election on the 22nd February, 1887; the petition was presented on the 9th April, 1887; Parliament met on the 13th April, 1887, and was in session until the 23rd day of June, 1887, on which day it was prorogued. The defendant, the sitting member, caused a notice to be given to petitioners' advocates of a motion to suspend proceedings during the session of Parliament, a copy of which is as follows:—

Motion de la part du Défendeur, sans admettre qu'il soit régulièrement assigné, ou qu'il soit aucunement tenu de comparaitre et de répondre à la prétendue pétition en cette cause et sous la réserve expresse du droit de produire entièrement toute objection qu'il jugera à propos.

A ce que, vu la convocation du Parlement de la Puissance pour une session dont l'ouverture est fixée au treize avril courant, tous procédés ultérieurs en cette cause soient déclarés suspendus à compter du dit jour treize avril courant inclusivement, et qu'il avait en outre déclaré que le délai prescrit pour production d'objections préliminaires ou de réponse au mérite suivant le cas est, et restera suspendu

depuis et y compris le dit jour treize avril courant et n'expirera, qu'avec les deux jours qui suivront la clôture de la dite session, le tout avec dépens distraits aux soussignés.

Joliette, le 12 avril 1887.

McCONVILLE ET RENAUD,
Avcts et Procs. du Défendeur.

A. MM. CHAMPAGNE ET DUGAS.
Avcts. et Procs. des Pétitionnaries.

Messieurs,—Avis vous est par le présent donné de la motion ci-dessus que de la part du Défendeur nous présenterions à cette Honorable Cour à son ouverture jeudi le quatorze avril courant à dix heures du matin, ou aussitôt que conseil pourra être entendu au palais de justice en la ville et district de Joliette.

Joliette, le 12 avril 1887.

McCONVILLE ET RENAUD,
Avct. et Procs. du Défendeur.

The motion was heard before Mr. Justice Gill on the 12th of April, 1887, who pronounced a judgment granting the said motion in these words:—

La cour, parties ouïes sur la motion du défendeur qu'attendu l'ouverture d'une session du parlement du Canada, le treize du courant, et vu les dispositions de la section première du chap. 10 de l'acte 38 Vict., (Ottawa 1875) reproduites par la sec. 32 du chap. 9 des Statuts Revisés du Canada 1886, tous procédés ultérieurs en cette cause soient suspendus jusqu'à la clôture de la dite session du parlement.

Considérant que dans l'interprétation à donner au mot instruction (trial) dans la dite section de la loi, il faut comprendre tout le procés.

Considérant que la présence du défendeur dans le district électoral est aussi nécessaire pour préparer ses moyens de défense qu'elle le serait pour l'enquête et notament dans l'espèce où il a été affirmé à l'audience sans contradiction formelle de la partie adverse, qu'un second avis de contestation a été signifié au défendeur depuis son départ pour aller prendre son siège au parlement et s'il est forcé de se défendre pendant que durera la session, il lui faudra revenir immédiatement pour donner des instructions qu'il n'a pu donner avant son départ puisqu'il n'avait pas eu la signification qui a été faite à son domicile depuis.

Accorde la dite motion, dit que tous les procédés ultérieurs en cette cause sont suspendus pendant la dite session du parlement et que les délais pour la production de toutes défenses soit préliminaries, soit au mérite, ne courront pas pendant la dite session du parlement; les dépens sur la motion devront suivre le sort des frais généraux du procès.

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Which order unquestionably suspended all proceedings and brought the case within the operation of the 32 section of 49 Vic. ch. 9, which provides that:

If at any time it appears to the court or a judge that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of parliament and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of parliament shall not be included.

On the 22nd September the petitioners gave notice of a motion to fix a day for hearing of the petition and on the 10th day of October, 1887, Mr. Justice Taschereau, after having heard the parties on petitioners' motion, accorded the same and ordered that the hearing should take place at the court house in the town of Joliette, in the district of Joliette, on Tuesday the 22nd day of November then next. On the 22nd day of November, 1887, the trial commenced before Mr. Justice Taschereau, and the sheriff of Joliette, the returning officer, was examined and cross-examined; after this examination, on the suggestion of the judge and the parties consenting, the following admissions were made:—

Les parties admettent les procédés de l'élection tels qu'allégués dans la pétition ainsi que la proclamation faite du candidat élu, dans la "Gazette officielle du Canada." Les parties admettent de plus que les pétitionnaires ont et avaient les qualités et qualifications voulues pour se porter pétitionnaires ainsi qu'allégué dans la dite pétition.

Et le déposant ne dit rien de plus.

One Urgel Faust was then examined and after proceeding thus far the court adjourned till the fifth of December following.

The session of parliament having been excluded by the order of Mr. Justice Gill and the trial having been commenced on the 22nd of November the petitioner was within the six months.

But it has been contended that if the trial was com-

menced on the 22nd of November the judge had no right to adjourn the court until the 5th of December, but was bound to proceed with the same "from day to day until such trial is over;" but without stopping to enquire whether this provision, if it stood alone, is imperative or directory only, these words must be read in connection with sub-section four of section 31, which enacts that the judge at the trial may adjourn the same from time to time, and from any one place to another in the same electoral district as to him seems convenient;" and also sub-section 2 of sec. 33 which enacts that

No trial of an election petition shall be commenced or proceeded with during any term of the court of which the judge who is to try the same is a member and at which such judge is by law bound to sit.

The court having been adjourned by the judge defendant's contention must fail.

The following is the judgment annulling the election, pronounced on the 20th February, 1888.

La cour ayant entendu les témoins examinés de part et d'autre et les parties elles-mêmes, par leurs procureurs respectifs, sur le mérite de la présente petition d'élection, et de la contestation d'icelle, ayant aussi examiné la procédure et toutes les pièces du dossier et sur le tout délibéré.

Considérant qu'il a été prouvé que des manœuvres frauduleuses ont éte pratiquées par des agents du défendeur à l'élection dont il s'agit, mais hors la connaissance et sans le connsentment du défendeur, et qu'ainsi l'élection susdite du défendeur est nulle.

Considérant que les pétitionnaires se sont désistés de cette partie des conclusions de leur pétition par laquelle ils réclamaient le siège pour le candidat Neven.

Maintient la pétition d'élection en tant qu'elle demande l'annulation de l'élection susdite, la rejette quant au surplus des conclusions, et en conséquence déclare nulle et sans effect l'élection du defendeur comme membre de la Chambre des Communes du Canada, pour représenter le district électoral de Joliette, dans la province de Quebec, laquelle élection a eu lieu le 15 février 1887, (pour la présentation des candidats) et le 22 février 1887 (pour la votation); déclare aussi nul et sans effet le rapport de la dite élection, et condamne le dit défendeur, outre les frais déjà adjugés pendant l'in-

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stance, aux frais de la dite pétition et des procédures sur icelle, et à tous les frais d'assignation, d'enquête et de sténographie rendus nécessaires par l'examen des témoins suivants des pétitionnaires : Francois-Xavier St. Jean, Adélard Barrette, Joseph Beaudry, Joseph Ratelle, fils, Israel Bélanger, Narcisse Gendron, Hormidas Desmarais. Onésime Clermont, Auguste Guilbault et Edouard Guilbault (le défendeur), les autres frais d'assignation, d'enquête et de stenographie devant être respectivement à la charge de chacune des parties qui les a encourus.

Et la cour accorde distraction de dépens à MM. Champagne et Dugas, procureurs des pétitionnaires.

There can be no doubt the judge was fully justified in declaring the election void by reason of bribery by the agents of the defendant. It is only necessary to mention the case of Adelard Barrette, a nephew of the defendant, who was clearly proved to have been a most active agent of the defendant and a most unscrupulous briber.

But it is contended that though the defendant had closed his *enquête* as to corrupt practices he should have been allowed to go into recriminatory proof against the defeated candidate H. Neveu, which it is claimed he had a right to do, the petitioners having claimed the seat for said Neveu. Had the claim not been withdrawn this he would clearly have had a right to do.

Sec. 5. A petition complaining of an undue return, or undue election of a member, or of no return, or of a double return, or of any unlawful act by any candidate not returned, by which he is alleged to have become disqualified to sit in the House of Commons, or at any election, may be presented to the court by one or more of the following persons :—

(a.) A person who had a right to vote at the election to which the petition relates ; or

(b.) A candidate at such election ;

And such petition is, in this act, called an election petition. Provided always, that nothing herein contained, shall prevent the sitting member from objecting under sec. 12 of this act, to any further proceeding on the petition by reason of the ineligibility or disqualification of the petitioner, or from proving under sec. 42 hereof, that the petitioner was not duly elected. 37 Vic. ch. 10, sec. 7.

Sec. 42. On the trial of a petition under this act complaining of an undue return and claiming the seat for any person, the respondent may give evidence to show that the election of such person

was undue in the same manner as if he had presented a petition complaining of such election. 37 Vic. ch. 10, sec. 66.

Section 5 applies to any case where it is alleged any candidate has been guilty of any unlawful act, but section 42 is confined to cases where the seat is claimed but election undue.

If the claim of the seat is *primâ facie* sustained, then the respondent may give evidence to show that the election of such person was undue in the same manner as if he the respondent had presented a petition complaining of such election.

This is all reasonable enough, because so long as the seat is claimed the judge is still trying out the question of the election and the party entitled to the seat, and as to the party who should be returned by him as the duly elected candidate, but where the claim of the seat for the defeated candidate is not put forward, or if put forward in the petition is abandoned, the election of such candidate ceases to be in issue, for the simple reason that when the claim of the seat is withdrawn there is no election to try and there could be no object, in fact it would be a contradiction in terms, to attempt to show that the election of a person admittedly not elected was undue.

It follows, therefore, if the seat is not claimed, or if claimed the claim is abandoned, and a party is desirous of proceeding against any candidate for any unlawful act by which he is alleged to have become disqualified, he must proceed under section 5.

STRONG J.—I am also of opinion that this appeal must be dismissed. Whatever opinion I might otherwise have entertained as to the proper construction of section 32 of the Controverted Elections Act, if the question were now open, I consider I am bound by the decision of this court, in the *Glengarry Case* (1), to

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hold that every election trial must be commenced within six months from the date of the presentation of the petition unless it is expressly excluded by an order or judgment of the court or judge.

Here the petition was presented on the 9th of April, 1887. On the 14th of April an order or judgment was pronounced by the Honourable Mr. Justice Gill sitting in the Superior Court at Joliette, suspending all proceedings during the session of parliament which commenced on the 13th April and lasted until the 14th June, 1887. The trial of the petition commenced on the 22nd of November, for on that day witnesses were examined before the trial judge and other proceedings taken. This it appears to me was clearly in time. It is true that several adjournments took place which, it is argued, were not such as the 32 section of the act requires, viz., *de die in diem.* I think there is a two fold answer to this objection. First, I am of opinion that this provision is entirely directory, and second, there is section 35 which gives to the judge trying an election petition the same powers, jurisdiction and authority as a judge has in all other trials, and one of these powers is the power of enlarging the time for any step or proceeding in the case, and there are often circumstances which necessitate longer adjournments than *de die in diem.* So that there is nothing in the objection.

As regards the merits, I do not think it possible that a case could ever have come *sub judicé*, much less have reached an appellate court, in which the evidence of bribery was so plain and direct as in the present. Without going through all the cases, let me take that of Adelard Barrette, a nephew of the appellant, in which a clear and undeniable act of bribery is proved. The agency is admitted but the appellant seems to think that he can shelter himself under an

express prohibition to his agent against any unlawful proceedings. It is surely not necessary to add that this will not do, and that he is responsible for all the acts of his agents whether they were in breach of his instructions or in accordance with them. As to the point whether the judge had proceeded regularly in avoiding the election without proceeding with the recriminatory charges, I am of opinion that so soon as the claim of the petitioners to the seat was abandoned the judge was right in not proceeding further with the petition. If the appellant wished to take any proceedings against the defeated candidate for penal purposes he could still do so, but that should not in any way delay the rights of the electors to have the election set aside at the earliest possible moment.

The appeal should be dismissed with costs, the election declared void and the usual certificate sent to the Speaker of the House of Commons.

FOURNIER J.—L'appel est du jugement final prononcé par l'honorable juge H. T. Taschereau sur la contestation de l'élection d'un député aux Communes pour le comté de Joliette, et de deux autres décisions rendues par le même juge sur des motions, l'une pour faire déclarer la pétition abandonnée et périmée, parce que l'enquête n'a pas été commencée et poursuivie dans les six mois, —l'autre pour faire déclarer que le juge n'avait plus de juridiction pour procéder au procès de la dite pétition, attendu que les procédés ayant été suspendus sur requête de l'appelant pendant la dernière session, il s'était écoulé plus de six mois depuis la fin de la dite session.

Le jugement au mérite, en date du 20 février, a annulé l'élection pour cause de corruption pratiquée par les agents de l'appelant. Les deux autres décisions ont rejeté les motions tendant à faire déclarer que le juge n'avait plus de juridiction pour entendre la cause.

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A l'élection qui eut lieu le 22 février, l'appelant fut déclaré élu par le vote de l'officier rapporteur. Une pétition se plaignant de l'illégalité de son élection et réclamant le siège pour le candidat adversaire fut présentée le 9 avril. Le parlement étant convoqué pour le 13 avril, le 12 l'appelant demanda par motion de cette dernière date et obtint un jugement déclarant:—

Que sa présence était nécessaire pour préparer ses moyens de défense, qu'elle le serait pour l'enquête et notamment dans l'espèce où il a été affirmé à l'audience sans contradiction formelle de la partie adverse, etc. etc. Ordonne en conséquence que tous les procédés seraient suspendus pendant la dite session du parlement et que les délais pour la production de toutes défenses, soit préliminaires, soit au mérite ne courraient pas pendant la dite session du parlement.

La session commencée le 13 avril ne fut terminée que le 23 juin suivant; de sorte qu'en vertu de la loi électorale, sec. 32, et du jugement cité, le délai de six mois fixé pour le commencement du procès après la présentation de la pétition n'a pu commencer à courir que deux jours après le 23 juin.

Le 20 septembre l'appelant produisit son plaidoyer à la pétition auquel l'intimé répondit de suite, et demanda le 22 septembre 1887, qu'un jour fût fixé pour l'instruction de la pétition. Le 10 octobre 1887 par décision à cet effet, le procès fut fixé au 22 novembre suivant, devant l'honorable Juge Taschereau qui a rendu le jugement au mérite.

En exécution du jugement fixant le procès au 22 novembre, les pétitionnaires commencèrent leur preuve et firent entendre deux témoins: A. M. Rivard, officier rapporteur à la dite élection, qui prouva l'élection et rapport de l'appelant, ainsi que la publication de son élection dans la Gazette Officielle comme député de Joliette,—l'autre, Urgel Faust, est entendu au sujet de l'élection. Le même jour, à part l'audition de ces témoins, il se fit encore une partie importante de la preuve, consistant dans l'admission suivante donnée

par les parties :—

Les parties admettent les procédés de l'élection tels qu'allégués dans la pétition ainsi que la proclamation faite du candidat élu, dans la "Gazette Officielle du Canada." Les parties admettent de plus que les pétitionnaires ont et avaient les qualités et qualifications voulues pour se porter pétitionnaires ainsi qu'allégué dans la dite pétition.

Tous ces faits, tant ceux contenus dans les témoignages que ceux énoncés dans cette admission, comme ceux de l'élection et rapport de l'appelant, tels qu'allégués dans la pétition, la proclamation, les qualités et qualifications des pétitionnaires pour se porter pétitionnaires, sont tous des faits qu'il était essentiel de prouver. Il eût été impossible à l'intimé de réussir sans en avoir fait la preuve. Le procès (*trial*) a donc commencé au jour fixé, le 22 novembre, par la preuve de faits importants. La loi (sec. 32) exigeant le commencement du procès dans les six mois (*shall be commenced*) a donc été respectée. Après ces procédés du 22 novembre, le procès au lieu de continuer *from day to day* fut ajourné au 5 décembre afin de fournir aux intimés l'occasion de produire d'autres particularités pour remplacer celles qui avaient été déclarées insuffisantes. C'est alors que l'appelant fit les deux motions dont la substance a été donnée plus haut, à l'effet de faire déclarer que la pétition devait être considérée comme abandonnée et périmée. Ces deux motions ayant été décidées comme on l'a vu plus haut, il fut procédé à l'enquête sur les accusations de corruption contenues dans les particularités.

Cette preuve a constaté de manière à ne laisser aucun doute à ce sujet qu'il y avait eu des actes de corruption commis par des agents de l'appelant. L'honorable Juge en a déclaré sept cas pour lesquels il a rayé autant de votes donnés à l'appelant.

Puisqu'un seul de ces actes légalement prouvé suffit pour faire annuler une élection, il n'est pas nécessaire

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pour justifier l'annulation de celle dont il s'agit d'entrer dans le détail de tous ces cas. Celui rapporté par le témoin Beaudry est tellement flagrant qu'il suffit à lui seul pour faire déclarer l'élection nulle.

Adélard Barrette, neveu de l'appelant et l'un de ses agents, s'étant présenté chez Beaudry, eut avec lui l'entrevue que ce dernier rapporte ainsi qu'il suit :

R. Il est venu chez nous, il m'a demandé pour quel parti j'étais, j'ai dit "J'ai été pour monsieur Guilbault." Il a dit "A présent vous l'êtes encore." J'ai dit, "A présent je crois bien que je ne voterai pas cette année, je suis malade, je vais rester à la maison." Il a dit "Vous vous levez toujours, il faut que vous alliez voter pour lui." J'ai dit "Ça me coûte bien. Il a pris cinq piastres ($5) et il me les a données. Il a dit, "vous allez voter, travaillez pour nous autres." Ça fait que j'ai pris les cinq piastres ($5).

Q. Est-ce que Perrault était dans la maison, alors? R. Ils étaient présents tous les deux.

Q. Perrault et Barrette étaient présents tous les deux quand Barrette vous a donné les cinq piastres ($5)? R. Oui.

Indépendamment de cet acte de corruption la suite du témoignage fait preuve d'une convention entre Beaudry et les deux agents de l'appelant pour corrompre plusieurs autres voteurs. Beaudry rapporte que s'étant ensuite rendu à la résidence de l'appelant, celui-ci lui demanda comment allait l'élection, à quoi il répondit :

Je crois bien qu'il faudrait un peu de graissaille pour que les nuls qu'il y avait.

Là-dessus l'appelant dit :

Moi, je ne suis pas capable de donner d'argent, c'est défendu; par exemple, j'ai des agents qui pourront vous rencontrer. Je puis vous nommer là où ils sont et vous aurez ce qu'il vous faudra.

Q. Les a-t-il nommés, ces gens-là? R. Oui, il a nommé Zéphirin Tellier, Adélard Barrette.

Q. Adélard Barrette? R. Oui, qui est présent ici; Octavien Michaud.

Q. En a-t-il nommé d'autres? R. Oui, il a nommé monsieur Gervais.

Q. Quel est son nom de baptême? R. Je ne peux pas dire son nom; je le connais de vue, mais je ne peux pas dire son nom.

Q. En a-t-il nommé d'autres? R. Monsieur Perrault.

Plus loin on lui fait les questions suivantes :

Q. Bien, monsieur Beaudry, êtes-vous bien positif à dire que monsieur Guilbault vous a dit de vous adresser pour de la graissaille... R. Oui, monsieur.

Q. .....Chez Barrette ? R. Qu'on aurait ce qu'il nous faudrait et d'envoyer fort.

Cette preuve serait suffisante pour constater l'agence de Barrette ; mais à ce témoignage on peut ajouter celui de l'appelant qui prouve bien des faits suffisants pour établir l'agence et qui finit par cette déclaration qui ne peut laisser de doute à cet égard :

Q. Est-ce la seule fois que vous lui avez parlé sur ce ton-là, à Barrette ? R. Chaque fois que je l'ai rencontré je lui ai toujours dit de prendre garde de se compromettre et de me compromettre. C'est cela que je lui ai défendu de faire, et d'autres le lui ont défendu aussi.

La défense se bornait évidemment à ne pas agir ouvertement, mais tout ce qui pouvait être fait secrètetement était accepté d'après l'appelant lui-même.

Il en est de même des autres cas cités par l'honorable juge, ainsi qu'il appert par son jugement du 1er février 1888.

La cour rend l'adjudication suivante :

En conséquence des actes de corruption prouvés contre l'agent du défendeur Adélard Barrette aux moyens desquels les nommés François X. St. Jean, Joseph Beaudry, Jos. Ratelle fils, Ephrem Laforest, Edmond Michaud, Israel Bélanger et Narcisse Gendron paraissent avoir été influencés, la cour retranche sept votes du nombre total des votes enregistrés en faveur du défendeur et retranche de plus du nombre des dits votes un autre vote à raison du fait que le nommé Hern. Desmarais, agent du défendeur, aurait voté bien que mineur.

La cour ajoute au nombre des votes du candidat Neveu un vote représentant le vote d'Onésime Clermont qui a été illégalement écarté par le Député Officier rapporteur au poll No. 9, paroisse Ste. Elizabeth. Sur application de la part du défendeur et attendu que le dit défendeur se trouve actuellement en minorité d'après la décision ci-dessus la cour fixe le 16me jour de février pour procéder à l'enquête récriminatoire et sur le scrutin demandé par le défendeur et permet à ce dernier de produire un bill de particularités le 10 février et la cour ajourne au 16e jour de février courant.

Lors de l'argument, l'appelant s'est plaint que le

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dernier jugement, en date du 20 février, manquait de précision et ne mentionnait aucun des cas de corruption à raison desquels l'élection était annulée ; ces détails étaient déjà donnés dans le jugement du 1er février ; il était inutile d'en faire la répétition dans le jugement suivant.

Si ce n'eût été de la question des six mois fixés pour le commencement du procès, il n'aurait pas porté le présent appel. Mais cette cause n'a aucune analogie avec celle de Glengarry (1). Dans cette dernière, la pétition avait été présentée le 25 avril 1887, et ce n'est que le 17 décembre qu'un ordre fut rendu par la cour des Common Pleas fixant le procès de la pétition au 12 janvier 1888. Aucune procédure n'ayant été adoptée pour faire déclarer que le procès serait suspendu pendant la session, les six mois fixés par la sec. 32 pour le commencement du procès étaient déjà expirés depuis longtemps lorsque la demande de fixation fut faite. La cour interprétant les diverses sections de l'acte des élections au sujet des délais et des ajournements du procès, comme suffisantes pour l'autoriser à fixer le procès après l'expiration des six mois, rendit le jugement fixant le procès au 12 janvier. Ce jour-là au moment où allait commencer le procès, l'avocat de Purcell renouvela devant le *trial judge*, l'objection qu'il avait faite devant la cour pour empêcher la fixation du procès, parce que les six mois dans lesquels il aurait dû être commencé étaient depuis longtemps expirés. Cette objection fut rejetée par le *trial judge* comme elle l'avait été par la cour. En appel devant cette cour la majorité des juges a décidé que les six mois fixés pour le commencement du procès étaient de rigueur, qu'une fois expirés, la cour, ni le *trial judge* n'avait plus de juridiction pour procéder au procès. Tant que cette décision ne sera pas modifiée, elle doit

(1) 14 Can. S. C. R. 453.

être considérée comme ayant finalement règlé cette question. Aussi je n'entrerai dans aucun argument à ce sujet, me bornant à mentionner la tentative infructueuse faite devant le Conseil Privé pour la faire réformer, et à référer pour mes motifs de confirmation du présent jugement aux raisons que j'ai données dans cette cause de Glengarry et celle du comté de Québec (1).

Les six mois étaient incontestablement expirés dans la cause de Glengarry. Il est aussi incontestable qu'ils ne l'étaient pas dans la présente cause, parcequ'à la demande de l'appelant, la procédure avait été suspendue pendant la session, et que ce délai n'a commencé à courir que le 25 janvier, deux jours après la fin de la session, en vertu du jugement rendu le 12 avril. Le procès ayant effectivement commencé le 22 novembre comme on l'a vu par les procédés rapportés ci-haut, il se trouve donc avoir été commencé dans les six mois.

On a fait l'objection que la loi obligeait le juge à procéder *de die in diem*, mais cette objection est sans valeur, parce qu'ayant acquis pleine et entière juridiction sur la cause, par le commencement du procès, il était au pouvoir du (*trial judge*) juge présidant au procès, en vertu de la sec. 31 s.s. 4, d'ajourner de temps à autre.

The judge at the trial may adjourn from time to time, and from any one place to another, in the same electoral district, as to him seems convenient.

Cette section fait voir que l'objection en question est tout à fait frivole.

L'appelant s'est aussi plaint de ce que le juge a refusé de procéder à la preuve sur les accusations récriminatoires portées contre l'autre candidat pour lequel les pétitionnaires avaient demandé le siège. L'élection ayant été déclarée nulle et la demande du siège faite par les pétitionnaires retirée, il n'y avait plus lieu de pro-

(1) 14 Can. S. C. R. 429 & 461.

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céder sur ces charges. Je concours complètement dans les raisons données par Sir William Ritchie, justifiant le refus du juge de faire une enquête devenue tout à fait inutile. L'appel doit être renvoyé avec dépens.

GWYNNE J.—The learned counsel for the appellant contended that the order of the 10th of October was made upon an application under the 64th section of the Controverted Elections Act, and therefore, although general in its terms, ordering a stay of all proceedings, it must be construed as extending only the time for the respondent in the petition filing preliminary objections thereto or answering it un the merits without at all extending the time for going to trial; but I am of opinion, that assuming the order to have been made in view of and under the 64th section, it is nevertheless a good order for extending the time for the taking of all proceedings including the going to trial, and that, therefore, the petitioners had six months from the presentation of the petition given to them to go to trial exclusive of the session of Parliament. I am of opinion also that what took place on the 30th November was a commencement of the trial which, therefore, did commence within the extended time,and that the trial was duly continued by adjournment until judgment was pronounced. I am of opinion also that when sufficient evidence to avoid the election had been produced, it was competent for the learned judge to close the taking further evidence upon the petition, and to pronounce his judgment avoiding the election.

It is contended, however, upon this appeal by the respondent in the election petition, the now appellant, against the judgment avoiding his election, that inasmuch as the petitioners had claimed the seat for the other candidate, and notwithstanding that the claim had been withdrawn in the progress of the case for the

petitioners, and before the learned judge had expressed himself satisfied with the evidence that had been given as sufficient to avoid the election, he, the respondent, had a right before judgment avoiding the election should be pronounced, to go into evidence upon recriminatory charges which he desired to be allowed to prove, and he contends that by reason of the learned judge having declined to receive such evidence because of the claim for the seat for the other candidate having been so as aforesaid withdrawn, it is competent for him to maintain the appeal against the judgment avoiding the election.

Although it appears to me that it would have been competent for the learned judge to have received evidence on the recriminatory charges notwithstanding the withdrawal of the claim for the seat for the candidate in whose interest the petition was filed, as was done in the *Harwich Case* (1), still I do not clearly see how we can, on this appeal, make his declining to do so sufficient ground for reversing his judgment avoiding the election, which judgment, having regard to the evidence upon which it rests, is unexceptionable. The objection in fact is not one affecting the soundness of the learned judge's judgment avoiding the election. It calls in question the correctness of the judgment of the learned judge upon a matter of procedure in relation to a totally different matter, namely, a counter charge which the claim to the seat made on behalf of the opposing candidate, by the petitioners, enabled to be enquired into on the trial of the election petition, and the withdrawal of which claim the learned judge deemed sufficient to warrant his refusal to receive evidence of charges which could only be entered into then in respect of the claim to the seat which had been withdrawn. The determination of those counter

(1) 44 L. T. N. S. 187.

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charges, in whatever way they might have been determined, if the evidence upon them had been received, could have had no effect upon the question of the avoiding of the election. The learned judge's judgment upon that question would have remained, even if the recriminatory charges had been proved. The act does not appear to me to make provision for such a case as the present. To reverse the learned judge's judgment avoiding the election, not for any reason affecting the soundness of that judgment upon the merits, but because the learned judge did not enter upon the counter charges for the reason above stated would not, as it seems to me, be a step in the furtherance of justice, and I do not see how we could upon this objection, reverse a judgment which upon the merits of what is concluded by it is unexceptionable.

I think, therefore, that the only course open to us is to dismiss the appeal, and report accordingly to the Speaker of the House of Commons.

PATTERSON J.—This election was avoided by a judgment pronounced on the 20th of February, 1888, by Mr. Justice Henri T. Taschereau, for corrupt practices committed by agents of the successful candidate Edouard Guilbault without his knowledge or consent.

The petition was filed on the 9th of April, 1887. Four days afterwards, viz., on the 13th of April the session of parliament began and it continued until the 23rd of the following June.

The 22nd of November was named as the day for the trial by an order made on the 10th of October.

Guilbault who was respondent to the petition is the present appellant. His contention is thus stated in his factum :—

1st. There was no jurisdiction to try this matter. The petition was out of court at the time of trial and the judge should so have determined, and dismissed the petition.

2nd. The learned judge should have found in favor of the appellant on his motions of the 12th December, 1887, and the 30th of January, 1888.

3rd. The learned judge should not, on the evidenoe, and on the record, have found in favor of the petitioners on charges of bribery by agents, and should not have voided the election.

The point made under the first of these grounds of complaint is that the trial was not commenced within six months from the filing of the petition.

If the session of parliament is included in the computation of the six months, that period expired on the 8th of October, while, if excluded, the time would extend to the 18th of December.

It is urged that whichever computation is adopted the six months period was exceeded.

But it happens that the appellant himself procured an order the effect of which was to exclude the session.

He gave notice on the 12th of April, the day before the meeting of parliament, that he would move on the 14th to stay all proceedings from the 13th of April till two days after the close of the session, and on the 14th the order he asked for was made.

The notice was of a motion in these terms :—

A ce que, vu la convocation du Parlement de la Puissance pour une session dont l'ouverture est fixée au treize avril courant, tous procédés ultérieurs en cette cause soient déclarés suspendus à compter du dit jour treize avril courant inclusivement, et qu'il avait en outre déclaré que le délai prescrit pour production d'objections préliminaires ou de réponse au mérite suivant le cas est, et restera suspendu depuis et y compris le dit jour treize avril courant et n'expirera qu'avec les deux jours qui suivront la clôture de la dite session, le tout avec dépens distraits aux soussignés.

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It was urged before us that the object of the motion was not to extend the time for the beginning of the trial, but to get further time to answer or object to the petition, by means of an order which the court or a judge is authorized by section 64 of R. S. C. ch. 9 to make. The motion asked, it is true, for an order of that kind, but asked it in addition to the stay of proceedings. The main application was for the stay during the session and the other matter seems to have been introduced to make it clear that while the petitioner's hands were to be tied as to proceedings on his part towards the trial the time was not to count against the respondent in respect to his proceedings.

The learned judge who made the order evidently understood the matter in this way. He refers in the order to the 32nd section of the act, but the direct authority for the order is section 33, and he pursues that section in giving reasons to show that the interests of justice rendered the enlargement necessary.

The document is in these words (1):—

There can be no question of the effect of that order in extending the time for the trial. In the face of it the petitioner could take no step during the specified time, while, but for it, he could have applied under section 13 at any time after the 15th of April, which was five days from the filing of the petition, to have a time fixed for the trial, provided no preliminary objections had been taken.

It may be worth noting that if the motion of the 14th of April had in its terms asked only for an extension of time till the end of the session for taking preliminary objections, it is not likely that a judge would have made the order without also extending the time for the trial, because, by section 13, the right to apply to have the time for the trial fixed is made to some

(1) See p. 465.

extent dependent on the disposal of the preliminary objections.

Upon these grounds we were all of opinion, and so held during the argument, that the effect of the order was that the six months limit reached to the 18th of December.

In the meantime, viz., on the 22nd of November, the election court sat for the trial of the petition, and two witnesses were examined to prove formal matters not affecting any of the charges. Evidence being then offered in support of one of the charges, it was objected that the article in the particulars was not sufficiently specific, and thereupon the petitioner was ordered to give better particulars and the court adjourned to the 5th of December. When it met on that day two motions against the jurisdiction based on the contention, which has been held to be unfounded, that the 22nd of November was beyond the six months' limit, were discussed and taken *en delibéré*, the court again adjourning till the 12th of December. On the 12th the applications were dismissed, and the judge having to preside, as we are told, at another court on the 13th, a further adjournment till the 5th of January took place. On that day the attack on the jurisdiction was renewed, the ground this time being that the extended time, which expired on the 18th of December, had been exceeded without the trial having been begun.

This contention, in the form in which it was advanced, wanted a foundation of fact. The trial had been begun on the 22nd of November. What was done on that day in proving certain essential facts was not repeated when the taking of evidence was resumed on the 30th of January after the various adjournments. If, after proving those facts on the 22nd of November, it had happened that no proof was given of any charge contained in the petition, either

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because the petitioner was unable or unwilling to adduce evidence, or because of the absence or insufficiency of particulars, or for any other valid reason, there would nevertheless have been a trial, and the petition might well have been dismissed.

The question of the trial having been begun on the 22nd November is, therefore, a simple one and must be decided against the appellant.

But there is another question upon the construction of section 32 that requires notice. By that section the trial is to be commenced within six months, "and shall be proceeded with from day to day until such trial is over."

Here there were several adjournments during the interval between the 22nd of November when the trial was begun and the 30th of Jauuary when the bulk of the evidence was taken. They were not different in character or duration from those frequently found necessary, and made without question, by all our ordinary courts. Can it be intended by this direction to proceed from day to day, that any adjournment which interrupts the continuous sittings of a court for the trial of a controverted election shall *ipso facto* oust the jurisdiction and render the petition *coram non judice*? If this is the effect it will be so in all cases, no matter what may be the cause of the adjournment, the illness or unavoidable absence of a witness, or of the judge himself, or any other accident beyond the control of the parties or the court.

There is nothing in the terms of the enactment, which are in form directory and not prohibitive, to make it necessary to adopt a construction involving consequences so anomalous and so calculated to do injustice, and that construction would, moreover, be at variance with the liberal spirit in which powers of amendment and of extending time are conferred by other sections of the act.

I think this is the first time the reading in question has been suggested. Adjournments such as those in this case have always hitherto been made when occasion for them arose, and a construction has thus, in practice, been put upon the provision, although no court may have formally pronounced upon it. That construction treats the provision as directory only, and I have no doubt of its being the proper construction.

It may be that this discussion of the provision is not necessary, for I am not sure that the appellant intended to raise the question. The objections taken by him from time to time in the court below were based on the contention, which we have held to be unfounded, that the trial was not begun on the 22nd of November, and not on any assumed obligation to proceed literally day after day. That is true of the motion of the fifth of January, as well as of the earlier ones. They all relied on the six months limit and on the denial that the trial had begun. But the petitioner in his formal answer to the last motion, which answer was filed on the 12th of January, asserted a full compliance with the statute.

Section 33, sub-section 2, declares that no trial of any election petition shall be commenced or proceeded with during any term of the court of which the judge who is to try the same is a member, and at which such judge is by law bound to sit.

The *de die in diem* rule is therefore not universal; and setting aside for the moment the directory character of the mandate, I apprehend that before a party can impeach a proceeding or maintain it to be void for non-compliance with the rule he must show that the case is not within the exception.

It is asserted by the petitioner in his answer to the motion of the fifth of January to be within the excep-

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tion, or facts are stated touching the engagements of the judge, tending in that direction, and some evidence in support of that statement has been read to us from the record, yet the petitioner has not, by any evidence, nor, as I understand, by any statement, negatived the exception, and we could not assume in his favour that the exception does not apply.

There is no reason from any point of view for holding the proceedings null by reason of the adjournments in question.

What I have said disposes of the second ground of complaint as well as of the first.

The third ground as formulated impeaches the judgment on matters of fact. From the discussion of the evidence which took place on the argument, it is clear that the finding of the learned judge on both questions, the agency of Barrette, and the act of bribery committed by him, are amply sustained by testimony on which it was the province of the learned judge to pronounce.

But under this head another objection has been urged, namely, that the learned judge refused to receive evidence of recriminatory charges which the appellant was prepared to give.

In the petition the seat was claimed for the defeated candidate. In those circumstances the appellant was entitled, by sec. 42, to give evidence to show that the election of the defeated candidate was undue, in the same manner as if he had presented a petition complaining of such election.

But the claim for the seat was withdrawn, for the reason that a scrutiny showed him to have a minority of votes, but at all events it was withdrawn. The learned judge thereupon considered that section 42 no longer applied. I think he was clearly right.

It has been argued that on this trial and on this

question the status of the appellant was the same as if he had, under section 5, presented a petition charging the candidate with corrupt practices. It is not necessary to decide whether such a petition could or could not have been presented under section 5. Assuming, however, that a substantive proceeding under that section or section 9, subs. *b*, could have been taken, it must have been within thirty days after the return, or fifteen days after the service of the papers, and upon giving security for costs. The proceeding under section 42 is authorized in order to avoid the awarding of the seat to a person who is disqualified or has not been duly elected, and can only apply so long as the seat is claimed. The language of the section creates no difficulty in this respect. It enacts that the recriminatory evidence may be given on the trial of a petition claiming the seat for any person. But the trial ceased to answer that description as soon as the petition ceased to claim the seat.

The whole proceeding under the section has reference to the seat, and the seat is no longer in question.

I am clearly of opinion that the appeal should be dismissed, and of course with costs.

Appeal dismissed with costs.

Solicitors for appellants: *McConville & Renaud.*

Solicitors for respondents: *Champagne & Dugas.*

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*Oct. 15.
*Dec. 15.

JOHN HENRY ALLEN..... ..... APPELLANT;

AND

THE MERCHANTS MARINE INSURANCE CO. OF CANADA..... } RESPONDENTS.

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

Insurance, marine—Condition of policy—Validity of—Claim not made within delay stipulated by the policy—Art. 2184 C. C.—Waiver.

A condition in a marine policy that all claims under the policy shall be void unless prosecuted within one year from date of loss is a valid condition not contrary to art. 2184 C. C., and all claims under such a policy will be barred if not sued on within one year from the date of the loss.

The plaintiff cannot rely in appeal on a waiver of the condition, unless such waiver has been properly pleaded.

Per Taschereau J.—The debtor cannot stipulate to enlarge the delay to prescribe, but the creditor may stipulate to shorten that delay.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) rendered on the 22nd day of November, 1887, which confirmed, unanimously, a judgment of the Superior Court rendered on the 31st day of October, 1885, dismissing the action of the appellant, plaintiff in the Superior Court.

The action was instituted on the 8th April, 1880, upon a policy of insurance to recover from the said respondents the sum of $5,000.

The declaration alleged that on the 29th October, 1877, the plaintiff effected an insurance with the defendants for the sum of $5,000 on the barque "Waterloo," her tackle, etc., to take effect from the 25th day of said month of October said vessel having sailed from Quebec on the 26th day of the same month, for a premium of $500. That in the said policy the said vessel, tackle, etc., were valued at $35,000; that the said vessel sailed

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

(1) M. L. R. 3 Q. B. 293.

from Quebec to Liverpool on the 26th October, 1877, and was lost on or about 28th February, 1878; that the plaintiff was interested in the said vessel to the extent of $5,000; that on the 6th June, 1878, the plaintiff abandoned the said vessel and all his rights therein to the defendants and complied with all the conditions of the policy.

The declaration concluded for a condemnation against the defendants for $5,000 with interest from 28th February, 1878, and costs.

The defendants pleaded two special pleas and a general denial to the action.

The first plea upon which this appeal was determined set up one of the conditions of the policy which is in words following:—

"It is also agreed that all claims under this policy "shall be void unless prosecuted within one year from "the date of loss; and in case the note or obligation "given for the premium herefor be not paid at matu-"rity the full amount of the premium shall be con-"sidered as earned and this policy become void while "the said note or obligation remains over due and "unpaid."

The plaintiff filed general answers to the pleas of the defendants.

Upon these pleadings and the evidence being taken the case was argued and judgment was rendered by the Honorable Mr. Justice Jetté in the Superior Court dismissing the plaintiff's action with costs.

Ritchie for appellant contended:

1. That the clause of the policy stating that "all claims should be void unless prosecuted within one year from the date of loss" was not binding on the appellant.

2. Supposing the clause to be binding, the respondents had waived the rights thereunder by their actions herein.

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3. That the condition, binding him to institute proceedings within a year is not valid, not being mentioned in the binding application for insurance, which was the contract between the parties and being contrary to the terms of art. 2184 of the Civil Code.

The learned council cited and relied on *Grant* v. *Lexington Ins. Co.* (1); *Jones* v. *Sun Mutual Ins. Co.* (2); *Eagle Ins. Co.* v. *The Lafayette Ins. Co.* (3); *Dolbier* v. *The Agricultural Ins. Co.* (4); *French* v. *The Lafayette Ins. Co.* (5); *The Anchor Marine Ins. Co.* v. *Allen* (6); *Chandler & Co.* v. *St. Paul F. & M. Inst. Co.* (7); also Parsons, Maritime Law (8); *Little* v. *Phœnix Ins. Co.* (9); Sansum's Digest of Insurance *vo.* Limitation (10).

Hatton Q.C. for respondent contended the clause was valid and not contrary to the code and that no waiver had been pleaded, citing and relying on the following in addition to the cases cited in the judgment given :—

Browning v. *The Provincial Ins. Co.* (11); *Rousseau* v. *Royal Ins. Co.* (12); Porter's Laws of Insurance (13); Bunyon Fire Insurance (14), and cases there cited.

As to the French law the learned counsel referred to Laurent (15); Pouget, dict. des assurances; Pothier, Droit civil (16); Merlin, Rep. Eén. Vo. Prescrip. (17); Dalloz Rep. Ass. Terrestres (18); Marcadé (19); Aubry & Rau (20); Troplong, Pres. (21); Pothier Vente (22).

(1) 5 Ind. Rep.
(2) 7 Rev. Leg. 387.
(3) 9 Indiana 443.
(4) 67 Maine 180.
(5) 5 McLean 461.
(6) 13 Q. L. R. p. 4, Queen's Bench, Quebec, May, 1886.
(7) 21 Minn. 85.
(8) 2 Page 483.
(9) 123 Mass. 381, 389.
(10) Pp. 767, 8, 9.
(11) L. R. 5 P. C. pp. 274-5.
(12) M. L. R. 1 S. C. p. 395.
(13) P. 177.
(14) 3 Ed. p. 135.
(15) 32 vol. sec. 184 p. 191.
(16) Vol. 1 ch 7 p. 340.
(17) Sec. 1 & 7, art. 2, quest 1, No. 3.
(18) No. 307.
(19) T. 12 p. 23 No. 1.
(20) T. 8 pp. 426 & 771-40, ibid. 4 pp. 408, 357.
(21) T. 1 p. 50 ss. 43, 44.
(22) No. 434, et sqq.

Sir W. J. RITCHIE C.J.—The appeal in this case should be dismissed upon the ground that the action was instituted too late under a valid provision of the policy. It is claimed that there was a waiver. It was not pleaded and, therefore, there is no issue upon which we could give judgment.

STRONG J.—I am of opinion that there is no foundation for this appeal. The action is n a policy of marine insurance whereby the respondents insured the barque "Waterloo" for the sum of $5,000 for one year from the 25th of October, 1877, sailing from Quebec "on present voyage" on 26th October, 1877. The policy was effected by E. H. Duval on account of himself, loss (if any) payable to the appellant, (who was described in the policy as of the firm of Moses & Mitchell, 4 Grace Church street, London). The "Waterloo" sailed on the voyage from Quebec on the 26th October, 1877, did not arrive at her port of destination and was never afterwards heard of.

It is not disputed that the vessel was lost sometime before the 28th February, 1878, on which day she was posted at Lloyd's list.

The policy contained a provision in the words following:—

It is also agreed that all claims under the policy shall be void unless prosecuted within one year from the date of loss.

This action was instituted on the 8th April, 1880.

By their first peremptory exception the respondents set up the bar of the prescriptive clause already referred to. The plaintiff fyled general answers only to all the defendant's exceptions. The cause being at issue, the parties went to *enquête*, and the action was afterwards heard before Mr. Justice Jetté in the Superior Court.

The Superior Court dismissed the action with costs and an appeal from that judgment having been taken to the Court of Queen's Bench by the present appel-

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lant, that court affirmed the judgment of the Superior Court. A further appeal has now been taken to this court.

Only two points requiring notice were argued here. First, it was said that the conventional prescription provided by the clause already quoted had been waived. It is sufficient to refer to one conclusive answer to this contention. The appellant cannot be admitted to insist on waiver in the state of the record before us. If it had been intended to rely on this reply it should have been set up by a special answer to the exception pleading the prescription, but this was not done. It is, therefore, out of the question now, in this second stage of appeal to consider this answer to the defence, even if it were sustained by the clearest and strongest evidence. It is sufficient then to say that it is not now competent to the appellant to raise this objection, and to this it may be added that there is not a tittle of evidence in support of the pretended waiver.

The only other point seriously urged in argument was the legal one that this prescriptive clause was void as against public policy. It has over and over again been adjudged that a provision of this kind is valid and unimpeachable in English law—and no authority has been quoted to show that the French law differs in this respect from the English law; on the contrary numerous French authorities show that the law of France as settled by a general consensus of legal authors as well as by the jurisprudence of the Court of Cassation, agrees with the law of England.

The appeal is one of the most frivolous and ill founded which has ever come before this court and should be dismissed with costs.

FOURNIER J.—Concurred with Taschereau J.

TASCHEREAU J.—This was an action on a policy of

Marine Insurance. One of the conditions of the policy was that "all claims under this policy shall be void unless presented within one year from the date of loss." The action was instituted more than two years after the loss. The company pleaded this condition and the Superior Court, thereupon, dismissed the action. The Court of Appeal unanimously confirmed that judgment, and the plaintiff now appeals to this court. His appeal must be dismissed. I would call it a frivolous appeal. His first contention was that "prosecuted" in the said policy does not mean "prosecution by a suit or action." The appellant has not been able to cite a single authority in support of this contention. In the case of *Carraway* v. *The Merchant's Mutual Ins. Co.* (1) this very same point was raised and determined against the plaintiff.

The appellant, secondly, argued that this condition is void under article 2184 of the Civil Code, which enacts that prescription cannot be renounced by anticipation, the only prescription against him recognized by law, as he contends, being the prescription of five years, under art. 2260 C.C. The question is now well settled, and the validity of such a condition perfectly well established. I need only refer to *Cornell* v. *The Liverpool Ins. Co.* (2); *Armstrong* v. *Northern Ins. Co.* (3); *Bell* v. *Hartford* (4); *Rousseau* v. *The Royal* (5); *Whyte* v. *Western* in the Privy Council (6); and to Laurent (7) and Pouget, Dictionnaire des Assurances (8) where all the French authorities are collected. The enactment that prescription cannot be renounced by anticipation is an enactment in favor of the debtor and means simply, that (to apply it to the present case, for instance) if the company had stipulated that an action on this

(1) 26 Ann Rep. La. 298.
(2) 14 L. C. J. 256.
(3) 4 L. N. 77.
(4) 1 L. N. 100.
(5) M. L. R. 1 S. C. 395.
(6) 22 L. C. J. 218.
(7) 32 S. 185.
(8) Vo. prescription de l'indemnité.

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policy should lie in case of loss at any time even after five years, the company upon being sued after five years could plead this prescription, notwithstanding the stipulation to the contrary. But that the plaintiff should himself invoke the article to support the contention that he could not legally stipulate that the delay to prosecute should be shorter than five years seems to be a misconception of the article. The debtor cannot stipulate to enlarge the delay to prescribe, but the creditor may stipulate to shorten that delay.

As to the waiver which the appellant attempted to rely upon, it is sufficient to say that there is no such issue raised on the record. The appellant's only answer to the company's plea was a general replication.

GWYNNE J. concurred.

Appeal dismissed with costs.

Solicitors for appellant: *Davidson & Ritchie.*

Solicitor for respondents: *J. C. Hatton.*

THOMAS WALSH (PETITIONER).....APPELLANT;

AND

WALTER H. MONTAGUE (RESPONDENT)..... } RESPONDENT.

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*Oct. 3, 4, 5 & 6.

*Dec. 14.

ON APPEAL FROM THE JUDGMENT OF MR. JUSTICE STREET, SITTING FOR THE TRIAL OF THE HALDIMAND CONTROVERTED ELECTION.

Scrutineer, agency of—Wilful inducing a voter to take false oath—Corrupt practice—Qualification of voters—Farmers' sons—Oath T—Secs. 90 *and* 91 *and secs.* 41 *and* 45 *of ch.* 8 *R. S. C.—Ballot papers rejected—Finding of trial judge.*

A scrutineer appointed for a polling place at an election under the written authority of a candidate is an agent for whose illegal acts at the polling place the candidate will be answerable.

The insisting by such scrutineer of the taking of the farmer's son's oath T by a hesitating voter whose vote is objected to and who is registered on the list as a farmer's son and not as owner, when, as a matter of fact, the voter's father had died previous to the final revision of the list leaving the son owner of the property, is a wilful inducing or endeavoring to induce the voter to take a false oath so as to amount to a corrupt practice within sections 90 and 91 of ch. 8 R. S. C., and such corrupt practice will avoid the election under sec. 93. Strong and Gwynne JJ. dissenting.

Per Strong J—1. That reading section 41 in conjunction with sec. 45 ss.2, and the oath T in schedule A of ch. 8 R. S. C. an enquiry on a scrutiny as to the qualification of a farmer's son at the time of voting is admissible, and if it is shown that a larger number of unqualified farmer's sons votes than the majority were admitted the election will be void. (Taschereau J. *contra*).

2. Secrecy of the ballct is an absolute rule of public policy and it cannot be waived. Sec. 71 ch. 9 R. S. C.

On this appeal certain ballot papers being objected to

Held, that it will require a clear case to reverse the decision of the trial judge who has found as a question of fact whether there was or was not evidence that the slight pencil marks or dots objected to had been made designedly by the voter.

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

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Also, that where the × is not unmistakably above or below the line separating the names of the candidates the ballot is bad.

APPEAL from the judgment of the Honorable Mr. Justice Street delivered at Cayuga upon the trial of the controverted election of Haldimand for the House of Commons whereby the election petition was dismissed with costs.

The election in question was held on the 5th and 12th days of November, 1887, when the respondent, Walter Humphreys Montague and Charles Wesley Coulter were candidates, and the said Walter Humphreys Montague was declared by the returning officer to have a majority of the votes cast at the said election.

The petition contained, in addition to the usual charges of bribery and corruption, many specific charges with reference to the reception, counting and rejection of ballots, and other charges of irregularity and unlawful practices in connection with the election which by the said petition it was sought to have declared void.

The trial began on Tuesday the 24th January, 1888, and by the direction of the presiding judge the charges of corrupt practices against the respondent and his agents were first disposed of, and afterwards certain evidence was taken as to charges in the petition of irregularities in the conduct of the said election.

On the fourth day of the trial, Friday the 27th of January, the learned judge proceeded to examine the ballots cast at the said election, and as the result of such counting of the ballots he declared a majority of ten votes to have been cast in favor of the respondent.

On the present appeal a number of ballots which on the scrutiny had been counted either for the respondent or the defeated candidate were objected to. These ballots were examined by the court and two ballots which had been allowed for the respondent by the trial judge after examination with a microscope were

disallowed, the court holding that unless the X is unmistakably above or below the line separating the names of two candidates so marked the ballot is bad.

The findings of the trial judge on the other objected ballots were upheld, the court holding that it would require a clear case to reverse the decision of the trial judge who had found as a question of fact as to whether there was or was not evidence that the slight pencil marks or dots objected to had been made designedly by the voter. No decision was arrived at on ballots No. 103 and No. 46.

Ballot No. 103 was cast at polling sub-division No. 4, in the township of Oneida, by one Philip S. Wintermute, and the words "Philip S. Wintermute," were written upon the ballot itself, before it was deposited in the ballot box. Charles Young, the deputy returning officer at the polling sub-division in question, was called by the respondent at the trial as a witness to support the claim to have this ballot counted. He stated that Wintermute voted as a farmer's son, that his right to vote was challenged, and that when he came back from the voting compartment and handed his ballot to the deputy returning officer to be deposited in the box one of the scrutineers for Mr. Colter suggested or urged, that a note of the objection to the vote should be made on the ballot-paper itself, and that accordingly he (the deputy returning officer) then wrote on the ballot-paper the words "Philip S. Wintermute," before depositing it in the box. This ballot was allowed for the respondent in the court below.

Ballot 46 was a ballot not initialed by the returning officer and was counted for the defeated candidate by the trial judge after evidence of its identity was given.

The appellant by his notice of appeal limited the subject of this appeal to the following special and de-

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fined questions and the rulings and decisions thereon of the learned judge at the trial, viz.:

"2. The refusal of the learned judge at the trial to count as votes for Mr. Colter 7 of the ballots cast at the said election at polling sub-division No. 2 in the township of Oneida and which, as the petitioner contends, were marked with a second cross by the deputy returning officer at the said polling station after the voter had returned the same to the officer to be deposited in the ballot box. The said 7 ballots were numbered by the county judge upon the recounting of votes after the said election as Nos. 85, 87, 88, 89, 90, 91 and 92.

"3. The charge (No. 8 in the particulars) that Frederick Harrison as agent of the respondent did induce Thomas Nixon to take a false oath at the poll and to vote at the said election though not qualified to do so.

"4. The charge (No. 20 in the particulars) that Stephen Allen, an agent of the respondent, did induce Robert Dougherty to take a false oath at polling station No. 3, in the township of Walpole, though the said Robert Dougherty was not qualified to vote at the said election.

"5. The charge that the deputy returning officer at polling sub-division No. 4, in the township of Oneida, put into the ballot box and counted ballots not duly received from the electors in the lawful performance of his duties as deputy returning officer at the said election.

"6. The charge that the deputy returning officer at polling sub-division No. 2, in the township of Oneida, improperly marked ballots received by him at the said election from electors before depositing the said ballots in the ballot box, and thereby prevented the said ballots from being counted at the said election, and the ruling of the learned judge at the trial, rejecting the evidence on behalf of the petitioner, which was tender-

ed by him at the trial in support of the said charge.

"7. The charge that many persons voted at the said election who for different reasons were not qualified to vote thereat, and the refusal of the learned judge at the trial to inquire into the right at the time of the election of any person to vote thereat, if the name of such person appeared on the list of voters as finally revised, and certified by the revising barrister, and the rejection by the learned judge at the trial of the evidence tendered on behalf of the petitioner to establish that many persons who voted at the said election had, between the time of the final revision of the voters' lists by the revising barrister at the date of the said election, forfeited the right to vote thereat."

The evidence relating to charges 3, 4, 5, 6 and 7, upon which this appeal was decided, is reviewed in the judgments hereinafter given.

Aylesworth (*Colter* with him) for appellant.

On the Harrison–Nixon charge (Par. 3 in the notice of appeal) the learned counsel cited and relied on The Dominion Elections Act, secs. 90, 91 93 and also sec. 45, sub-sec. 2, ch. 8 R. S. C.; *Cooper* v. *Slade* (1); *North Norfolk Case* (2); *Wallingford Case* (3); *The Hereford Case* (4); *The Launceston Case* (5); *The Carrickfergus Case* (6); *The Louth Case* (7); *The Selkirk Case* (8); *The Soulanges Case* (9); and Taylor on Evidence (10).

On the Allen-Dougherty charge (Par. 4 in the notice) upon the question of agency *The Stroud Case* (11) was referred to. On this charge they referred also to the judgment of Chief Justice Moss in a case referred from the County of Elgin to the Ontario

(1) 6 H. L. C. at p. 788.
(2) 1 O'M. and H. at p. 242.
(3) 1 O'M. & H. at p. 59.
(4) 1 O'M. & H. at p. 195.
(5) 2 O'M. & H. at p. 133.
(6) 3 O'M. & H. at page 91.
(7) 3 O'M. & H. 161.
(8) 4 Cans. S. C. R. 494.
(9) 10 Can. S. C. R. 652.
(10) 8 Ed. secs. 376-7.
(11) 3 O'M. & H. at p. 11.

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Court of Appeal under the Ontario Voters Lists Acts—printed in the appendix to Hodgins' Manual on the Law affecting Voters' Lists in Ontario, 2nd Ed., as case No. 8 in *re Norman*.

The learned counsel then argued that the trial judge had erred in refusing to allow witnesses to disclose for whom they had voted in order to prove the truth of charge 6 in the notice of appeal. and contended that the statute was framed solely to leave to the voter the privilege of secrecy if he wished to assert and maintain it. Citing sec. 71 of the Dominion Elections Act and Taylor on Evidence (1): McCreary on Elections (2); *People* v. *Pease* (3); *Reg.* v. *Kinglake* (4); *Thomas* v. *Newton* (5); *King* v *Adey* (6): Cooley on Limitations (7).

Then as to right to enquire on a scrutiny into the qualification of the farmer's sons at the time of voting the learned counsel contended that sec. 41 ch. 8 R. S. C. must be read as conferring on farmers' sons the right to vote subject to the provisions contained in sec. 45, sub-sec. 2 and in support of his interpretation of the statute in this respect relied upon the judgment in *The South Wentworth Case* (8); *The Stormont Case* (9); *North Victoria Case* (10); Cooley on Limitations p. 762.

M'Carthy Q.C. for respondent.

As to the Harrison--Nixon charge he contended there was no agency. Matthison and Macaskie on Corrupt Practices (11) and cases there cited. Harrison's authority was limited as provided in sec. 36 ch. 8 R. S. C. But, admitting agency, he argued that it was impossible under the circumstances to hold: First, that Nixon took a

(1) 8th Ed. secs. 396, 438.
(2) 3rd Ed. sec 453.
(3) 27 N. Y. 45-81.
(4) 11 Cox C. C. 499.
(5) M. & M. 48 n.
(6) M. & Rob. 94.
(7) P. 762.
(8) Hodg. 531 at pp. 533-34.
(9) Hodg. 21 at p. 44.
(10) Hodg. at p. 681.
(11) P. 106.

false oath. There was no ground on which the learned judge could have held that any oath which Nixon was required to take was false in fact, or if false in fact that it was false in the sense in which it would be unlawful for him to take it, namely, knowingly false. Secondly, there was not a tittle of evidence on which the learned judge could have found that Harrison either "compelled or induced" Nixon to take the oath, or that he did so with the belief that Nixon was not in a position to take the oath, or that he did so corruptly within the meaning of the act, and he submitted that the holding and finding of the learned judge was the only possible one under the circumstances—citing the *Kingston Case* (1).

As to the Allen-Dougherty charge no agency was proved. The scrutineer had not been appointed, and moreover, the facts clearly shew that Dougherty was still a resident on his father's property and could take the oath.

The learned counsel then referred to the irregularities relied on and contended the defeated candidate had suffered no injustice.

As to charge 31. Unless a *primâ facie* case of fraud is alleged and proved there is no right to enquire how a voter voted. On the grounds of public policy the legislature determined that a ballot could not under any circumstances, for the purpose of ascertaining by whom that ballot was marked, be enquired into in a court of justice. In this respect the ballot act under the law of Canada differs from the law established in England, where under certain circumstances the court is at liberty to investigate how the ballot has been marked. Clauses 70, 71 and 72, as indeed the whole election act itself, clearly indicate that the great object which the legislature had in view was the secrecy of the ballot, and

(1) Hodg. 625.

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that under no possible circumstances could it ever be made known by any course of procedure how a man had voted; in other words that the ballot was to be absolutely and for all time secret. In Leigh & Le Marchant on Elections (1) is a statement showing how the peculiar inconsistency to be found in the English ballot is accounted for. In the Canadian law the policy as to the secrecy of the ballot was maintained and the act is consistent in itself. So that in a scrutiny, if it be determined that an elector was bribed by a candidate or his agent, it is provided that one vote should be deducted from that candidate's poll, without any enquiry or means of enquiry as to how in fact the bribed elector voted, and it may not be at all impossible that the elector may have voted under the secrecy of the ballot different from the way in which he was bribed or corrupted to vote, Nevertheless as there can be no such enquiry the law has provided as the only means of redress that one vote shall be deducted from the candidate's poll. Besides strictly speaking there can be no evidence as to how a man voted other than the production of the paper itself, nor would there be any safety if courts were to deal not upon the ballot which is the vote, but upon the statement of witnesses as to how they voted. A witness might falsely say he had voted differently from the way in which he had voted, without the slightest fear of detection, and without it being possible to establish that his evidence was wrong. The courts ought not to make any exception. Now with regard to the English mode or method of procedure, to show very clearly that the principle contended for is the right one, there, no examination can be had of the ballot until it be established to the satisfaction of the court that the person who cast that ballot was guilty

(1) P. 85 in a note.

of an offence which *ipso facto* destroyed his vote. Then by reference to the numbers the ballot can be produced, every care being taken to prevent any other ballot being seen, and upon its being ascertained how he voted, the poll is altered accordingly, whereas the Canadian Parliament deliberately adopted the other rule as above referred to. At the trial the respondent's counsel offered in express terms to waive his objections if any evidence was given to the trial judge upon which he would say that a *primâ facie* case of fraud had been made out. And if this was such a fraud there must surely be evidence of it. It was difficult to conceive how such a fraud could have been practiced. For it must be remembered that the voter getting his ballot has an opportunity to see that at that time it is not marked. He folds it up leaving the counterfoil and number exposed, which he exhibits on his return to the polling room to the deputy returning officer. The deputy returning officer then removes the counterfoil and in the presence of the voter deposits the ballot which he has brought back to him in the box. The witness that was examined in this case said that was all done and done in the presence of two scrutineers on each side and the poll clerk, so that the offer was made by the respondent's counsel, if a *primâ facie* case of fraud was made out, to withdraw the objection and allow the petitioner full and ample enquiry. The petitioner's counsel would not avail himself of that offer, and therefore his lordship properly determined not to allow the examination to proceed.

The following authorities were cited:

The North Durham Case (1); *The Harwich Case* (2); *The Litchfield Case* (3); *The Wigtown Case* (4); Rogers on

(1) 3 O'M. & H. 1.
(2) 44 L. T. 187.
(3) 3 O'M. & H. 139.
(4) 2 O'M. & H. 220.

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Election (1) ; *Macartney* v. *Corry* (2).

Then the learned counsel discussed the scrutiny charges under the eighth class of scrutiny particulars that farmers' sons voted who were not entitled to vote and contended:

First, that no scrutiny is at all allowed under the act; secondly, that no scrutiny could be held because the ballot is conclusive and is the only evidence as to how a man did vote; thirdly, a man cannot be allowed to say how he voted, and could not be compelled to say how he voted; fourthly, every person whose name is on the list is entitled to vote.

With regard to the apparent conflict which is introduced by the Franchise Act—by one section of the Franchise Act and by clause 70 of ch. 8 R. S. C.—they have to be reconciled. By the Franchise Act farmers' sons are required to have what is called a continuing qualification, differing from everybody else, and Parliament has evidently for the purpose adopted the oath as the protection. The same thing is done in the Local Legislature,they have farmers' sons and owners' sons and all that class who require to have, just as in this case, a continuing qualification, but under the local act it has been held in the *Wentworth Case*, and was intimated in the recent case in Kent with the same effect by the learned judges who were there, that there could be no scrutiny upon any ground whatsoever. The oath was the protection that the law intended. For those reasons no enquiry can be made under this head of objection taken in these particulars. *Stowe* v. *Joliffe* (3).

Sir. W. J. RITCHIE C.J.—Among the particulars of corrupt practices alleged are the following :—

8. Frederick Harrison, a resident of the township of Walpole, an agent of the respondent, did at polling station No. 6, in the township

(1) 2 vol. (15 Ed.) p. 687. (2) 7 Ir. C.L.R. 190.
(3) L.R. 9 C. P. 446.

of Walpole, induce Thomas Nixon, 'a resident of the township of Walpole, to take a false oath at the poll and to vote at said election though not qualified to do so.

20. Stephen Allen a resident of the township of Walpole, an agent of the respondent, did on the 12th day of November, 1887, induce Robert Dougherty to take a false oath at polling station No. 3, in the township of Walpole, though said Robert Dougherty was not qualified to vote at said election.

It is provided by 49 Vic. ch. 8 sec. 90 that

Every candidate who corruptly, by himself or by or with any other person on his behalf, compels or induces or endeavors to induce any person to personate any voter, or to take any false oath in any matter wherein an oath is required under this act, is guilty of a misdemeanor, and shall, in addition to any other punishment to which he is liable for such offence, forfeit the sum of $200 to any person who sues for the same.

And by sec. 91:

The offences of bribery, treating, or undue influence, or any of such offences, as defined by this or any other act of the Parliament of Canada, personation or the inducing any person to commit personation, or any wilful offence against any one of the seven sections of this act next preceding, are corrupt practices within the meaning of this act.

We have then in this case to look to the seven preceding sections, of which 90 is one, simply to discover what wilful offences are corrupt practices within the meaning of this act, and under sec. 90 the wilful offence is the compelling or inducing or endeavoring to induce any person to take any false oath in any matter wherein an oath is required under this act, and the inquiry is not whether the candidate is guilty of a misdemeanor or not.

Then by section 93 it is provided that:

If it is found by the report of any court, judge or other tribunal for the trial of election petitions, that any corrupt practices had been committed by any candidate at an election, or by his agent, whether with or without the actual knowledge and consent of such candidate the election of such candidate if he has been elected shall be void.

The inquiry then in this case is confined to the question: Whether there has been a wilful offence under section 90, and if so, whether it was committed by an agent of the candidate?

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Mr. Frederick Harrison represented Dr. Montague under a written authority whereby he appointed Harrison to act in the capacity of scrutineer for him (me) at polling sub-division No. 6, in the municipality of Walpole in the said electoral district of Haldimand.

A voter named Nixon who was on the list qualified as a farmer's son, and qualified only in that capacity, offered himself to vote at this polling place as a farmer's son. William Parker, the scrutineer of the opposing candidate insisted that this voter should be sworn and this is the account he gives of what took place:—

William Parker, sworn—Examined by Mr. Aylesworth—Q. Where were you engaged on polling day? A. Sub-division 6 of Walpole. Q. What capacity? A. As agent at the polls. Q. For whom? A. For Mr. Colter. Q. Were you there when Mr. Nixon came to vote—the last witness? A. Yes. Q. What took place? A. When he came in I said to the returning officer I want this man sworn: Nixon said what is that for; he said I have voted here three or four times and you have never said anything; I said well I want you sworn; so he turned to go out and the poll clerk, and I am not sure whether others said to him—Q. The poll clerk—who do you mean? A. Andrew Falls: that is the name he didn't remember; the poll clerk said don't go out; if you do you cannot come back again; so he turned and came back, and he said to me what is your objection to my vote, Mr. Parker, you have never objected to it before; and I replied I don't discuss voters' qualifications here, and I turned to the returning officer and says I require him sworn; so the returning officer took the book to swear him, and I said oath "T," and I looked over and saw the returning officer was reading oath "T" to him, but still he hesitated. Q. Who did? A. Nixon the voter; so Harrison, the other scrutineer, said your vote is perfectly good, Tom; he said take the oath, Tom, take the oath; I will be responsible; so then he took the oath and voted. Q. What oath was read to him? A. Oath "T," the farmer's sons' oath. Q. Did you have a copy of the oath? A. Yes, I had a copy of the act. Q. How did you know it was oath "T?" A. I just looked over it and could see it. Q. You followed the reading? A. I could see when he began to read what he was reading and I said oath "T" to the returning officer before he began. Q. And was this part of it, "That I am resident with my father within this electoral district?" A. Yes, sir, that is the last.

And Nixon the voter on his examination says in reply to the question: What was the form of oath ad-

ministered to you? was it as owner or owner's son or farmer's son or which ? Answers, farmer's son.

This oath "T" is the form of oath of qualification of a person whose name is registered as a voter on the list of voters as being a farmer's son, not claiming the benefit of the provision as to occasional absence as a mariner, fisherman or student.

I, (B), solemnly swear (or if he is one of the persons permitted by law to affirm in civil cases, solemnly affirm) :

1. That I am the person named or purporting to be named, by the name of , (and if there are more persons than one of the same name on the said list, inserting also his addition or occupation) on the list of voters for polling district No. , in the electoral district (or municipality) of .

2. That I am a British subject by birth (or naturalization, as the case may be), and that I am of the full age of 21 years.

3. That I have not voted before at this election, either at this or at any other polling place.

4. That I have not received anything, nor has anything been promised me, directly or indirectly, either to induce me to vote at this election, or for loss of time, travelling expenses, hire of team, or for any other service connected therewith ;

5. That I have not, directly or indirectly, paid or promised anything to any person, either to induce him to vote or to refrain from voting at this election ;

6. That I am resident with my father, (or if his father is dead, with my mother) within this electoral district, and that I have not been absent from such residence more than six months since I was placed on the list of voters. So help me God.

And this last clause is that which it is claimed the witness could not truthfully take and it cannot be denied that if he did take this oath he did take a false oath in a matter wherein an oath is required under the act.

This statement of Mr. Parker I must accept as strictly true, because neither the returning officer nor Harrison, the scrutineer of Mr. Montague, were called to show that oath "T" was not regularly and properly administered, or that any portion of the oath was omitted, and independent of any evidence of Parker in the absence of any evidence to the contrary it must be pre-

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sumed the returning officer did his duty. If he did not do so the sitting member should have shewn it.

It is not necessary for me to discuss or decide a question raised on the argument, viz: whether a voter registered as a farmer's son has a right to choose what oath he will take, because in this case he actually took the farmer's son's oath, and did not choose or offer to take any other. I may say, however, that if I were called on to express an opinion I should require much more than I have heard in this case to convince me that a voter so registered has any such right.

The questions then resolve themselves to these: Was Harrison the agent of Mr. Montague at this polling place, and if so, did he compel or induce, or endeavor to induce, the voter Nixon to take the false oath? There cannot be a doubt that, having been authorized to act as scrutineer at the polling place in question, he was there as the agent of the candidate appointing him. The sections of the act 36, 37 and 38 make this, in my opinion, too plain for argument, they are as follows:

36. In addition to the deputy returning officer and the poll clerk, the candidates and their agents (not exceeding two in number for each candidate in each polling station), and, in the absence of agents, two electors to represent each candidate on the request of such electors, and no others, shall be permitted to remain in the room where the votes are given, during the whole time the poll remains open;

Provided always, that any agent bearing a written authorization from the candidate, shall always be entitled to represent such candidate in preference to, and to the exclusion of any two electors, who might otherwise claim the right of representing such candidate under this section. 41 Vic. ch. 6 s. 4.

37. Any person producing to the returning officer or deputy returning officer, at any time, a written authority from the candidate to represent him at the election or at any proceeding of the election, shall be deemed an agent of such candidate within the meaning of this act. 37 Vic. ch. 9., s. 36.

38. One of the agents of each candidate, and, in the absence of such agent, one of the electors representing each candidate, if there

is such elector, on being admitted to the polling station shall take the oath to keep secret the names of the candidates for whom any of the voters has marked his ballot paper in his presence, as hereinafter required, which oath shall be in the form Q in the first schedule to this act. 37 Vic. ch. 9 s. 36, part.

If an agent, then was Harrison guilty of the corrupt practice attributed to him? The voter, it appears, having turned to go out, the poll clerk said to him "don't go out, if you do you cannot come back again," so he turned and came back and after asking Parker "what is your objection to my vote" and receiving the reply, "I don't discuss voters' qualifications here," and requiring him to be sworn; and while, Parker says, "the officer was reading oath T to him, but he still hesitated,"—(Q. Who did? A. Nixon the voter.)—Harrison the other scrutineer said: "your vote is perfectly good Tom, take the oath Tom—I will be responsible." "So he took the oath and voted." And Nixon himself says in answer to the question;

Did Harrison take any part when your vote was challenged? A. He insisted that I should take the oath. Q. What did he say? A. He said my vote was perfectly good. Q. Anything else? A. That was all; I took his word and went and voted.

If the scrutineer or agent representing the candidate chose to interfere with the voter and urge him to take an oath he could not truthfully take and, in the language of the voter himself, "he insisted that I should take the oath, he said my vote was perfectly good, I took his word and went and voted:" and. further, professed to assume the responsibility of the voter's doing so, this, in my opinion, was such a wilful inducing or endeavoring to induce the voter to take a false oath as to amount to a corrupt practice.

May it not, indeed, be fairly said that this was something more than mere inducing or endeavoring to induce this voter to take this oath which, but for the agent's interference, the hesitating voter might not, and from his own evidence, most probably never would,

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have taken, for he says, "I took his word and went and voted?" Did not this insistance that he should take the oath, and this assumption of responsibility for his so doing, if not amounting to a legal compelling very nearly approach moral compulsion or coercion? This having been done in a place and at a time when the scrutineer or agent ought not to have interfered with the voter, who should have been left to act as his own judgment and knowledge of his position prompted, and on his own responsibility, constrains me to the conclusion that what Harrison did was done corruptly and wilfully with the intention of securing the vote, at all hazards, for the party whom he was representing; for I cannot think he would have been so urgent that the oath should be taken if he had not been well assured for whom the voter intended to vote: and I am the more impressed with this conviction inasmuch as the evidence stands uncontradicted, and I cannot doubt but that Harrison would have been examined at the trial could he have contradicted the evidence of Parker, or have shewn that what he did was done under a misapprehension or mistake either of fact or law, that he honestly believed the voter was entitled to vote and could truthfully take the oath, and that what he did was not done wilfully or corruptly. As no excuse or justification has been put forward for his conduct the sitting member must take the consequence of his improper act and the election must be declared void.

STRONG J.—I have the misfortune to differ from the majority of the court in the Harrison-Nixon case.

The particulars of this charge are, as they have just been stated by the learned Chief Justice, that Frederick Harrison, who was the scrutineer for the respondent at polling place No. 6, in the township of Walpole,

induced Thomas Nixon, whose name appeared on the registry as a voter, to take a false oath and to vote, though not qualified, and thereby committed a corrupt act, as an agent, sufficient to avoid the election. It appeared that Nixon was registered as a farmer's son and that his father had died, on the 4th of April, 1886, before the final revision of the lists but that his name was left on the lists as a farmer's son; that the oath administered to him, and which he certainly could not properly take, was oath "T" which reads as follows:

I am resident with my father within this electoral district, and that I have not been absent from such residence more than six months since I was placed on the list of voters,

and that he nevertheless took this oath.

Two witnesses were examined on this charge, the voter Nixon and Parker the scrutineer for the petitioner at the poll in question.

What is said by Nixon is as follows:—

Q. Did Harrison take any part when your vote was challenged? A. He insisted that I should take the oath. Q. What did he say? A. He said my vote was perfectly good. Q. Anything else? A, That was all; I took his word and went and voted. * * Q. The deputy returning officer I suppose, read the oath over to you before you took it? A. Yes sir. Q. That is the way it was administered? A. Yes sir. Q. Was this part of it: "That I am a resident with my father within this electoral district and have not been absent from such residence more than six months since I was placed on the list of voters? A. I do not remember that part "with my father, &c."

* * * * * * *

Q And when you went in the polling booth, as I understand, the gentleman who was there was Mr. Parker? A. Yes, sir. Q. Who was there representing Mr. Colter, required you to be sworn? A. Yes, sir.

Then Parker is called and he is examined by the counsel for the petitioner:

Q. Were you there when Mr. Nixon, the last witness came to vote? A. Yes. Q. What took place? A. When he came in I said to the returning officer, I want this man sworn; Nixon said what is that for; he said I have voted here three or four times and you have never said anything; I said, well, I want you sworn; so he turned

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to go out—the poll clerk and I am not sure whether others said to him. Q. The poll clerk—who do you mean? A. Andrew Falls; that is the name he didn't remember; the poll clerk said don't go out; if you do you cannot come back again: so he turned and came back, and he said to me what is your objection to my vote, Mr. Parker; you have never objected to it before; and I replied I don't discuss voters' qualifications here, and I turned to the returning officer and says I require him sworn; so the returning officer took the book to swear him, and I said oath "T," and I looked over and saw the returning officer was reading oath "T" to him, but still he hesitated. Q. Who did? A. Nixon the voter; so Harrison, the other scrutineer, said your vote is perfectly good, Tom; he said take the oath, Tom, take the oath; I will be responsible; so then he took the oath and voted. Q. What oath was read to him? A. Oath "T," the farmers' sons' oath. Q. Did you have a copy of the oath? A. Yes, I had a copy of the act. Q. How did you know it was oath "T"? A. I just looked over it and could see it. Q. You followed the reading? A. I could see when he began to read what he was reading and I said oath "T" to the returning officer before he began. Q. And was this part of it, "That I am resident with my father within this electoral district"? A. Yes, sir, that is the last.

On cross-examination he says:—

Q. You turned to the returning officer and said what? A. I want him sworn. Q. Now what further? A. He hesitated again and Harrison said your vote is perfectly good, Tom, and he rose partly off his feet, he says take the oath, Tom, take the oath Tom, I will be responsible. Q. What did you say to that? A. Nothing. Q. Then what did you do? A. Went to the returning officer, took the book, I said oath "T." Q. Thereby meaning? A. The farmer's sons' oath. Q. Then what did the returning officer do? A. He read the oath, read the farmer's sons' oath. Q. Did you hear him reading it? A. Yes.

Now upon this evidence the learned judge found that Nixon had a good vote and concluded his adjudication on the charge as follows:—

Now, under those circumstances, can it be found that Mr. Harrison wilfully and corruptly induced Thomas Nixon to take a false oath in order that his vote, which was perfectly good without any false oath, might be put in? I think that such a finding would not be justified by the facts, and I find therefore that Mr. Harrison did not wilfully and corruptly induce this Thomas Nixon to take the oath which he did, and I dismiss that charge also.

As regards agency I am not clear that Harrison who was a mere scrutineer, and therefore an agent with a

limited authority, was an agent for whose corrupt acts the respondent was according to the general law of elections answerable. But I will assume rather than admit that he was such an agent. We have then to consider the provisions of the law applicable to the case, and these are contained in secs. 90, 91 and 93 of the Dominion Elections Act.

Sec. 90 enacts that:

Every candidate who corruptly, by himself, or by or with any other person on his behalf, compels or induces or endeavors to induce any person to personate any voter, or to take a false oath in any matter wherein an oath is required under this act, is guilty of a misdemeanor, &c.

And sec. 91 declares that:

The offences of bribery, treating, or undue influence, or any of such offences, as defined by this or any other act of the Parliament of Canada, personation or the inducing any person to commit personation, or any wilful offence against any one of the seven sections of this act next preceding, are corrupt practices within the meaning of this act.

And sec. 93:

If it is found by the report of any court, judge or other tribunal for the trial of election petitions, that any corrupt practice has been committed by any candidate at an election, or bv his agent, whether with or without the actual knowledge and consent of such candidate, the election of such candidate if he has been elected shall be void.

Now it is apparent that these provisions do apply to make the inducing a voter to take a false oath by an agent a corrupt practice avoiding the election, provided it is done (as required by section 90) "corruptly," and (as required by sec. 91) "wilfully."

Then can it be said on the evidence that Harrison acted "corruptly" and "wilfully?"—I am of opinion that it cannot. Supposing that Harrison was aware of the father's death, it appears to me that he acted in perfect good faith when, assuming very naturally, though in point of law I admit erroneously, that Nixon, registered as a farmer's son, did not lose his vote

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because he had become the actual owner of the property on which he had resided with his father, he encouraged him to take the oath appropriate to his actual *status* as a voter. That Harrison did or said anything to induce Nixon to take oath "T" or any other particular form of oath is not proved. He is therefore to be regarded as having instigated Nixon only to take such an oath as was appropriate to his case. This I cannot hold to have been a wilful and corrupt inducement to take a false oath.

2nd. Further Nixon was originally registered as a farmer's son and at the time he was registered it was true; his father died in April, 1886, and this election took place in 1887. There is no proof that Harrison knew that Nixon's father was dead, in which case oath "T" would have been the proper oath.

I must hold, therefore, that the act was not a wilful one, was free from any corrupt intent, and I consequently agree in the conclusion of the learned judge at the trial that the charge was not proved.

There is another charge, that Allen, a scrutineer for the respondent, induced Dougherty, a voter to take a false oath. It occurred at polling place No. 3, in the township of Walpole.

This charge, in my opinion, wholly fails. The facts are that Dougherty removed from the house his father resided in into another house on the same farm, but that he occupied this last house as a caretaker or servant of his father, the possession being clearly in the father. Assuming that agency was proved, and that is a very considerable assumption for there is much doubt about it, I hold with the learned judge that the voter had a perfectly good vote and was able consistently with the truth to take the oath which was administered to him.

3rd. As to the charge that the deputy returning officer at polling place No. 4, Oneida, put into the ballot box

and counted ballots not duly received from electors and which is thus referred to in the notice of appeal:

5. The charge that the deputy returning officer at polling sub-division No. 4 in the township of Oneida, put into the ballot box and counted ballots not duly received from the electors in the lawful performance of his duties as deputy returning officer at the said election.

I am clear there is nothing in this case. It relates only to one ballot which could not affect the result of the election. Moreover the county judge on the recount made such an allowance in favor of the defeated candidate as afforded a sufficient remedy for any irregularity which the evidence establishes.

Another case is charge No. 6 in the notice of appeal, viz.:

The charge that the deputy returning officer at polling sub-division No. 2 in the township of Oneida, improperly marked ballots received by him at the said election, from electors before depositing the said ballots in the ballot box, and thereby prevented the said ballots from being counted at the said election, and the ruling of the learned judge, rejecting the evidence on behalf of the petitioner which was tendered by him at the trial in support of the said charge.

Nothing could be made of this charge without admitting the evidence of voters to show how they voted. This I hold cannot be done. To do so would, in my opinion, be a direct violation of the act which requires secrecy. Sec. 7, of the Dominion Elections Act, enacts:

No person who has voted at an election shall, in any legal proceeding questioning the election or return, be required to state for whom he voted.

It is no answer to this to say that secrecy is imposed for the benefit of the voter and that he can waive it, for I hold secrecy to be imposed as an absolute rule of public policy, and that it cannot be waived. The whole purview of the law is different from the English act and from the Ontario act. I am of opinion, therefore, that the learned judge rightly rejected the evidence though I may not be able to agree with the grounds he put it upon.

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The next charge that is important is stated as follows in the notice of appeal:—

7. The charge that many persons voted at the said election who, for different reasons were not qualified to vote thereat, and the refusal of the learned judge at the trial to enquire into the right at the time of the election of any person to vote thereat, if the name of such person appeared on the list of voters as finally revised, and certified by the revising barrister and the rejection by the learned judge at the trial of the evidence tendered on behalf of the petitioner to establish that many persons who voted at the said election had, between the time of the final revision of the voters' lists by the revising barrister and the date of the said election, forfeited the right to vote thereat.

This principally relates to the case of farmers' sons whose votes were impeached. It appears to me that the evidence was, if admissible in other respects, material, inasmuch as if it were shewn that bad votes were received more in number than respondent's majority that would be sufficient to avoid the election. Then, as regards the qualification of farmer's sons, I think it clear that the registry was not conclusive, though as regards qualification founded on ownership it appears to be conclusive.

I found this opinion on section 41, which is as follows:

41. Subject to the provisions hereinafter contained all persons whose names are registered on the lists of voters for polling districts in any electoral district, in force under the provisions of "The Electoral Franchise Act", or of the act passed in the session held in 48th and 49th years of Her Majesty's reign and intituled "An act respecting the Electoral Franchise," on the day of the polling at any election for such electoral district, shall be entitled to vote at any such election for such electoral district and no other persons shall be entitled to vote thereat.

read in conjunction with section 45 sub-sec. 2 enacting that

Such elector, if required by the deputy returning officer, the poll clerk, one of the candidates or one of their agents, or by any elector present, shall, before receiving his ballot paper, take the oath of qualification in the form S, or in one of the forms T, U, V, or W, in the first schedule to this act, as the circumstance of the case require

—which oath the deputy returning officer and poll clerk are each hereby authorized to administer."

And the last paragraph of oath "T"

That I am resident with my father within this electoral district, and that I have not been absent from such residence for more than six months since I was placed on the said list of voters.

Now I contend that the proper construction of these provisions is that no one is to vote who has not the qualification arising out of a continuous residence subsequent to registration, for I say that sec. 41 is subject to the exception afterwards contained in sec. 45, sec. 2, which, by requiring the oath of qualification, makes, in my opinion, the fact of the continuance of the qualification, stated in the last paragraph of oath "T," of residence with the father essential as a preliminary to the right to vote. It is true that it makes the oath sufficient evidence for the purpose of authorizing the reception of the vote, but it does not, in my opinion, make it conclusive evidence, and therefore on a scrutiny further enquiry is admissible, and if it is shewn that a larger number of bad votes than the majority were admitted the election ought to be set aside, though the seat could not, of course, be awarded, inasmuch as no voter can be asked how he voted. *Stowe* v. *Jolliffe* (1) does not apply. The registry there was conclusive, here it is not.

Therefore it appearing that evidence duly tendered at the trial was improperly rejected, there should be further enquiry and the witnesses whose evidence was so rejected should be examined pursuant to sec. 51 ss. 3 of the Controverted Elections Act (2), and the appeal should be ordered to stand over for that purpose.

FOURNIER J.—La pétition se plaignant de l'élection de l'intimé contient les allégations ordinaires de corruption et allègue en outre que des bulletins ont été

(1) L. R. 9 C. P. 446. (2) R. S. C. ch. 9.

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admis et rejetés illégalement ainsi que beaucoup d'autres irrégularités, et conclut à l'annulation de l'élection. Sur les trente-neuf accusations de menées corruptrices contenues dans les particularités, l'enquête a eu lieu dans un grand nombre de cas, et a été abandonnée dans plusieurs autres. L'intimé avait donné avis qu'il procéderait à la preuve sur des accusations récriminatoires. Mais la pétition ayant été rejetée en entier, il ne s'est pas trouvé dans l'obligation de procéder sur ces charges.

Parmi les accusations rejetées par l'honorable juge Street qui a présidé au procès et au sujet desquelles il y a appel, se trouve la huitième qui est énoncée dans les termes suivants :

8o. Frederick Harrison, a resident of the township of Walpole, an agent of the respondent did, at polling station number six, in the township of Walpole, induce Thomas Nixon, a resident of the township of Walpole, to take a false oath at the poll and to vote at the said election, although not qualified to do so.

La preuve de cette accusation faite par Thomas Nixon le voteur lui-même et par William Parker, l'agent de l'autre candidat, W. Colter, est si complète, qu'elle ne laisse aucun doute sur l'existence du fait imputé.

Nixon s'étant présenté pour voter, Parker, l'agent de Colter, le requit de prêter serment ; il s'en plaignit, mais la demande ayant été réitérée, il fit quelques pas pour sortir du poll. Changeant subitement d'idée, il revint sur ses pas et se plaignit de nouveau de ce que l'agent exigeait de lui le serment de qualification. L'agent Parker ayant encore insisté, le député-officier rapporteur commença à lire la formule du serment de qualification pour les voteurs enrégistrés sur la liste des fils de fermiers. Nixon hésitait encore, lorsque Harrison, l'agent du membre siégeant se levant à demi, interrompit l'officier rapporteur en disant au voteur :

Your vote is perfectly good, Tom, take the oath, Tom, take the

oath; I will be responsible.

Immédiatement après ces paroles, Nixon fit le serment requis et vota. Les mêmes faits sont aussi prouvés par Wm. Parker, de la manière la plus positive. Dans son témoignage, Nixon dit à propos de l'intervention de Harrison, que ce dernier voyant l'objection à son vote insista à ce qu'il fit serment.

Harrison insisted that I should take the oath. He said my vote was perfectly good. That was all, I took his word and went and voted.

Le serment prêté par Nixon est celui de la formule T. concernant les fils de fermiers, se terminant par la déclaration :

That I am resident with my father within this electoral District, and that I have not been absent from such residence more than six months since I was placed on the list of voters, &c., &c.

L'agence de Harrison est prouvée. Il avait été spécialement nommé par écrit pour représenter l'intimé à ce poll. Il était de son devoir de protéger les intérêts de l'intimé en résistant à des objections non fondées qui auraient pu empêcher des voteurs de donner leurs votes en faveur de son candidat. Mais celle qui avait été prise contre Nixon était bien fondée. Porté sur la liste des voteurs comme fils de fermier, demeurant avec son père, il avait, lors de son vote perdu depuis longtemps sa qualification de voteur, par le décès de son père. Il avait aussi laissé la propriété sur laquelle il avait été qualifié lorsqu'il demeurait avec son père, pour aller demeurer avec une de ces sœurs sur une autre propriété. Il n'était enregistré comme voteur qu'en qualité de fils de fermier et en aucune autre qualité, sur aucune autre liste. C'est ainsi qu'il a voté. Le serment qu'il a prêté qu'il était résident dans le district électoral avec son père était évidemment faux et tout-à-fait contraire à la vérité. Il donne lui-même la date du décès de son père dans son témoignage comme ayant eu lieu le 4 avril 1886. Sa mère était morte depuis environ dix ans. Il n'a pas prêté le ser-

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ment sans beaucoup d'hésitation, comme on l'a vu par son propre récit. Sans l'insistance de Harrison, il est clair qu'il serait retourné sans voter. Ses hésitations sont faciles à comprendre, il lui répugnait sans doute beaucoup de faire le serment qu'il résidait avec son père mort depuis 19 mois. Mais pressé par Harrison, son voisin qui savait aussi bien que lui la mort de son père, et qui, d'après sa manière de lui adresser la parole, semble être avec lui sur un pied de familiarité intime, il a fini par se laisser persuader qu'il n'y avait pas de mal à faire ce serment; il a pu tout probablement se croire dégagé en conscience de toute responsabilité par le ton persuasif et la persistance de Harrison à lui répéter que son vote était bon et à lui dire de voter, qu'il prenait tout sur sa responsabilité. Sans l'intervention de Harrison, il eût sans doute suivi sa première pensée de s'en aller sans voter; évidemment ce vote n'est dû qu'à la pression exercée sur Nixon par Harrison. Ce dernier ne pouvait certainement pas être de bonne foi lorsqu'il agissait ainsi, il ne pouvait ignorer la mort du père de Nixon dont une des propriétés adjoignait la sienne. Dans tous les cas puisqu'il prenait sur lui d'affirmer la validité du vote, tandis qu'il était clairement illégal, sa conduite a eu l'effet de rendre l'intimé responsable des conséquences de son action. S'il ignorait la véritable position de Nixon fils, il aurait dû s'en informer avant d'en parler avec autant d'assurance qu'il l'a fait. Comme tant d'autres, il a mis plus de zèle que de discrétion dans l'exercice de ses fonctions comme agent et son principal doit malheureusement en supporter les conséquences.

Harrison s'est donc en connaissance de cause rendu coupable du fait d'induire Nixon à faire un faux serment. L'offense qu'il a ainsi commise est définie comme suit par la section 90 de l'acte des élections, déclarant:

That every candidate who corruptly by himself, or by any other person on his behalf, induces or endeavors to induce any person to take any false oath in any matter wherein an oath is required under the Act, is guilty of a misdemeanor.

Par la section suivante, 91me, il est déclaré que

Any wilful offence against any one of the seven sections of this Act next preceding, are corrupt practices within the meaning of this Act.

Le fait d'avoir induit Nixon à faire un faux serment est clairement, d'après ces sections, une menée corruptrice commise par un agent de l'intimé, et a eu en conséquence l'effet d'affecter la légalité de l'élection.

Dans la section 90, le mot *corruptly* ne signifie pas d'une manière absolue que l'acte, qualifié ainsi, a été fait dans un but immoral, malhonnête ou avec malice. Ce mot y est plutôt employé pour signifier que l'acte visé par cette expression est une violation de la prohibition du statut à cet égard (1). Il n'était pas nécessaire de faire la preuve que Harrison, en agissant comme il l'a fait, avait une intention malhonnête et immorale. Toutefois il n'a pas offert son serment pour expliquer ses recommandations. Cependant l'opinion de l'honorable juge a été que la preuve de l'intention de Harrison aurait dû être faite, mais elle est contraire à l'interprétation adoptée par les autorités suivantes:

All the judges have considered that the word 'corruptly'..... means, with the object and intention of doing that thing which the statute intended to forbid. It does not mean corrupt in the sense in which you may look upon a man as being a knave or a villain.

Per Mr. Justice Blackburn in *The North Norfolk Case* (2).

And in discussing the meaning of the word in considering whether treating had or had not been done corruptly, Mr. Justice Blackburn says, "the point to be considered is, Was it given with an intent to influence the election?"

The *Wallingford Case* (3).

The word 'corruptly' means contrary to the intention of this Act, with a motive or intention by means of it to produce an effect upon the election.

(1) *Cooper* v. *Slade* 6 H. L. Cas. 746 to 788.

(2) 1 O'M. & H. 236, at page 242.

(3) 1 O'M. & H. 57, at page 59.

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Per Mr. Justice Blackburn in *The Hereford Case* (1).

This language is quoted with approval by Mr. Justice Mellor in *The Launceston Case* (2).

And by Mr. Baron Dowse in *The Carrickfergus Case* (3).

See also, on the same subject, *The Louth Case* (4).

Harrison connaissait parfaitement l'objection faite à Nixon, il avait entendu Parker demander l'administration du serment suivant la formule T. au sujet du fils de fermier; il avait été témoin des hésitations de Nixon, mais sa crainte de perdre un vote pour l'intimé le dominait tellement, qu'il a exercé toute la pression dont il était capable sur ce jeune homme pour l'engager à prêter un serment faux. Non seulement Harrison avait l'intention d'assurer un vote à son candidat, mais il y a mis de la persistance et l'a obtenu au moyen d'un serment faux. Il est inutile d'en dire davantage pour prouver que l'acte de Harrison a été fait volontairement et non par inadvertance. Il a manifesté sa volonté assez souvent et n'a dû son succès qu'à ses efforts réitérés. Quels que soient les motifs qu'on lui suppose son acte a été au moins *wilful* dans le sens d'intentionnel, tel qu'il a été interprété par cette cour dans la cause de l'élection de Selkirk, *Young* v. *Smith* (5).

Je suis en conséquence d'avis que pour ce seul fait de Harrison l'élection doit être annulée et l'appel maintenu avec dépens.

TASCHEREAU J.—I am of opinion that this election should be annulled on the Harrison-Nixon charge, at No. 6 Walpole polling division.

The facts relating to this charge are as follows:

Thomas Nixon voted at the election. His name was on the voters' list as a farmer's son and not in any other capacity. He is an unmarried man, living with

(1) 1 O'M. & H., at p. 195.
(2) 2 O'M & H., 129, at p. 133.
(3) 3 O'M. & H., at p. 91.
(4) 3 O'M. & H., 161.
(5) 4 Can. S. C. R. 494.

his sister, on the property in respect of which he voted; his mother died some years ago, his father also at the time of the election, had been dead a little more than 19 months.

Nixon's post-office is Hagersville, and he has lived on the place ever since he was born.

The respondent's agent at this polling place was Frederick Harrison, whose post-office is also Hagersville, and who appears assessed as owner of the next farm to Nixon, in the adjoining concession.

When Nixon came to vote, one of the scrutineers at the poll required that he should be sworn; Nixon expostulated, but the demand was repeated, and Nixon thereupon turned to go out, but came back and again remonstrated with the scrutineer, and was again met with the demand that he be sworn.

The deputy returning officer began to read to him the form of oath for persons registered on the list as farmers' sons, but Nixon still hesitated, when Harrison, partly rising off his feet and interrupting, said: "Your vote is perfectly good, Tom; take the oath, Tom, take the oath; I will be responsible," and thereupon Nixon took the farmers' sons' oath and voted.

Nixon states in his account of what took place, that on his vote being challenged Harrison "insisted that I should take the oath He said my vote was perfectly good. That was all; I took his word and went and voted."

On these facts the petitioner alleges that the said Harrison, an agent of the respondent, induced or endeavored to induce the said Thomas Nixon to take a false oath when tendering his vote at the polls and was thereby guilty of a corrupt practice under the Dominion Elections Act, sec. 90 which provides that every candidate who corruptly by himself, or by any other person on his behalf, induces or endeavors to induce

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any person to take any false oath in any matter wherein an oath is required under the act, is guilty of a misdemeanor, and sec. 91 by which any wilful offence against the preceding section is made a corrupt practice within the meaning of the act. As to the facts there can hardly be any dispute.

First, as to Harrison's agency, there is no room for doubt. He was specially appointed by the respondent in writing to represent him at this poll, and it was in the course of his duty as such representative of the respondent that he interfered to have Harrison's vote taken.

2nd. The oath which Nixon took was unquestionably taken in a matter wherein the statute required an oath to be taken. One of Colter's scrutineers requiring it, Nixon could not get a ballot paper without taking the oath, and the farmers' sons' oath, he being on the list as such, was the only one that could be administered to him as was shown.

3rd. It is as conclusively established that the oath he took was a false one. He swears that he was then resident with his father within this electoral district; yet his father had been dead nearly two years.

4th. Harrison induced Nixon to take the oath. In fact, he would not have taken it, it is plain from the evidence, if Harrison had not interfered to induce him to do so. He says that Harrison insisted he should take the oath, and he said "my vote was perfectly good. I took his word and went and voted."

Now, was this act of Harrison a wilful act and one corruptly done within the meaning of the Elections Act? It is settled law that the word "corruptly" as used in sec. 90 of the Elections Act does not mean "wickedly, immorally or dishonestly," neither can it mean "consciously" or with intent to commit an offence. The word means, as per Lord Cranworth, in *Cooper* v. *Slade*

(1), " in violation of that which this statute was passed to prohibit."

Here Harrison's object and intention is manifest. He heard the objection raised to Nixon's vote; he knew the point of the objection, as the scrutineer who objected had also stated the particular form of oath which he demanded to be administered, viz:—that for a farmer's son not claiming the benefit of the provisions as to occasional absence; he had seen Nixon in the first place turn away unwilling to take the oath; he saw him then hesitating; the voter was a young man; Harrison was manifestly alarmed lest a vote should be lost to the respondent if something was not promptly done to reassure the voter and encourage him into taking the oath; he hastened to assume the responsibility of what he was urging Nixon to do; he heard the oath read containing the averment of residence with the father, but said not a word to retract or modify the urgency of his previous language; he manifestly acted with the object and intention of securing the vote at all hazards, even though it was necessary that the untrue oath should first be taken.

He could not have believed that Nixon's father was living; and the respondent did not attempt to bring him in the witness box to swear to that belief. He lives in the same place as Nixon, and is the owner of a farm next to Nixon, in the adjoining concession. He knows him intimately as is evidenced by the familiar way in which he addresses him "take the oath, Tom, take the oath?"

This with the fact of his not coming forward to swear the contrary cannot but create a strong presumption that he knew of Nixon's father's death. But even without this knowledge, the corrupt act is proved. He induced Nixon to knowingly, wilfully and corruptly take a false oath required by the act, for

(1) 6 H. L. C. 746.

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he must have known that the farmer's son's oath was the only one that Nixon could give so as to vote. This is what the act in plain terms declares to be a corrupt practice. And the *scienter* of Harrison is immaterial. If an agent assumes recklessly to induce a voter to take an oath without previously ascertaining or taking any steps to ascertain whether that oath will be true or not, and the oath turns out to be a false one, I think it clear that this agent has committed the offence created by section 90 of the statute. He has procured a vote, which, without that false oath, could not have been recorded. He has consequently acted "in violation of that which the statute was passed to prohibit." To say that Harrison's *scienter* was necessary to complete the offence, is to say that he must have been guilty of subornation of perjury. Now it is, as I read the section, something more than subornation of perjury that Parliament has legislated against, another and different offence that it has created. And I cannot see that the fact that the statute has declared this to be a misdemeanor makes any difference. No *mens rea*, no *scienter*, is necessary where a statute prohibits the very act that has been done, neither is *ignorantia juris* or *ignorantia facti* an excuse. In *R.* v. *Prince* (1) for instance, the defendant having been found guilty of abducting a girl under 16 the court held the conviction right, although the jury had found that the prisoner reasonably believed the girl to have been 18. In *R.* v. *Bishop* (2), also it was held that under a statute which prohibits the receiving of lunatics in a house not licensed, the owner of a house who had received lunatics was guilty of the offence enacted by the statute, though the jury found that he believed honestly and on reasonable grounds that the persons received were not lunatics.

These cases show that ignorance of fact is no excuse

(1) 13 Cox 138. (2) 5 Q. B. D. 259.

where the act is prohibited by the statute, and go further even than it is necessary to do in to the the present case. So under a statute imposing a penalty for having adulterated tobacco the defendant was held liable to the penalty, although he did not know that he had such tobacco in his possession. *R.* v. *Woodrow* (1). I also refer to *Atty. Gen.* v. *Lockwood* (2), *R. V. Marsh* (3).

In *Cundy* v. *Lecocq* (4) Stephen J. said :—

I do not think that the maxim as to the *mens rea* has so wide an application as it is sometimes considered to have ; in old times and as applicable to the common law or to earlier statutes, the maxim may have been of general application, but a difference has arisen owing to the greater precision of modern statutes. It is impossible now to apply the maxim generally to all statutes, and it is necessary to look at the object of each act to see whether and how far knowleuge is of the essence of the offence created.

I refer also to the case of *Young* v. *Smith* (5), in this court, and to *The State* v. *Perkins* (6).

In *Mierelles* v. *Banning* (7), the word "knowingly" was in the statute as an ingredient of the offence there charged, and consequently the case has no application here. This word "knowingly" has no doubt purposely been left out of the clauses of the Elections act which declare what will be corrupt practices.

As to the offence being wilful, I need only refer to the case of *Young* v. *Smith* (5), in this court, hereinbefore cited. Harrison wilfully induced Nixon to take the oath, that oath was false ; this constitutes a wilful offence in the sense of the election act. If a man wilfully does an act which the statute declares to be an offence, he is guilty of an offence against the statute. See *R* v. *Holroyd* (8), and *Hudson* v. *McCrae* (9).

I may notice that what the act declares illegal is the

(1) 15 M. & W. 404.
(2) 9 M. & W. 378, 401.
(3) 4 D. &. Ry. 261.
(4) 13 Q. B. D. 207.
(5) 4 Can.S.C.R. 494.
(6) 42 Vermont 399.
(7) 2 B. & Ad. 909.
(8) 2 M. & Rob. 339.
(9) 4 B. & S. 585.

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inducing to take a false oath. It does not say, "inducing to commit perjury." So that if the oath is a false one, whether the party taking it knew it to be so or not, the inciting to take it would appear to fall under this act. Nothing in this case, however, turns upon this.

As to the petitioner's claim for the seat, it must be dismissed.

The evidence of thirty-six voters to show that they had voted for Colter at polling division, No. 2, Oneida, was properly held not admissible by the learned judge at the trial.

Had the learned judge permitted the enquiry to have been prosecuted as the petitioner desired, it would have in effect disclosed not merely how those willing to tell had voted, but practically how every man at the poll had voted, because if out of one hundred votes fifty are found to have voted for A. and fifty for B and the fifty who voted for A. are called and expressing their willingness to tell, do tell that they voted for him, it at once becomes known who the fifty were who voted for B., although they may be most unwilling that that fact should be disclosed. It would be interfering, therefore, with the overriding principle prevailing throughout the Ballot Act, and which embodies a great public policy, had the learned judge permitted the evidence to be given.

The evidence tendered by the petitioner to prove that a certain number of farmers' sons who had voted had no right to vote was also properly declared inadmissible. The list coupled with the oath, when the oath is required, is conclusive as to their right to vote.

The other irregularities complained of on this appeal could not affect the result of the case, in the view I take of it.

The appeal should, in my opinion, be allowed with costs and the election set aside.

GWYNNE J.—The scrutiny of ballots having resulted in leaving unaffected the right of the respondent in the election petition to retain the seat the only material points upon which, in view of the judgment arrived at by the majority of the court, it is necessary for me to express any opinion, are the two charges of corrupt practices made in connection with the cases of Thomas Nixon and Robert Dougherty.

These charges were as follows:

1. Frederick Harrison, a resident of the township of Walpole, an agent of the respondent did, at polling station number six in the township of Walpole, induce Thomas Nixon, a resident of the township of Walpole, to take a false oath at the poll, and to vote at said election though not qualified to do so.

2nd. Stephen Allen, a resident of the township of Walpole. an agent of the respondent, did on the 12th day of November, A.D., 1887, induce Robert Dougherty to take a false oath at polling station number three in the township of Walpole, though said Robert Dougherty was not qualified to vote at said election.

These charges are based wholly upon sections 90 and 91 of the Dominion Elections Act, 49 Vic., ch. 8. These sections are as follows (1):—

Before enquiring into the evidence adduced in support of these charges, it will be well to determine first what is the true construction of this section 90 and what is the nature of the offence therein pointed at under the words "induce any person to take a false "oath in any matter wherein an oath is required "under this act" and how it can be committed and proved.

By the Dominion Act, 49 Vic. ch. 154 of the Revised Statutes of Canada which is a consolidation of, and substitution for, the 1st, 2nd, 6th and 7th sections of

(1) See p. 513.

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the Dominion Statute 32-33 Vic. ch. 23, and the 1st sec. of 33 Vic. ch. 26 it is, among other things, enacted that

> Every person who (having taken an oath, affirmation, declaration or affidavit in any case in which by any act or law in force in Canada or in any Province of Canada it is required, or authorised, that facts, matters or things be verified or otherwise assured or ascertained, by or upon the oath, affirmation, declaration or affidavit of any person) wilfully and corruptly upon such oath, affirmation, declaration or affidavit swears or makes any false statement as to any such fact, matter or thing, is guilty of wilful and corrupt perjury and liable to be punished accordingly.

A false oath to constitute perjury at common law must be taken in a judicial proceeding before a competent jurisdiction, but the taking a false oath before a person competent and authorized to administer it, although the oath be not in a judicial proceeding, is a misdemeanor at common law, though perjury cannot be assigned upon such an oath unless it be under the provision of some statute (1), but the above statute, ch. 154 of the Revised Statutes, does make the taking a false oath in any case which, by any act or law in force in Canada, it is required or authorized that any fact, matter or thing be verified upon oath to be perjury; so that it is clear that perjury can be assigned upon and for the taking of a false oath in any matter wherein an oath is required under the Dominion Elections Act, and the procuring or suborning any person to take any such false oath is a misdemeanor and punishable as such wholly independently of the 90th section of the said Dominion Elections Act. The punishment for such offences is provided by the above ch. 154 of the revised statutes which enacts as follows:—

> Every one who commits perjury or subornation of perjury is guilty of a misdemeanor and liable to a fine in the discretion of the court and to 14 years imprisonment.

Now the 90th sec. of the Elections Act does not create

(1) *The Queen* v. *Chipman* 1 Den. C.C. 432; *Reg.* v. *Hodgkiss* L. R. 1 C. C. R. 212.

any new offence or constitute that to be a misdemeanor which was not already a misdemeanor independently of the section; what it points at is, as appears plainly by the language of the section, an act which is already recognized by law to be a misdemeanor, to which offence punishment is by law already annexed, and the object of the section is to add to such punishment, a further punishment namely—that the person who is guilty of the misdemeanor of corruptly inducing or endeavoring to induce any person to take any false oath in any matter wherein an oath is required under the act, in addition to any other punishment to which he is liable for such offence, shall forfeit the sum of $200 to any person who sues for the same; and the 91st sec. makes the wilful committal of the offence specified in the 90th sec. a corrupt practice under the provisions of the Election Act, so as not only to avoid the election of the candidate who may be guilty of the offence, but to disqualify such candidate for the period of seven years from being capable of being elected to the House of Commons and of sitting therein, or of voting at any election of a member of that House, or of holding any office in the nomination of the crown, or of the Governor General of Canada.

Before a judge sitting without a jury, as he does upon an election petition, finds any one guilty of an offence to which such extremely penal consequences are annexed, he should be, and on an appeal from his decision this court should be, well assured of the true construction of the sections of the acts under consideration, and that the offence to which such penal consequences are annexed has been clearly established by evidence no less sufficient than would be required to justify a conviction by a jury upon an indictment for the offence.

Now, as to the construction of the secs. 90 and 91, it

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is expressly provided by them taken together that the offence of inducing a person to take the false oath referred to therein consists in wilfully and corruptly, (in the sense that those words are used in an indictment for subornation for perjury) inducing a person to take an oath in a matter wherein an oath is required to be taken by any act of the Dominion of Canada, false swearing in which oath is by the before herein mentioned ch. 154 of the revised statutes of Canada made a misdemeanor for which the person taking the oath might be indicted for and convicted of perjury.

Now the offence of wilfully and corruptly inducing or procuring any person to take such an oath is the misdemeanor known in law as subornation of perjury, to the complete perpetration of which offence knowledge of the falsity by the person accused is essential; and this is the law also in the case of an indictment for the misdemeanor of procuring or inducing another to take a false oath, upon which perjury could not be assigned, both misdemeanors as to the elements constituting the offence standing precisely on the same footing. Formerly it was necessary to be expressly averred in the indictment, but now if the party who is charged with having corruptly induced Nixon to take the oath which he did take was indicted for that offence, it would be sufficient to set out the substance of the offence in the manner prescribed by the 108th sec. of ch. 154 of the revised statutes, which is, verbatim, identical with the 21st sec. of the Imperial Statute 14–15 Vic. ch. 100 and enacts that:

In every indictment for subornation of perjury or contracting with any person to commit wilful and corrupt perjury or for inciting causing or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously or corruptly to take, make, sign or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate or other writing, it shall be sufficient whenever such perjury or other offence aforesaid has been actually committed to allege the offence of the person who actually commit-

ted such perjury or other offence in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully and corruptly did cause and procure the said person to do and commit the said offence in manner and form aforesaid; and whenever such perjury or other offence aforesaid has not actually been committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury.

That is to say without setting forth the bill, answer, information, indictment, declaration or any part of any proceeding either in law or equity, and without setting forth the commission or authority of the court or person before whom such offence was committed.

Upon an indictment for subornation, since the passing of 14–15 Vic. ch. 100, it is as necessary as it was before that it should be proved—1st. that perjury had been committed by the person who took the oath and unless that be proved the defendant cannot be convicted of the subornation. Secondly, the subornation or previous inducement or procurement to commit that offence—that is to say, it must be proved that the defendant solicited or procured the person who took the oath to take it, knowing the same to be false, or that by taking it the party so doing would be committing perjury (1).

Now, that any person can be pronounced by a judge sitting upon the trial of an election petition to have been guilty of an offence of this nature upon less evidence than would be required upon the trial of an indictment for the same offence before a jury, is a proposition which neither in law or justice or common sense can, in my opinion, be entertained.

That a judge without a jury should be authorized to try a charge of an offence of this nature is a sufficiently grave departure from the ordinary rule that no

(1) Archbold's Criminal Pleading, Edit. 1886 p. 942; Roscoe's Criminal Evidence, 10th Edit. 1884 p. 864.

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one can be convicted of a criminal offence, especially one so seriously affecting his civil rights and liberty, except by a jury; we cannot, however, extend by construction the penal character of the act so as to hold that it justifies an adjudication of guilt unless it be established by as complete and sufficient evidence as would be required on a trial before a jury.

Now as to the evidence adduced in support of the charge. Nixon himself was called upon behalf of the petitioner and also a Mr. Parker, who acted as scrutineer for the candidate in whose interest the petition was filed, at the polling place where Nixon voted. The material evidence given by him and by Parker on his cross-examination which, where it differs from that as taken down upon his examination in chief, appears to me to be more reliable, in short substance is, that when Nixon came forward to get his ballot paper Mr. Parker said to him that he required him to be sworn, upon which Nixon turned towards Parker and said to him, "what is your objection to my voting, Mr. Parker, I have been here several times and you never questioned it before?" To which Parker replied that he did not discuss voters' qualifications there, and turning to the returning officer said, "I want him sworn;" at this point Harrison intervened and said, "your vote is perfectly good, Tom." Nixon swears that all that Harrison said to him was,—your vote is a good one or perfectly good, he repeated several times that this was all the insisting he did—all that he said or at least that he Nixon heard—that otherwise Harrison never spoke to him upon the subject of his vote either then or previously—that he, Nixon, had never heard that his right to vote was doubted, and that he had not any expectation that his vote would be objected to or that he would be required to be sworn.

Parker admits that he did not state what was his objec-

tion to Nixon's voting although asked by Nixon what it was, and that he knew that since the death of Nixon's father (which occurred in April, 1886, while the election took place in Nov., 1887), he Nixon was the owner of the property in respect of which he was upon the voters' list with the description added of farmer's son, and upon which he had resided all his life; he says, however, that when Harrison said to Nixon that the vote of the latter was perfectly good, he added, "take the oath, Tom, I will be responsible." Nixon swears that if Harrison said this he did not hear it, and he denies that to his knowledge Harrison did make use of this expression. Upon this contradiction, if it be material whether in point of fact Harrison did or not make use of these words, they cannot, upon a charge of this nature, be regarded as proved to have been used by him. If the words were used, as Nixon swears that he never heard them, they could not have operated upon his mind to induce him to take the oath he might be required to take or did take; and so, unless the substance of the offence charged is to be wholly disregarded, because it is alleged to have been committed at an election, and the accused is to be convicted on a mere technicality, it becomes immaterial whether the words were used or not, if the person to whom they are alleg- to have been addressed by way of inducement to get him to take a false oath never heard them. Hereupon Parker called upon the deputy returning officer to administer the oath "T"; whether Nixon heard Parker say to the returning officer that the oath "T" was the one he should administer, or that Nixon had any knowledge of the matters contained in such oath there is no evidence. No reference had been made to the contents of the oath or as to what Nixon would have to swear—an oath was administered which Parker says was the oath "T," and now we see exposed the gist of the charge

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and the point of objection to Nixon's vote becomes developed ; an objection which does not appear to have been in the mind of any one but Mr. Parker, at the election, and which he studiously suppressed.

Nixon in his father's lifetime was registered on the voters' list as a voter in the character of farmer's son. His father died in April, 1886, his mother had died 8 or 9 years previously. Upon his father's death Nixon became owner of the property upon which his father in his lifetime resided and upon which Nixon himself had resided all his life, and was still residing at the time of the election in November 1887. Nixon swears that at the time of the election, in November 1887, he did not know in what character he was entered upon the voters' list then in use, namely, whether as farmer's son or as owner. We have seen that the point was not alluded to at the election. Now the oath, T., assuming it to have been, as Mr. Parker swears it was, the oath administered, in its last paragraph contains these words—" with my father " which if they had been omitted when the oath was being administered, every syllable in the oath could have been sworn by Nixon with the most perfect truth, and laying out of consideration all question as to whether the deputy returning officer would have been justified or authorized in omitting them if he had known all the facts of the case, the oath with these words left out would have been in conformity with the circumstances and facts of the case as they in truth existed, and if they had not been omitted but Nixon had never heard them he never could be convicted of having taken a false oath, such offence involving, as of necessity it must, knowledge of the falsity and a deliberate intention to take the oath with such knowledge; so that upon this ground alone the charge against Harrison must fail. Upon this point Nixon in substance swears that to his

knowledge and belief these words "with my father" or the words—"I am residing with my father" were not in the oath that he took—that he has no remembrance of hearing anything of the kind.

With the greatest deference I must express my dissent from the doctrine that upon a charge of the grave nature of the misdemeanor charged here there is to be any presumption that the officer who presided at the election did or did not administer the right oath or did or did not omit any part of it. The charge is one of a grave misdemeanor charged against the agent and upon such a charge nothing is, in my opinion, to be presumed. The maxim *omnia præsumuntur rite esse acta* does not, in my opinion, apply to supply any defect in evidence adduced for the purpose of establishing the commission of the misdemeanor. Everything must be clearly proved which constitutes the perfection of the offence, and neither the agent nor the candidate is called upon to prove anything. I can see no reason whatever in principle why this offence should be established on less conclusive evidence than on an indictment, and any imperfection or insufficiency in the evidence enures to the benefit of the person accused who must be acquitted of the charge if not conclusively proved. But independently of this and confining myself to the charge of corrupt inducement made by Harrison to procure Nixon to take the oath, I confess that I am unable to perceive upon what possible foundation that charge could in reason and common sense be maintained. There was no evidence offered that Harrison had any knowledge of the true facts of the case. And assuming him to have known them as they now appear to have been, but which do not seem to have been alluded to by any one at the election, it seems to me a perversion of language to attribute the epithet "corruptly" to the opinion given

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by Harrison that Nixon's vote was perfectly good, even if that opinion had been supplemented by the expression, "take the oath Tom, &c., &c.," as testified by Mr. Parker. This gentleman appears to have been of opinion, that although Nixon had a good vote while his father lived he ceased to have a vote when, by his father's death, he became absolute owner of the property upon which, in his father's life time, they had both resided. Harrison may, I think, be excused if he entertained, although it might be erroneously, a different opinion.

The point, indeed, is one upon which lawyers, much less laymen, might differ without justly subjecting those who might be of opinion that Nixon had a good vote, under the circumstances, to the imputation of corruption in expressing that opinion. In his father's life time he was upon the voters' list as a voter in the character of a farmer's son. By the Dominion Franchise Act he could have been upon the list as a farmer's son only in the event of his not being otherwise qualified to vote in the electoral district in which his father's farm is situate. 49 Vic. ch. 5 sec. 3 ss. 7. The father died on the 4th April, 1886, and although upon his death the son became absolute owner and sole occupant of the property upon which he had, in his father's lifetime, resided with his father, as the assessment takes place between the 15th February and the 30th April, the father may have been assessed for the property in that year before his death, so that the revising officer may have had no opportunity of correcting the voters' list in that year; but in 1887 the son was the sole occupant of the property and the only person who was assessable for it, and as owner and occupant. He had a right therefore to remain on the voters' list in 1887, though not as a farmer's son. His name could not have been removed from the list. He was qualified

to be upon it as owner of the property, he was in point of fact on it, though not described as owner, but he could not have been removed from the list, although the character in which he was entitled that his name should remain there was changed. Provision is made for such a case by section 16 of the Electoral Franchise Act, which enacts:—

The revising officer shall not remove the name of any person on the list of voters, from such list, on the ground that the qualification of such person is incorrectly entered thereon, if it appears that such person is entitled to be registered on the list of voters as possessed of any of the qualifications set forth in the act, but the revising officer shall retain the name of such person on the list and correct the same accordingly.

At the time of the election in Nov., 1887, Nixon's right then was to be on the voters' list in the character of owner, and if not on the list in that character that was the fault of the officials upon whom were imposed by the law the duties necessary to be discharged in order to ensure that the voters' list should be correct. Now by the act 49 Vic. ch. 8, sec. 41—all persons whose names are registered on the list of voters in force on the day of the polling at any election shall be entitled to vote at such election. The act does not say that he shall be entitled to vote only in the character in which he is described, and it may be erroneously described, on the list. By sec. 45 of this same act if his name is on the list he is entitled to demand and receive a ballot paper, and the only restraint upon the right which is imposed by the statute is that if required he shall take a vote of qualification in the form S. or in the forms T. U. V. or W. in the first schedule of the act mentioned, *as the circumstances of the case may require.*

Now, under the circumstances of Nixon's case, without expressing any opinion as to whether or not Nixon's vote was in strict law a perfectly good one, or whether or not the peculiar circumstances of the case

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were such as to entitle him to demand and receive his ballot paper upon taking the oath appropriate to be administered to an owner of property all that it is necessary to say, and upon this I express a very decided opinion, is that laymen certainly, and I think lawyers also, might without any corrupt intent whatever and indeed very conscientously entertain and express the opinion that the fault of the officials to discharge their duty had not disfranchised Nixon, and that as he was qualified to be on the list, and was in fact upon it, although erroneously described, his vote was a good vote, and as owner, that being the character which should have beeu annexed to his name upon the list, and under the peculiar circumstances of the case the appropriate oath to have been administered to him would have been the oath which should have been administered to an owner of property; and, assuming Harrison to have known all the circumstances of the case, the evidence as to what he said at the polling booth is perfectly consistent with his having entertained and conscientiously entertained this opinion, and with this being all he intended to convey. Hereafter lawyers who may be interested in an election, and who I presume cannot claim any exemption from liability upon a charge of this nature which a layman cannot have, will need to be very careful indeed that in giving advice in an election as to the right of any person to vote and as to the form of oath he may be required in law to take, he gives no opinion, however conscientious, which a court can pronounce to be erroneous, for if the court should differ from him (which unfortunately sometimes happens) he would become guilty of the misdemeanor of which Harrison has been pronounced to have been guilty and for which the respondent is made to suffer.

The case of Dougherty differs from that of Nixon in this, that in Dougherty's case the objection to his vote was stated and fully discussed at the polls. The ques-

tions raised were:—1st. One of law, namely, whether the nature of his residence upon his father's property which he described was such a residence as came within the meaning of the act? And 2nd. Whether Doherty could conscientiously take the oath that he was residing with his father?

Now, the only evidence of the charge of corrupt inducement to Dougherty to take a false oath made against Allen is that given by Dougherty himself, who said that he had several times voted upon the same qualification without objection; that previously to the election in November he had heard his right to vote questioned upon the point raised; that he had given the subject the fullest consideration and had come to the conclusion that his vote was a good one and that he could conscientiously take the prescribed oath. He also said that at the poll the returning officer had expressed the same opinion, and had added that at a recent trial of an election petition which had taken place in relation to an election in the same electoral district before the Chancellor, that learned judge had expressed the opinion that precisely such residence as that of Dougherty was sufficient, and that a person upon such evidence could well take the oath. Allen, who is now accused of having corruptly induced Dougherty to take a false oath, also expressed his opinion to be that Dougherty could conscientiously take the oath, and this expression of opinion is the sole foundation for the charge made against Allen.

All that appears to me to be necessary to say upon this charge in addition to what I have said in Nixon's case, as to the nature of the offence pointed at in section 90 of the act 49 Vic. ch. 8 is that the expression of such opinion by Allen does not appear to me to constitute any inducement made by Allen much less "corruptly" made, in order to get Dougherty to take a false oath.

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And as to both of these charges, I am of opinion that if the learned judge who tried that election petition had upon the evidence adduced adjudged either Harrison or Allen to have been guilty of the offence charged against them respectively he would have greatly erred.

Appeal allowed with costs.

Solicitor for appellants: *A. K. Goodman.*

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

DAME M. SUSAN FORSYTH.....APPELLANT; 1887

AND *Nov. 3.

GEORGE BURY.....RESPONDENT. 1888

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE). *June 14.

Judgment in licitation—Binding on parties to it—Constitutionality of an act of incorporation—When its validity can be questioned and by whom.

The Island of Anticosti, held in joint ownership by a number of people, was sold by licitation for $101,000. The report of distribution allotted to G. B. (plaintiff) $16,578.66, for his share, as owner of one-sixth of the island acquired from the Island of Anticosti Company, who had previously acquired one-sixth from Dame C. Langan, widow of H. G. Forsyth.

The respondent's claim was disputed by the appellant, the daughter and legal representative of Dame C. Langan, alleging that the sale by her through her attorney, W. L. F., of the one-sixth to the Anticosti Company was a nullity, because the act incorporating the company was *ultra vires* of the Dominion Government, and that the sale by W. L. F., as attorney for his mother, to himself, as representing the Anticosti Company, was not valid.

The Anticosti Company was one of the defendants in the action for licitation, and the appellant an intervening party; no proceedings were taken by the appellant prior to judgment, attacking either the constitutionality of the Island of Anticosti Company's charter or the status of the plaintiff, now respondent.

Held, affirming the judgment of the court below, Ritchie C. J. and Gwynne J. dissenting, that as Dame C. Langan had herself recognized the existence of the company, and as the appellant, her legal representative, was a party to the suit ordering the licitation of the property, she, the appellant, could not now on a report of distribution, raise the constitutional question as to the validity of the act of the Dominion Parliament constituting the company, and was now estopped from claiming the right of setting aside the deed of sale, for which her mother had received good and valuable consideration.

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

(Mr. Justice Henry was present at the argument but died before the delivery of the judgment.)

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FORSYTH v. BURY.

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

The proceedings in this case arose out of the sale by licitation of the Island of Anticosti. The respondent claiming to be entitled to one-sixth part of the Island of Anticosti, in common with others, instituted proceedings against P. Leslie *et al.*, in order to have the whole island sold by licitation. The appellant intervened in the proceedings and subsequently by order of the court the property was ordered to be sold, and there was a judgment homologating the report of distribution of moneys levied, viz., $101,000, with the exception of the $13,136.45 awarded to the respondent as being the purchaser from the Island of Anticosti Company of two-twelfths undivided shares of the island which the said Anticosti company had previously bought from Dame Charlotte Langan, widow of the late Henry George Forsyth.

The appellant is the daughter and the testamentary executrix of the said Dame Charlotte Langan, the vendor, and was collocated on her intervention for the sum of $24,902.40, as being the owner of ¼th undivided share, but contested the collocation in favor of Bury for different reasons, the principal being that the act incorporating the said Anticosti Company was null, void and *ultra vires*, and that consequently the said company could neither buy nor sell said property and that the deeds of sale of her mother, Charlotte Langan, to the Anticosti Company and of the Anticosti Company to the respondent Bury were also null and void.

The act incorporating the company is 35 Vic. ch. 115 (D.) and the principal clauses relied on as being *ultra vires* of the Dominion Parliament are stated at length in the judgment of the Chief Justice hereinafter given (1).

(1) See p. 547.

The following are the material facts relating to the sale of the two-twelfths claimed by the respondent:—

On the 11th September, 1874, the late Dame Charlotte Langan, widow of Henry G. Forsyth by William Langan Forsyth, acting as the attorney of his mother, under deed passed before Andrews, notary, became party to a deed by which she declared that she sold to the Anticosti Company, represented by William Langan Forsyth, one-sixth of the Island of Anticosti, and the price of such sale was stated to be $250,000 of the company's stock, fully paid up, and to be transferred to the vendor.

On the 9th December, 1875, Mrs. Forsyth signed a declaration, stating that she had received from her son, W. L. Forsyth, payment and compensation in full for her right to one-sixth of the island mentioned in the deed of the 11th September, and, on the 4th of January following another deed of sale was passed, by which W. L. Forsyth, who stated that he was his mother's attorney, sold to the company one-sixth of the island for the sum of $250,000, with a declaration that this new deed should be considered as being only a ratification of that of the 11th September, 1874. The said W. L. Forsyth further declared, on his mother's behalf, that the latter had received from him due compensation for the consideration of the sale of the 11th September, as appeared by the receipt above mentioned, and that the company was to allot to W. L. Forsyth $250,000 of paid up stock and be thus freed from the payment of the price of sale.

On the 1st February, 1881, "a special general meeting of the shareholders of the Anticosti Company" was held and a proposal was made by Mr. Bury the respondent to purchase one-sixth of the island for $1,000. This offer was, on the motion of the secretary, Mr. Forsyth, accepted, and Mr. Forsyth was author-

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ized to sign, as secretary, a deed of sale. Subsequently, on the 23rd of the same month, another "special general meeting," consisting of four persons was held. This meeting elected five directors, to whom Bury's offer was again submitted, and who accepted the offer and authorized "the proper officers to sign the deed of sale." On the 16th March following Peter S. Murphy, as president of the Anticosti Company, and W. L. Forsyth, as its secretary, signed a deed of sale, transferring the one-sixth of the island to Mr. Bury for $1,000.

Kerr Q.C. for appellant contended: 1st. that in so far as the act of incorporation by the Dominion Parliament granted them, the Island Anticosti Company, the power of acquiring and utilizing a property wholly situated within the province of Quebec, for the purpose of clearing and cultivating the same, the said act was *ultra vires* of the Parliament of Canada, such matters being of a purely local interest, affecting property and civil rights in the province of Quebec, and consequently if the company had not the power to purchase, its pretended deeds of purchase were null and void, and the same argument applied to the sale made by the company to the respondent.

See *L'Union St. Jacques de Montreal* v. *Belisle* (1); *Dow* v. *Black* (2); *Smith* v. *Merchants' Bank* (3).

If an absolute nullity the objection could be alleged by the appellant, as it might have been by her *auteur*.

2nd, that even if the company was legally incorporated the facts proved in evidence show that the whole transaction was a fraud, and the title being simulated and fraudulent the respondent never became the owner of the sixth, for which he was collocated, and the appellant was entitled to be collocated therefor as testamentary executrix of Mrs. Forsyth.

(1) L. R. 6 P. C. 31. (2) L. R. 6 P. C. 272.
(3) 28 Grant 629.

Laflamme Q.C. and *David* for respondent, contended that the proceedings having taken place under arts. 919, 933-939 of the code of procedure, to which proceedings the appellant was a party, she could not at this late stage raise any question as to the status of the respondent or as to the constitutionality of the act of incorporation. As regards the appellant and respondent, the judgment in licitation had acquired the force of *res judicata*. On the question of constitutionality of the act of incorporation, the learned counsel referred to *Abbott* v. *Fraser* (1); *Colonial Building Association* v. *Loranger* (2); Grant on Corporations (3); *Lemoine* v. *Lionais* (4); Fisher & Harrison's Digest (5); Morawetz on Corporations (6); *L'Union Navigation Company* v. *Rascony* (7).

SIR W. J. RITCHIE C.J.—The Island of Anticosti having been sold by licitation for the sum of $101,000.00, this amount was deposited and the distribution thereof proceeded with amongst the owners according to their respective shares.

The report of distribution allotted to George Bury $16,578.66 for his share as owner of one-sixth of the island which he appeared to have acquired from the Island of Anticosti Company.

Susan Forsyth contested this collocation, and the Superior Court, sitting at Murray Bay, maintained the contestation, declaring that Bury had never been owner of the one-sixth which he claimed and that, consequently, he was not entitled to any portion of the price of sale.

An appeal having been taken from this judgment to the Court or Queen's Bench, it was reversed, and it

(1) 20 L. C Jur. 197.
(2) 7 Legal News 10.
(3) P. 1000.
(4) 6 Rev. Leg. 123.
(5) P. 1992.
(6) Pp. 49-50.
(7) 20 L. C. J. 306.

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was decided, Mr. Justice Tessier dissenting, that Bury had really been owner of one-sixth and was entitled to be collocated for that portion of the proceeds.

It is from this judgment that the appeal to this court is taken.

By 35 Vic. cap. 115 the Island of Anticosti Company was incorporated by the Dominion Parliament so far as it was within the province of parliament to grant the powers conferred.

The 1st section names the persons incorporated.

2nd. The said company shall have power to purchase from the proprietors thereof the whole of the Island of Anticosti, with all the rights, title, privileges and interest of the said proprietors in and to the same; and upon the completion of such purchase and the transfer of the same, the property therein shall be vested in the said company; It shall be lawful for the said company to colonise the said island, and to sell or lease the whole or any part of the said island from time to time, upon such terms as to them may seem proper,—and this in so far as it is within the province of the Parliament of Canada to grant such powers.

3rd. The company may also acquire by purchase, lease or otherwise, and may hold absolutely or conditionally any other lands, tenements, real or immoveable estate, not exceeding in yearly value ten thousand dollars, for the convenient conducting and management of their business, and may sell, alienate, let, lease and dispose of the same from time to time, and may acquire others in their stead, not exceeding at any time the value aforesaid,—in so far as it is within the province of the Parliament of Canada to grant such powers.

4th. The company may carry on all such operations as may be found necessary to develop the resources of the Island in respect of agriculture, forests. fisheries, mineral deposits of gold, silver, copper, iron and other metals or ores, and of coal, peat, plumbago, and salt springs, and shell marl, the opening up and working of quarries of slate, limestone, sandstone, grindstone, marble or other economic minerals or mineral substances, and to wash, dress, smelt and otherwise prepare and manufacture such articles for sale, in so far as it is within the province of the Parliament of Canada to grant such powers.

And by the 10th. When and as soon as one-tenth of the said capital stock shall have been subscribed as aforesaid, and ten per centum of the amount so subscribed paid in, the provisional directors or a majority of them may call a meeting of the shareholders at such

time and place as they shall think proper, giving at least two weeks notice in the *Canada Gazette*, and in one or more newspapers published in the city of Montreal; at which general meeting and at the annual general meetings of the company thereafter, a board of directors shall be elected, consisting of not less than five nor more than thirteen, as may be prescribed by the by-laws (of the provisional or other directors) in force at the time of such election; but they shall not be authorised to commence operations under this act until at least fifty thousand dollars shall have been paid in.

This Dominion act, so far as it professes to confer the right to purchase the Island of Anticosti, in the Province of Quebec, and to sell or lease the same, is, in my opinion, clearly *ultra vires* of the Dominion parliament. It is for a provincial object, and affecting property and civil rights in the Province of Quebec alone; the legislative right to incorporate such a company belongs to the Provincial Legislature, under the British North America Act.

The company, then, having no legal existence to enable them to purchase, hold or sell the land, the answer to the plaintiff's contention simply is: If the Dominion act is *ultra vires* the alleged company never was incorporated in reference to provincial objects, or in connection with property and civil rights in the province; therefore, there was no charter to be violated, nor any charter into the validity of which it is necessary to inquire. The existence of this company is not questioned collaterally, but directly, in this case, the plaintiff claiming by, through and under the alleged corporation which, as shown, should have no existence as such. I think that Judge Routhier was right in holding that the company, assuming it had a legal existence for some purposes, could take nothing under the alleged deeds from Mrs. Forsyth, by her attorney, of the 14th of September, 1875, and the 4th of January, 1876, to the Island of Anticosti Company, and the company could convey nothing to the plaintiffs under the deed of the 16th of June, 1881, between the company

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and George Bury; or, in other words, the company never bought because it had no right to buy, and never sold because it had no right to sell, and, therefore, the company acquired no title and could convey none, and, consequently, Bury had no *locus standi* to be collocated as claimed.

If the act of incorporation is not *ultra vires*, I am of opinion there never was any valid organization of the company to enable it to transact business, it not having complied with the provisions of the 10th section of the act of incorporation, and if this had been shown I am inclined to agree with Mr. Justice Tessier that the sale of the 11th of September by W. L Forsyth, as attorney for his mother, to himself as representing the Anticosti company, was not a valid execution of the power and was bad on its face.

I am, therefore, of opinion that George Bury has no right to the collocation No. 11 of $6,578, but that this collocation should be made in favor of the appellant Maria Susan Forsyth. The judgment of the Superior Court reserved to the interested parties whatever recourse they might have for the recovery of all sums paid in virtue of the deed of the 4th of January, 1876. This judgment, I think, should be affirmed. The appeal must be allowed and this judgment affirmed.

STRONG J.—This action was instituted by the respondent as one of several co-owners of the island of Anticosti for the licitation of the property, and the appellant being, also, the owner of a share in the island was a defendant in the action. The appellant pleaded no plea or defence raising any question as to the validity of the plaintiff's title, either by challenging the constitutional validity of the charter granted to the Anticosti company (the plaintiff's immediate *auteurs*), or by impeaching the legality of the organi-

zation of the company under the provisions of the charter, but allowed a judgment ordering the licitation of the property to be rendered *sub silentio*. Pursuant to judgment thus rendered, the property was sold and the purchase money lodged in court. Thereupon the prothonotary made his report of distribution of the monies thus arising from the sale by which he collocated the parties to the action for their respective shares.

The appellant Mrs. Forsyth has contested this collocation so far as relates to the monies allowed to the respondent by an opposition, in which she attacks the respondent's title to the share of the property which he claimed in the action, and has thus for the first time raised the questions which have been argued on this appeal.

Whilst I entirely concur that if we can now enter into the merits our judgment ought to be in favor of the appellant, I am nevertheless of the opinion that by her own omission to raise the objections she now insists upon in the proper manner and at the proper time, that is by plea or defence before judgment, the appellant has precluded herself from insisting on the matters she has raised by her opposition.

By allowing a judgment for licitation to pass without objection the appellant must be considered as having admitted that the respondent's title, derived from the common *auteur* of herself and the respondent, was valid, and that the respondent's conclusions taken in the action and granted by the judgment were well founded.

I was convinced by the argument of the learned counsel for the appellant that the charter of the Anticosti company was *ultra vires* of the Dominion, and, also that the company had no authority to acquire the

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property which the respondent claims to have derived from them, or to take any proceedings in prosecution of the enterprise for which they were incorporated until the amount of share capital, prescribed by the 10th section of the act of incorporation, ($250,000) should have been in good faith subscribed for and ten per cent. thereon actually and *bonâ fide* paid up, neither of which pre-requisities was, it is clear upon the evidence, ever complied with. It is, therefore, with very great regret that I am compelled to give effect to the objection that it is now too late for the appellant to raise the contentions she has insisted on by her opposition.

Between these parties, however, the matter is concluded and the appellant is bound by the principle of *res judicata* from raising the questions which are put forward by this appeal, and which have been already referred to.

It was argued that *res judicata* should have been pleaded in answer to the appellant's opposition and that the respondent having failed so to plead is not now entitled to avail himself of it. I cannot agree to this. By the record in the principal action now before us, and forming part of the record in appeal, the appellant's recognition of the plaintiff's title which was the foundation of all the proceedings in licitation is manifest. Under these circumstances it is impossible to go behind the judgment ordering the sale without doing great injustice, not only to the respondent, but also to the other parties to the cause interested in maintaining the judgment and the proceedings had pursuant to its terms.

The objection to which I feel bound to give effect is, therefore, not a matter of narrow technical procedure, but one founded on substantial justice and universally recognized in practice.

In courts proceeding according to English law, land may be ordered to be sold at the instance of one of several co-owners, instead of being partitioned, provided the necessity for a sale is established. In such a case if the land were sold and the purchase money paid into court an objection then raised for the first time that the plaintiff in the action at whose instance the sale had been ordered had no title, would be considered altogether too late and would not be listened to for a moment. If we were now to allow this appeal we should, therefore, not merely be relaxing salutary rules of procedure, but actually impugning principles upon which the validity of titles may depend. My conclusion is that the appeal must be dismissed with costs.

FOURNIER J.—La contestation en cette cause s'élève sur la distribution des argents provenant de la vente de l'Ile d'Anticosti, dont l'intimé était propriétaire pour deux douzièmes, qu'il avait acquis par acte notarié, le 16 mars 1881, de la Compagnie d'Anticosti incorporée par acte du parlement fédéral. Cette dernière avait acquis ces deux douzièmes de Dame Charlotte Langan, veuve de feu H. G. Forsyth, maintenant représentée en cette cause par l'appelante. La dite Dame Langan agissait à l'acte de vente du 4 janvier 1876 par le ministère de son procureur, William Langan Forsyth. Ces divers actes comportent tous qu'ils étaient faits pour bonne et valable considération.

La principale raison de la contestation de cette collocation est que l'acte d'incorporation de la Compagnie d'Anticosti est inconstitutionnel et nul comme *ultra vires* du parlement fédéral, et qu'en conséquence la dite compagnie ne pouvait acheter ni vendre des immeubles dans la province de Québec, et que la vente faite à l'intimé était nulle.

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La contestation contient aussi des allégations de fraude et d'irrégularité dans les procédés de la dite compagnie, qui paraissent n'avoir guère occupé l'attention des deux cours appelées à juger ce litige.

La prétention d'illégalité de la constitution de la compagnie a été admise par la cour Supérieure et rejetée par la cour du Banc de la Reine, dont l'un des considérants est :

That the Anticosti Company has been incorporated by an Act of the parliament of Canada, passed in the thirty-fifth year of Her Majesty's reign, ch. 115, and considering that the said Act, in so far as it created the said company a body corporate, and attributed to it certain of the powers thereby conferred, was not *ultra vires*.

A l'appui de ce considérant de la cour du Banc de la Reine on peut citer les décisions du Conseil Privé dans la cause du *Colonial Building and Investment Co.* v. *Loranger* (1), et celle dans la cause de *Ross* v. *Canada Agricultural Ins. Co.* (2).

La première question que soulève cette contestation n'est pas celle de la constitutionalité de l'incorporation de la Compagnie d'Anticosti, mais bien plutôt celle de savoir si après en avoir plusieurs fois reconnu l'existance de la façon la plus formelle, l'appelante peut encore être reçue à la mettre en doute.

Le but de la demande en licitation intentée par Bury était d'amener à vente par licitation la propriété de l'Ile d'Anticosti appartenant aux divers propriétaires mentionnés dans la procédure, et d'en partager le prix de vente conformément aux droits de chacun des divers propriétaires. Il est incontestable qu'à une telle action on ne peut mettre en cause que ceux qui ont des droits certains à une part quelconque dans l'immeuble à liciter. Lorsque le demandeur Bury a pris son action contre madame Forsyth, co-propriétaire de l'Ile d'Anticosti, pour l'amener à liciter et partager avec lui et les autres propriétaires, l'île en question, le premier devoir de

(1) 7 Legal News 10. (2) 5 Legal News 23.

madame Forsyth était d'entamer immédiatement (*in limine*) la contestation avec Bury sur ses droits de propriété. Elle était obligée de refuser de laisser poursuivre cette licitation, si elle ne lui reconnaissait pas sa qualité de co-propriétaire. Au lieu de cela, elle laisse la procédure poursuivre son cours et prend part à un grand nombre d'actes de procédure, bâsés sur la qualité de co-propriétaire prise par Bury. Chacun de ses actes est une reconnaissance de sa part des droits de Bury. Enfin, le 22 septembre 1882, jugement est rendu sur la demande de Bury, à laquelle madame Forsyth est partie en cause, ordonnant la licitation de l'Ile d'Anticosti, reconnaissant ainsi les droits de propriété de Bury, qui sont consacrés par le jugement.

Ce jugement ordonnant la licitation est un de ces interlocutoires qui ont un caractère de finalité qui oblige la partie qui peut avoir à s'en plaindre, à en appeler, afin de l'empêcher d'obtenir la force de *chose jugée*. Elle n'a fait aucun procédé pour attaquer ce jugement passé depuis longtemps en force de chose jugée et devenu partant inattaquable.

Ce n'est que le 5 janvier 1885, plus de deux ans et trois mois après le jugement du 22 septembre 1882, ordonnant la vente de la propriété, que Dame Susan Forsyth, fille et représentante légale de Dame Charlotte Langan, épouse de H. G. Forsyth, présente pour la première fois une contestation des droits de Bury, sous la forme d'une contestation à la collocation n° 11 du rapport de distribution. C'est dans cette contestation, faite longtemps après la vente de la propriété et lorsque le prix de vente est devant la cour, pour distribution, qu'elle attaque la validité de l'acte du 16 mai 1881, vente par la Compagnie d'Anticosti à Bury et celui de juin 1876, par lequel la dite Dame H. G. Forsyth, représentée par l'appelante, vendait à Bury par le ministère de son procureur W. L. Forsyth, partie (deux

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douzièmes) de l'Ile d'Anticosti. Elle soulève aussi la question de la légalité ou la constitutionalité de l'acte d'incorporation de la dite compagnie. Elle plaide simulation des actes en question, non considération, fraude, etc., etc.

Tous ces faits qui sont antérieurs à l'action en licitation, s'ils étaient fondés auraient dû faire le sujet d'une contestation à l'action en licitation et faire rejeter les prétentions de Bury à une partie de cette propriété. Ils ne peuvent plus être plaidés contre un jugement passé en force de chose jugée. Le rapport de distribution n'est que l'exécution de ce jugement qui ne pouvait être attaqué que par l'appelante, ou par un tiers qui n'y aurait pas été partie. L'appelante ne le peut pas parce qu'elle représente à titre universel Charlotte Langan, sa mère, partie à l'action et aux actes attaqués.

Il est de plus évident que si Dame Charlotte Langan n'a pas opposé ces défenses dans le temps voulu, c'est qu'elle les a tacitement abandonnées. Elle n'a pas voulu, sans doute par un sentiment de dignité personnelle et par esprit de justice envers celui qui a le plus contribué à donner une valeur considérable à une propriété qui n'avait été jusque-là pour elle et sa famille qu'une source de dépenses inutiles,—elle n'a pas voulu, dis-je, lui contester des droits qu'il avait acquis de la Compagnie d'Anticosti à laquelle elle les avait vendus. Mais un motif légal encore plus puissant a dû aussi l'empêcher d'attaquer les droits de Bury, c'est que par rapport à elle il n'était qu'un tiers-acquéreur de bonne foi, et comme tel il n'était nullement responsable en loi des torts qu'elle avait pu subir dans ses transactions avec la dite Compagnie d'Anticosti. Ce n'est qu'à cette dernière qu'elle pouvait s'adresser pour les faire réparer. L'appelante n'a pas plus de droit que sa mère d'opposer ces moyens de nullité, parce qu'elle est sa représentante à titre uni-

versel et qu'en loi elle est considérée comme la même personne. De plus, en supposant qu'elle eût fait une preuve suffisante pour invalider les actes qu'elle impugne, elle ne pourrait en obtenir la nullité parce qu'elle ne l'a pas demandée par les conclusions de sa contestation. La cour ne pouvant pas, dans tous les cas, adjuger au-delà de sa demande. Indépendamment de ce défaut de conclusion insurmontable, elle n'offre pas de rendre les diverses considérations reçues, et ne peut en conséquence être reçue à demander la nullité de ces actes sans se déclarer elle-même prête à faire raison à Bury de ses avances.

Ces arguments, fondés en droit et appuyés sur les faits de la cause, me semblent suffisants pour faire rejeter cette contestation.

Je ne crois pas qu'il soit utile pour la décision de cette cause d'entrer dans plus de considérations que ne l'a fait la cour du Banc de la Reine au sujet de la constitutionalité de l'acte d'incorporation de la compagnie, mais je crois qu'il est important de ne pas perdre de vue le fait que cette question n'a été aussi soulevée qu'après le jugement de licitation, c'est-à-dire plus de deux ans et trois mois après la mise en cause de la dite compagnie conjointement avec la mère de l'appelante. C'est après avoir plaidé côte à côte pendant plus de deux ans comme parties au même procès que l'appelante s'imagine de soulever cette question, lorsqu'il ne s'agit plus que d'exécuter le jugement. En effet, la compagnie a été mise en cause dès le début de l'action, comme on peut le voir à la première page du dossier, dans l'énonciation des qualités des parties. Après l'avoir considérée comme corps légal pendant deux ans, il est trop tard maintenant pour lui nier son son existance. Cette prétention est contraire à la doctrine bien établie par les autorités dans le factum de l'intimé :

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The contracts made with third parties by corporations existing in virtue of a statute apparently good, and even by corporations existing *de facto*, must be held good and valid (1).

En outre, les nombreux acquiescements qui ont eu lieu par les divers actes de procédure dans le cours de l'action empêchent l'appelante de revenir sur cette question. Pour ces motifs, je suis d'avis que l'appel doit être renvoyé avec dépens.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed with costs for the reasons given in the formal judgment of the Court of Queen's Bench in the 5th and 6th *considérants* thereof. The maxim *quem de evictione tenet actio, eumdem agentem repellit exceptio* determines this case.

As to the constitutional question raised by the appellant we cannot determine it. We simply say she cannot raise it.

GWYNNE J.—With the greatest deference for the opinion of my learned brothers who have pronounced judgment dismissing the present appeal, I cannot see that the grounds upon which they proceed, as I understand them, are open upon the record before us on this appeal.

In an action instituted by the respondent claiming to be entitled to one-sixth part of the Island of Anticosti against Patrick Leslie and others, defendants, and the present appellant as *intervenante*, the respondent obtained a decree in licitation for sale of the island under article 1562 C.C. Accordingly the sale by licitation took place and the sum of $101,000 was deposited in court to abide the result of the report of distribution. By that report the sum of $16,578, as representing the proportionate value of the said one-sixth part of the island, was allotted to George Bury, the above respondent.

(1) Morawetz on Corporations at p. 138.

The appellant contested this collocation, claiming herself to be entitled to the one-sixth part of the island which was claimed by the respondent. The contestant in her opposition pleaded that the said George Bury was in no way entitled to be collocated, as aforesaid, because that he never was at any time the owner or proprietor of the said one-sixth part of the island, and she alleged divers matters which she relied upon as rendering utterly null and void the deeds under which he claimed and she averred title to the said one-sixth part in herself by a title derived from the late Dame Charlotte Forsyth, in her life time the owner of the said one-sixth part.

The respondent contested this opposition by pleading the title under which he claimed as derived from the same Dame Charlotte Forsyth through the Anticosti Company, a company incorporated by an act of the Dominion Parliament, and which company, as the respondent contended, were vendees of the said Dame Charlotte Forsyth and vendors to the respondent for value.

Upon the pleadings issues were joined and the only question thereby raised was as to the validity of the title of the respondent to the said one-sixth part in view of the objections pleaded by the opposant to the validity of the title.

Assuming the deeds, under which he claimed, to have been invalid for the reasons alleged by the opposant or any of them, there was no dispute as to the title of the opposant the now appellant.

The Superior Court in the District of Saguenay maintained that the respondent, George Bury, never had acquired any title in or to the said one-sixth part of the island in question, supporting one of the grounds of objection taken by the opposant, namely, that the Dominion Act incorporating the Anticosti Company was *ultra vires* and for that reason null and void.

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The Court of Queen's Bench of the district of Quebec, the appeal side, reversed this judgment, and rendered judgment in favor of the respondent upon the ground that he was, as the court adjudged him to be, a *bonâ fide* purchaser for value from the Anticosti Company, and that as against him the appellant having, as the court adjudged her to have, recognized the existence of the company and its right to acquire and sell the said property, cannot now contend that the company had no right to purchase or to sell the said one-sixth part, and for the reason, further, that whether or not the said Anticosti Company had a right to acquire and possess the said property the sale which the said late Dame Forsyth made to the said company of one-sixth part of the said island was a sufficient authority to the said company to convey to a *bonâ fide* purchaser the right and interest which she had in the said one-sixth part, and by the sale which the company made to the respondent of the said one-sixth part he has acquired a good and valid title to the same, and is entitled to be collocated out of the proceeds of the sale of the island for the value of the said one-sixth part less his proportion of the cost of the sale of the island.

Upon an appeal from this judgment the questions presented for our consideration, as it appears to me, are:—

1st. Can this judgment of the Court of Appeal of the district of Quebec be maintained in view of the only issues which are joined by the respondent's contestation of the appellant's opposition to the collocation in favor of the respondent appearing in the report of distribution and upon which issues the litigants themselves have been content to rest the case which they have submitted to the court for its adjudication? In other words, was the court justified in adjudging the appellant to be estopped from insisting upon the de-

fects in the respondent's title which she had pleaded in her opposition, in the absence of any pleading upon the record alleging the existence of any facts upon which such estoppel could be and was rested?

2nd. If the opposant was not estopped from insisting upon the defects in the respondent's title which she had pleaded in her opposition, then we have to determine and adjudicate upon the issues joined as to those defects.

The record, as it stands, contains no pleading setting up the existence of any facts which raise any question of the estoppel adjudged by the court. In the absence of such a pleading the judgment of the Court of Appeal of the Province of Quebec cannot, in my opinion, be maintained, and I must say, moreover, that I fail to see any facts in the case which, if pleaded, would have been, in my opinion, sufficient to support that estoppel.

But it is objected, although no such objection appears upon the record, that the only proper time to take the objections which have been taken by the appellant to the respondent's title was in the action in licitation. Why they must have been taken there, in order to be effectually taken, I fail to see, and I have not heard any reason suggested, which is, to my mind, satisfactory why they might not be taken equally well and effectually, as they have been taken, upon the record before us.

The appellant herself was interested in the island and in the proceeds to arise from any sale which might be made thereof quite independently of her claim to the one-sixth part, which the respondent also claimed, and she appears to have been quite content that the sale should take place under the direction of the court on the proceeds being deposited in court, to abide the determination of the court upon the question being raised upon the report of distribution as to the parties

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entitled to the proceeds, and in what proportions they should be found to be entitled.

I confess that the mode in which the question of title has been raised upon the present record, appears to me to be the most convenient and most natural mode for raising the questions under the circumstances of the case. However, the suggestion of this objection is but another form of raising a question of estoppel against the right of the opposant to have the issues joined between her and the respondent adjudicated upon by the court, for which I can see no justification either upon principle or authority in the absence of any pleading suggesting facts upon which the estoppel could be rested and submitting the question of estoppel to the court. If this mode of proceeding can be sanctioned, then, as it appears to me, the issues joined upon the record as it stands are a mere delusion. For these reasons I cannot see that we have anything to do upon this appeal but to adjudicate upon the validity of the respondent's title as pleaded by himself, in view of the objections taken to it by the opposant, and of the facts offered in evidence by the respective parties in relation to such objections, in fact to adjudicate upon the issues as raised by the parties themselves and upon which they have been respectively content to rest the case which they have submitted to the court for its adjudication.

And now as to those issues: If it were necessary to the determination of the present case to decide whether the Dominion Act 35 Vic. ch. 115, intituled an act to incorporate the Anticosti Company was or not *intra vires* of the Dominion Parliament I should be, as at present advised, of opinion that it is *intra vires*, but as in the view which I take a decision upon that point is not necessary to the determination of the case now before us, I need not state my reasons for the

opinion I entertain upon that point.

If the plaintiff Bury had never acquired the interest which he claims to have acquired in the undivided one-sixth part of the Island of Anticosti of which the late Dame Charlotte Forsyth in her life time was seized, and if the question now before us had arisen between Dame Charlotte in her life time, or since her death between the present opposant and the Anticosti Company, I can see nothing in the case which could estop the late Dame Charlotte in the one case, or the present opposant in the other, from asserting their right to recover, and from recovering, the $16,578.06 in contestation.

It is clear from the evidence that the late Dame Charlotte never received anything from the company for the alleged transfer to the company of her one-sixth share in the island, and that the company not only never in point of fact paid anything for the one-sixth interest in question, but that they never were in a position to pay anything for it, or to acquire it under the provisions of their act of incorporation, for the company never had succeeded in procuring stock to be in good faith taken to the amount of ten per cent. on the sum of $2,500,000 named in the act as the capital stock of the company, and of having $12,500.00 of such stock actually paid in, both of which things, namely, the subscription of ten per cent. upon the capital stock of the company and the actual payment of $12,500 thereof were by the act made conditions precedent to the company's commencing any operations, even that of the election of directors by the shareholders.

Until such ten per cent. should be subscribed and such sum of $12,500 should be actually paid in, the powers of the provisional directors named in the act were limited to opening stock books and procuring

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stock to be subscribed, and such provisional directors were, by the act, made the only persons having control of the affairs of the company. It appears, however, that certain persons, some of whom had subscribed for shares in good faith, but not to the amount of ten per cent. required by the act, and at a time when not more than about 80 shares, more or less, of $100 each, had been *bonâ fide* subscribed, and before $12,500, or indeed it would seem before one hundredth part of that amount had actually been paid upon stock subscribed, went through the form in 1875 of electing a board of directors. Yet, it plainly appears, that in 1876, by reason of the company having wholly failed to procure the requisite amount of ten per centum of the capital stock, or anything more than the above number of eighty shares or thereabouts, to be subscribed in good faith, it became, to all intents and purposes, and was deemed by the persons who had subscribed in good faith, to be defunct and abandoned, and they never took any further interest therein.

Under these circumstances it appears to be free from doubt that if the question was now before us between the late Dame Charlotte, if she were living, or, since her death, between the present opposant and the company, the latter would have no claim whatever to the amount in question, or any part thereof, but that Dame Charlotte in the one case, and the present opposant in the other, would be entitled to the money. The only question therefore which, it appears to me, remains is: Can the plaintiff Bury, under the circumstances as appearing in evidence attending his procuring the execution of the instrument under which he claims, be in any better position? The answer to which must be, in my opinion, decidedly in the negative; for the contrivance to which he was party by which a fictitious board of directors was pretended to be elected by per-

sons who never were *bonâ fide* shareholders in the company, but had become nominally shareholders, and for the sole purpose of assisting Bury in procuring the execution of the instrument under which he claims in consideration of $1,000 paid by him to Wm. D. Forsyth was a transaction, so fraudulent in its nature that Bury, a party to that transaction, never could be regarded in a court of justice as a purchaser for value and in good faith, even if the company had legally acquired the beneficial interest of the late Dame Charlotte Forsyth in the land which, for the reasons already stated, they had not.

In my opinion the appeal should be allowed with costs, and the appellant should be collocated in the place of the respondent for the said sum of $16,578.56.

Appeal dismissed with costs (1).

Solicitors for appellants: *Pemberton & Languedoc.*

Solicitors for respondent: *Longprè & David.*

(1) Application for leave to appeal was made to the Judicial Committee of the Privy Council in this case and refused.—*Canadian Gazette*, vol. xi. p. 418.

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*Oct. 13, 15.
*Dec. 15.

THE LONGUEUIL NAVIGATION CO. (PLAINTIFFS) ..... APPELLANTS;

AND

THE CITY OF MONTREAL (DEFENDANTS) AND THE ATTORNEY GENERAL FOR THE PROVINCE OF QUEBEC (INTERVENING PARTY) ..... RESPONDENTS.

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

39 *Vic. ch.* 52 (*P.Q.*)—*Constitutionality of—By-law—Ultra vires—Taxation of ferry boats—Jurisdiction of Harbor Commissioners—Injunction.*

By 39 Vic. ch. 52 sec. 1 sub-sec. 3 the city of Montreal is authorized to impose an annual tax on "ferrymen or steamboat ferries" under the authority of the said statute the corporation of the city of Montreal passed a by-law imposing an annual tax of $200 on the proprietor or proprietors of each and every steamboat ferry conveying to Montreal for hire travellers from any place not more than nine miles distance from the same, and obtained from the Recorder's Court for the city of Montreal a warrant of distress to levy upon the appellant company the said tax of $200 for each steamboat employed by them during the year as ferry-boats between Longueuil and Montreal. In an action brought by the appellant company, claiming that the Provincial statute was *ultra vires* of the Provincial Legislature and that the by-law was *ultra vires* of the corporation, and asking for an injunction, it was

Held, affirming the judgment of the Court of Queen's Bench, Montreal, that the Provincial Legislation was *intra vires*.

2. Reversing the judgment of the court below, that the by-law was *ultra vires*, as the words used in the statute only authorize a single tax on the owner of each ferry, irrespective of the number of boats or vessels by means of which the ferry should be worked.

3. Affirming the judgment of the court below, that the jurisdiction of the harbor commissioners of Montreal within certain limits does not exclude the right of the city to tax and control ferries within such limits.

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

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) confirming a judgment of the Superior Court.

The appellant company employed several of their boats to perform the ferry service between Montreal and Longueuil; and the Recorder's Court of the City of Montreal having issued, at the instance of the City of Montreal, against the appellants, a warrant of distress to levy the tax of $200 which had been imposed upon each of their boats, the respondents presented before one of the judges of the Superior Court a petition to suspend the proceedings on such warrant of distress and brought the present suit.

The action was in order to have the by-law of the city of Montreal, imposing a tax of $200 on each ferry boat employed by the appellant company between Montreal and Longueuil, set aside and the Provincial act 39 Vic. ch. 52 under the authority of which the by-law was passed, declared unconstitutional and *ultra vires.*

Because:

1. By the common law of the British Empire, no citizen or British subject, nor any property of such citizen or subject, can be taxed twice for the same thing, the same object or the same purpose; the appellant company, besides the special tax of two hundred dollars ($200), pay a business tax of seven and a half per cent. and stand *ipso facto* on an unequal footing with the other navigation companies.

2. Commerce and navigation are exclusively within the jurisdiction of the Parliament of Canada and in the present case the Provincial Parliament acted *ultra vires* in granting to the city of Montreal power and authority to pass the by-law imposing a tax on the ferry-boats of the said company.

(1) M. L. R. 3 Q. B. 172.

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3. The tax of two hundred dollars ($200) is an indirect tax which impedes trade, and under the British North America Act the Provincial Legislature is not empowered to impose such tax.

4. The harbor of Montreal, where appellants' boats are moored, is situated beyond the limits of the city and within the jurisdiction of the Harbor Commissioners, who alone are empowered to collect the wharfage dues on account of said mooring.

5. The corporation has no power to impose a tax on any business, industry, labor, trade or occupation whatever, carried on outside of its limits, nor can it be vested by any Legislature with the power of imposing such.

6. The preamble of by-law No. 94 only refers to the statute 37 Vic. ch. 51, sec. 78, which was repealed, and wherein no mention is made of the act 39 Vic. ch. 52, which has been substituted for the latter, and it is fatal to the validity of the provisions therein contained.

The Attorney-General for the Province of Quebec intervened under 45 Vic. ch. 4 to sustain the validity of the Provincial Act.

The City of Montreal pleaded to the action and affirmed the principle that the laws upon which was based the by-law were constitutional.

Archambault Q.C. for appellant.

Ethier for respondents the City of Montreal.

Roy for the Attorney General.

In addition to the points relied on by counsel in the courts below and which are sufficiently stated in the report of the case in M. L. R. 3 Q. B. p. 173 and *seq.* the learned counsel for the appellants contended that the by-law was beyond the provincial act.

SIR W. J. RITCHIE C.J.—I think the provincial act is constitutional but I think the by-law is bad because it does not follow the provincial act. The appeal should be allowed with costs.

STRONG J.—The constitutional question raised by the action need not be considered save for the purposes of costs as hereafter mentioned, inasmuch as it is quite clear that the 23rd section of the by-law of the 21st April 1876 was *ultra vires* of the City Council. The only statutory authority to which this provision of the by-law can be ascribed is the Provincial Statute of Quebec, 39 Vic. cap. 52 sec. 1, sub-sec. 3, which authorises the City to impose an annual tax on "ferrymen." and "steamboat ferrymen." These words could only authorise a single tax on the owner of each ferry irrespective of the number of boats or vessels by which the ferry should be worked. The plainest principles of construction require this even without the aid of this rule which makes it imperative on us in case of doubt to adopt that interpretation which is most favorable to the party who is claiming exemption from a tax.

Then this 23rd section of the by-law in question provides that an annual tax of $200 shall be imposed on ferry owners for every ferry boat which transports to the city, passengers from any place no more than nine miles distant. This tax is manifestly in excess of the powers conferred by the legislature since it is not confined to the imposition of a single tax on each ferry owner, but exacts the tax in respect of each steamboat used for the ferry, an imposition which can be referred to no statutory authority whatever. If we are to read the 3rd sub-section of section 1, of 39 Vic. ch. 52, as *in pari materiâ* with the enactment on the same subject contained in the earlier act of 37 Vic. ch. 51 section 78, this becomes if possible still plainer, for the last mentioned act is also in words confined to authorising a tax on ferrymen irrespective of the number of vessels they may happen to make use of in operating their ferries.

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The portion of the by-law impeached is therefore *ultra vires* of the City and void, and the respondents should be prohibited from collecting the tax.

I have had some doubt whether the conclusions taken by the plaintiffs in the action were such as to entitle them to the judgment indicated, but having regard to the last clause of the conclusions it does not appear to me that such a judgment would be *ultra* the plaintiffs' demand so as to offend against article 17 of the Code of Civil Procedure.

The appeal should be allowed with costs as against The City of Montreal and a judgment entered in the court below for the plaintiffs with costs. The appellants should however pay the costs of the Attorney General who has been put *en cause* for the purpose of sustaining the constitutional validity of the statute which was not seriously impugned and indeed could not be in the face of the later decisions in the Privy Council, the tax authorised being clearly a direct tax such as a Provincial Legislature has authority to impose.

FOURNIER J.—Le jugement de la Cour du Banc de la Reine, Province de Québec, dont il est interjeté appel en cette cause, a confirmé la légalité d'un règlement de la Corporation de la cité de Montréal, adopté le 21 avril 1876, dans le but de déterminer le montant des taxes et droits de licence qui seraient prélevés sur les différents genres d'industries et de commerce exercés et pratiqués dans la dite cité.

L'appelante se plaint principalement de l'article 23 de ce règlement, conçu en ces termes :

Sec. 13.—Une taxe annuelle de deux cents piastres est par le présent imposée et sera prélevée sur le *proprétaire* ou les *propriétaires* de tout et chaque bateau-à-vapeur traversier qui transporte à la cité, moyennant rétribution, les voyageurs de tout endroit n'étant pas à une distance de plus de neuf milles de la cité.

Un des principaux moyens de nullité que l'appelante fait valoir contre ce règlement, est que, d'après son préambule, il parait avoir été basé sur l'acte 37 Vic., ch. 51, tandis qu'à cette époque, le 21 avril 1876, ce statut avait été révoqué par l'acte 39 Vic., ch. 52.

En effet, la 1re section de ce dernier acte révoque la 78e section de la 37 Vic., ch. 51, donnant l'autorité d'établir sur les propriétaires de bateau-à-vapeur traversiers la taxe de $200 imposée par l'article 23. A la section ainsi abrogée, il en est substitué une autre sous le même numéro et au même effet où sont contenus avec des pouvoirs additionnels tous ceux qui étaient déjà énumérés dans la section 78 de la 37 Vic., ch. 51. C'est ainsi qu'on y retrouve dans l'énumération des pouvoirs conférés par la ss. 3 de la 1re section, le pouvoir de taxer exercé par l'article 23, exprimé dans les termes suivants :

Et sur les traversiers ou bateaux-à-vapeur traversiers, qui transportent à la cité, moyennant rétribution, les voyageurs de tout endroit n'étant pas à une distance de plus de neuf milles da la cité.

Dans la ss. 13 de la section 78 de 37 Vic., ch. 51, le pouvoir de taxer est ainsi exprimé :

Sur les traversiers qui transportent dans la cité, moyennant rétribution, les voyageurs de tout endroit situé à une distance de pas plus de neuf milles de la cité, et généralement sur tous commerces, manufactures, occupations, affaires, arts, professions, ou moyens de profit ou de subsistance, qu'ils soient énumérés ci-dessus ou non, qui sont maintenant ou qui seront par la suite faits, exercés ou en opération dans la dite cité.

On voit en comparant ces deux textes qu'après le mot " traversier " on trouve dans la ss. 3 de la 1ére section de l'acte de 39 Vic., ch. 52, les mots suivants : *où bateaux-à-vapeur traversiers* qui ne se rencontrent pas dans la ss. 13 de la section 78 de la 37 Vict., ch. 51.

C'est sur cette différence que l'appelante se fonde pour prétendre que la Corporation n'avait pas le 21 avril 1876, pouvoir d'adopter l'article 23 et de taxer les bateaux-à-vapeur traversiers. Il est vrai comme on

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vient de le voir que l'acte mentionné dans le préambule du règlement, ne fait pas mention de bateaux-à-vapeur. Il n'est nullement question dans cet acte du genre de pouvoir moteur employé pour transporter les voyageurs. Les termes de cette section sont si généraux qu'ils comprennent tous les modes de locomotion alors en usage, et donnent le pouvoir de taxer les traversiers (*ferrymen*) sans égard au mode du pouvoir moteur qui d'après cet acte peut être aussi bien la vapeur que la voile, la rame ou les chevaux.

La citation dans le préambule du règlement en question, est évidemment une simple erreur cléricale; c'est sans doute l'acte 39 Vic., ch. 52, que l'on a voulu citer; sanctionné le 24 décembre 1875, il était en force longtemps avant l'adoption du règlement du 21 avril 1876, et la Corporation se trouvait par cet acte à posséder un pouvoir de prélever des taxes sur les traverses et les traversiers, mais non pas le pouvoir de taxer chaque bateau-à-vapeur traversier. S'il n'y avait que la version française du statut à consulter il serait plus facile de justifier l'article 23 du règlement en question; mais lorsqu'on réfère au texte anglais, on voit qu'il y a entre les deux versions une différence assez considérable. La version anglaise donne pouvoir de taxer les *ferrymen* ou *steamboat ferries*, c'-est-à-dire les traversiers ou bateaux-à-vapeur traversiers. Cela ne signifie pas autre chose que toute traverse de quelque manière qu'elle soit faite pourra être taxée. Le règlement au contraire, impose une taxe non sur la traverse ou le bateau-à-vapeur employé à cet effet, mais il taxe le propriétaire ou les propriétaires de tout et chaque bateau-à-vapeur traversier. C'est certainement aller au delà du pouvoir conféré. Ce n'est plus la traverse ou le traversier qui est taxé. Ce règlement pourrait atteindre un propriétaire de bateaux-à-vapeur qui ne serait pas traversier, mais qui aurait

loué son bateau-à-vapeur à quelqu'un qui l'emploierait à une traverse. La taxe reposerait sur le bateau et non pas sur la traverse ou sur celui qui l'exploite. Les deux versions du statut n'étant pas d'accord je crois que dans ce cas on devrait prendre la version anglaise, sur le principe qu'elle est plus claire et impose une taxe moins rigoureuse et moins étendue que celle de la version française. La compagnie appelante possède un grand nombre de bateaux-à-vapeur, mais n'en emploie qu'un seul régulièrement. Pour une raison ou pour une autre ce bateau est souvent remplacé par un autre qui fait le même service de la traverse; est-ce à dire que ce bateau qui n'est employé que temporairement doit être considéré comme tenant une traverse différente et soumis à une autre taxe de $200.00? Telle n'est certainement pas l'intention du statut, et le règlement excède en cela les pouvoirs conférés à la corporation et se trouve en conséquence illégal.

L'appelante prétend en outre que l'acte de la législature de Québec sur lequel est fondé ce règlement est entaché d'inconstitutionalité, comme ayant été adopté en violation des dispositions de l'Acte de l'Amérique Britannique du Nord, attribuant au gouvernement fédéral par la section 91, ss. 10, le pouvoir législatif sur la navigation et les vaisseaux, (*navigation and shipping*). Les dispositions adoptées par la législature de Québec ne concernent pas la navigation, mais seulement la réglementation des traverses qui, dès avant l'acte de confédération était sous le contrôle de la province du Canada, qui avait délégué aux corporations de Montréal et de Québec le pouvoir de taxer et réglementer les traverses. Ce pouvoir n'a pas été retiré aux provinces, car il est clair que la ss. 13 de la section 91 ne donnant au gouvernement fédéral que les traverses (*ferries*) entre deux provinces, ou entre une province et les pays étrangers, a laissé aux provinces le pouvoir

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de régler les traverses en dedans de leurs limites. Cette interprétation est positivement confirmée par la ss. 16 de la section 92 attribuant le pouvoir législatif aux provinces "en général sur toutes affaires d'une nature purement privée ou locale dans la province." Une traverse du genre de celle dont il s'agit est certainement un sujet d'une nature locale ou privée tombant sous le pouvoir de la législature provinciale. Les pouvoirs conférés à ce sujet par différents actes du parlement du Canada. avant la Confédération sont encore en pleine force. La consolidation faite de temps à autres des statuts concernant les Corporations des cités de Montréal et de Québec, n'a pas eu d'autre effet que de continuer ces pouvoirs. Je concours dans les observations suivantes de l'honorable juge Baby sur cette question:

Avant cette époque (la Confédération), il est certain que la Corporation de Montréal avait ce pouvoir et l'a exercé. Or d'après la section 129 du dernier acte précité (Acte de l'Amérique Britannique du Nord), toutes les lois en force au Canada lors de l'Union ont continué d'exister comme si la Confédération n'avait pas eu lieu, et cela même dans le cas, d'après les nombreuses décisions déjà rendues, où ces lois auront été renouvelées (*re-enacted*) ou refondues, ainsi que nous l'avions jugé tout particulièrement dans les causes *Major* v. *la Corporation de la cité de Trois-Rivières*, et *Barras et la Corporation de Québec.*

Je concours également dans les observations de l'honorable juge tendant à établir que la juridiction de la Commission du Havre de Montréal n'exclut pas celle de la cité sur le sujet des traverses. Comme elles sont un peu longues, je ne citerai que celles de Sir A. A. Dorion, J. C. sur le même sujet:

As to the jurisdiction of the Harbour Commissioners that does not interfere with the contract of the city. The Harbour Commissioners by their charter are excluded from levying a tax upon ferry-boats plying within nine miles from the city. What was the object of that exception? It was because these boats were already subject to the taxation by the city of Montreal. The corporation of the city have a right to tax the owners of properties extending to the river.

Concluant à l'illégalité de l'art. 23 du règlement attaqué, il est inutile de s'occuper du moyen fondé sur

l'inégalité dans l'imposition de cette taxe. Pour tous ces motifs l'appel doit être accordé avec dépens.

Le Procureur-général de la province de Québec ayant été mis en cause uniquement pour avoir l'occasion de soutenir la constitutionalité de l'acte 39 Vict., ch. 52, sur lequel est basé le règlement attaqué, et n'étant nullement intéressé dans les autres questions débatues, et cette cour étant d'opinion que l'acte en question est *intra vires* ; l'appel, quant à lui, doit être renvoyé avec dépens.

TASCHEREAU J.—The City of Montreal has power by 39 Vic. ch. 52 to impose an annual tax on "ferrymen or steamboat ferries plying for hire for the conveyance of travellers to the city."

Under that act the city has imposed an annual tax of $200 on the proprietor of every and each ferry steamboat. It is evident that the statute does not support this tax. Each steamboat ferry, says the act, not each ferry steamboat, one tax for each ferry, never mind how many steamboats are engaged, not a tax on each steamboat of a ferry.

The appellants, who are proprietors of a ferry on which they work many steamboats, every one of which is taxed at $200 under the said by-law ask that it be quashed. I think their contention well founded. The French version of the statute would rather support the by-law, but as the English version is clearly against it, we must on general principles, determine adversely to the tax.

I think the appeal should be allowed with costs in all the courts against respondents, *distraits*, and by-law quashed.

On the issue with the Attorney General costs in all the courts against appellants.

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GWYNNE J.—I concur in allowing the appeal upon the ground of the tax imposed by the by-law not being authorized by the provincial act.

Appeal allowed with costs, but costs of the Attorney General to be paid by appellants.

Solicitor for appellants: *F. X. Archambault.*

Solicitor for respondents, The City of Montreal: *Roüer Roy.*

Solicitor for respondent, The Attorney General for the Province of Quebec: *P. H. Roy.*

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*Nov. 21.

*Dec. 20.

JOSEPH BELL (PLAINTIFF).....APPELLANT;

AND

JAMES CHARLES MACKLIN (DEFENDANT).....} RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Rescission of—Setting aside conveyance of land—Misrepresentation—Matters of title—Fraud—Action for deceit—Evidence.

A party who seeks to set aside a conveyance of land executed in pursuance of a contract of sale, for misrepresentation relating to a matter of title, is bound to establish fraud to the same extent and degree as a plaintiff in an action for deceit.

B. bought land described as "two parcels containing 18 acres more or less," and afterwards brought an action for rescission of his contract, on the grounds that he believed he was buying the whole lot offered for sale, being some 25 acres, and that the vendor had falsely represented the land sold as extending to the river front. The evidence on the trial showed that B. had knowledge, before his purchase, that a portion of the lot had been sold.

Held, affirming the judgment of the court below, that even if B. was not fully aware that the portion so sold was that bordering on the river front, the knowledge he had was sufficient to put him on inquiry as to its situation, and he could not recover on the ground of misrepresentation.

PRESENT—Strong, Fournier, Henry, Taschereau and Gwynne JJ.

APPEAL from a decision of the Court of Appeal for Ontario, reversing the judgment of the Divisional Court, by which a decree in favor of the plaintiff was affirmed.

The facts set up in the statement of claim and on the trial were that the defendant Macklin had offered for sale a portion of land, representing that it extended to the bank of the river Lynn; that it was bought by the plaintiff who discovered, before paying the purchase money, that the portion on the river front had previously been sold to other parties; that he then attemped to negotiate with Macklin with a view to obtaining a reduction of the price, and Macklin consented to an arbitration to fix the value of the land not so included; that the arbitration fell through and he brought an action for a rescission of the contract or compensation in the shape of reduction in the price of the land.

The misrepresentation as to the extent of the land was denied by Macklin, who claimed that a map was exhibited to plaintiff at the time of the sale showing the situation of the land; that he offered for sale 18 acres more or less, and the conveyance which he executed gave to plaintiff the same quantity; that if plaintiff supposed he was getting the river front he must have expected to get twenty-six acres instead of eighteen as offered in the advertisement; and that the arbitration was a farce, as he had never sold the land of which the arbitrators were to fix the value and they could award nothing for it.

The Chancellor, before whom the case was heard, decided in favor of the plaintiff, and ordered a reference to the master to take an account of the amount due the plaintiff on account of the misrepresentation by Macklin, giving, however, an option to the latter, to be exercised within ten days, of having the decree altered so as to

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direct a rescission of the contract. On appeal to the Divisional Court this judgment was confirmed, but on further appeal to the Court of Appeal it was reversed, the last mentioned court holding that the only relief that could be granted would be a rescission of the contract, and that there was nothing in the circumstances of the case to warrant the court in granting such relief as they would not support an action of deceit. The plaintiff then appealed to the Supreme Court of Canada.

W. Cassels Q.C. for the appellant.

This case depends entirely on questions of fact and the judge at the trial, the judges of the divisional court and the Chief Justice of Ontario in the Court of Appeal have all concurred in finding the facts in plaintiff's favor. Under such circumstances the Court of Appeal should not have reversed the judgment. *Smith* v. *Chadwick* (1); *Redgrave* v. *Hurd* (2); *The Picton* (3); *Grasett* v. *Carter* (4).

Mr. Justice Burton in the Court of Appeal has not considered the case as it was presented but treated it as if it was a case for compensation from the beginning, which has never been contended for. In fact, therefore, two judges of the Court ot Appeal have reversed the judgment of the court below.

The cases relied on by Mr. Justice Burton are not applicable. In *Brownlie* v. *Campbell* (5) there was a special agreement that errors of the character of those complained of would not entitle the purchaser to relief. *Wilde* v. *Gibson* (6) was treated as an action of deceit which would require evidence of a very different character from that required in a case like the present. *Petrie* v. *Guelph Lumber Co.* (7).

The following authorities also were cited: *Mathias* v.

(1) 9 App. Cas. 194.
(2) 20 Ch. D. 19.
(3) 4 Can. S. C. R. 654.
(4) 10 Can. S. C. R. 105.
(5) 5 App. Cas. 950.
(6) 1 H. L. Cas. 605.
(7) 11 Can. S. C. R. 450.

Yetts (1); *Newbigging* v. *Adam* (2); *Hart* v. *Swaine* (3); *Arkwright* v. *Newbold* (4); *Allen* v. *Quebec Warehouse Co.* (5).

Robinson Q.C. for the respondent.

In *Hale* v. *Kennedy* (6) it was contended that the court should not interfere with the findings of the courts below on matters of fact it was held, following *Symington* v. *Symington* (7), that it was a question of the practice of the appellate court.

In order to succeed the appellant must show absolute fraud. Kerr on Frauds (8).

The defendant did everything possible to supply information to the plaintiff, and if the plaintiff would not take the trouble to make inquiries and find out what he was getting he must bear the consequences.

STRONG J.—The facts are very fully stated in the elaborate judgments delivered by the judges of the Court of Appeal, and need not be repeated here.

The plaintiff having taken a conveyance and having no contract entitling him to compensation for deficiency (9) is restricted to such relief as he may be able to obtain on the covenants for title contained in his purchase deed, or to relief by way of rescission for fraud. An action on the covenants for title was out of the question, for it is not pretended that the respondent had not a good title to all the land he assumed to convey (and which comprised all he ever contracted to convey also) that is to the two parcels of 13¼ acres and 13 acres respectively, less the land expressly excepted which had been sold to the railway company by Papps. There remained, therefore, no remedy open to the plaintiff (if any he was

(1) 46 L. T. N. S. 496.
(2) 34 Ch. D. 582.
(3) 7 Ch. D. 42.
(4) 17 Ch. D. 301.
(5) 12 App. Cas. 101.
(6) 8 Ont. App. R. 159.
(7) 2 Sc. App. 424.
(8) P. 488 and cases there cited.
(9) *Joliffe* v. *Baker*, 1 Q. B. D. 255.

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entitled to) but an action for rescission. Accordingly we find the statement of claim framed as making a case for rescission and the first claim for relief adapted to the case so made, though an alternative claim for compensation is added. The judgment, it is true, is for compensation, but I think we may accept the explanation of this given by the learned Chancellor in his judgment from which it appears that at the trial before Mr. Justice Proudfoot the learned judge offered the respondent the option of having a judgment against him for compensation instead of rescission, and that after deliberation the respondent accepted the first alternative. This option was, of course, given to the respondent with the assent of the plaintiff's counsel as it could not have been regularly offered otherwise, and having been accepted by the respondent no party can now complain of it. I must remark, however, that the offer of the option, with the assent of the plaintiff and its acceptance by the respondent, ought regularly to have been shown on the face of the formal judgment, and it is to be regretted that the proper practice in this respect was not observed.

In some of the learned judgments delivered in the court below much stress is laid on the form of the relief given being erroneous. Whilst I entirely agree that it would be so, apart from the assent of the parties, I also agree with Mr. Justice Osler, that if this were the only objection to the decision of the Chancery Division "there would be no difficulty in turning the judgment into one for rescission" which, also agreeing with the same learned judge, I hold "to be the only relief which the plaintiff can possibly be entitled to."

The question we have to determine is then reduced to this: Has the plaintiff made by his pleadings and evidence such a case as the well settled principles of law require to entitle him to have the conveyance of

the 15th of June, 1882, by which the executory contract of sale of the 8th of the same month was carried into execution, rescinded and set aside?

In the late case of *Brownlie* v. *Campbell* (1) Lord Selbourne and Lord Blackburn both lay it down most distinctly that after a conveyance of land has been executed nothing in the way of misrepresentation, short of actual positive fraud, will warrant a judicial rescission between vendor and purchaser. What amounts to actual fraud in the way of misrepresentation is hardly susceptible of abstract definition. It certainly does appear from the authorities that, as regards executory contracts, innocent misrepresentation may be a ground for rescission (2); while an action for deceit is not maintainable unless there is actual moral fraud, as is well demonstrated in the judgment of this court in the case of *Petrie* v. *Guelph Lumber Co.* (3). As regards the defence to an action for specific performance, which depends on principles altogether different from an action for rescission, it has long been settled that honest misrepresentation free from all taint of fraud will constitute a defence. The case of *Brownlie* v. *Campbell* (1), however, warrants the proposition that whatever may be the rule applicable to other executed contracts a contract for the sale of land executed by a conveyance, and especially when the conveyance is preceded by a preliminary agreement in writing (4), is governed by different principles from those which regulate the same relief as applied to an executory contract requiring something to be established beyond mere innocent misrepresentation, namely, that there was either conscious falsehood on the part of the person making the

(1) 5 App. Cas. 925.

(2) *Arkwright* v. *Newbould*, 17 Ch. D. 320; *Reese River Mining Co.* v. *Smith*, L. R. 4 H. L. 64; *Redgrave* v. *Hurd*, 20 Ch. Div. 1.

(3) 11 Can. S. C. R. 450; *Smith* v. *Chadwick*, 9 App. Cas. 187.

(4) *McCulloch* v. *Gregory*, 1 K. & J. 286.

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representation, or that it was made by a person who ought to have known the fact, to one who had a right to rely on the accuracy of his statement, recklessly and without caring whether it was true or not (1). In other words, a party who seeks to set aside a conveyance of land executed in pursuance of a contract of sale for misrepresentation relating to a matter of title is bound to establish fraud to the same extent and degree as a plaintiff in an action for deceit. It is not pretended in the present case that the respondent when he made the statement which is charged as fraudulent, viz., that the land he had to sell in lot 10, the southerly or 13 acres parcel, extended to the edge of the river, was knowingly stating what was false; if, then, his representation is to be deemed fraudulent, it can only be because he recklessly made the statement without knowing or caring whether it was true or false. In addition to the falsehood of the representation something more must be proved. In the words of Sir W. P. Wood, V.C., in *Barry* v. *Croskey* (2), it must also be established "that such false representation was made with the intent that it should be acted upon," by the person to whom it is made. And, further, that such person did act upon it accordingly, and from so doing suffered an injury which was an immediate and direct, and not a remote, consequence of the representation. The plaintiff cannot, therefore, succeed in this action unless he brings himself within these conditions.

In *Redgrave* v. *Hurd* (3) the Master of the Rolls says:—

If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the ground that the misrepresentation was untrue, it must be shown either that he had know-

(1) *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459.
(2) 2 J. & H. 1.
(3) 20 Ch. D. 1.

ledge of the facts contrary to the representation or that he stated in terms, or shewed clearly by his conduct, that he did not rely on the representation.

This passage, however, has in later cases (1) been unfavorably criticised, and in *Hughes* v. *Twisden* the court say that it is not a presumption of law that the party was induced to enter into the contract by the misrepresentation, but that the misrepresentation is

To be regarded as an important piece of evidence from which, if there is nothing else, the court may draw the inference of fact that the plaintiff was induced by the statement to enter into the contract;

and in the case before it, the court declined to draw such an inference.

Next proceeding to apply these general principles of law to the facts of the present case, I think it can be shewn from the circumstances and documents in evidence, and that without transgressing any established rule of appellate procedure which requires us to consider the finding of the judge at the trial in whose presence the witnesses were examined conclusive as to their credibility, that the plaintiff when he entered into the contract of purchase, and at all events when he took his conveyance, must have had knowledge of facts which indicated to him that he could not safely rely on the representation, and further, that in point of fact the plaintiff did not rely on the representation in entering into the agreement for purchase and certainly not in completing the purchase by conveyance.

The case made by the statement of claim is that the whole of the two parcels were sold without exception or reservation, and that the exceptions were contained for the first time in the deed. The written agreement is not stated by the plaintiff, and the case is put forward as that of a sale in which there had been no written agreement preceding the conveyance. In

(1) *Hughes* v. *Twisden*, 34 W. R. 498; *Smith* v. *Chadwick*, 9 App. Cas. 187; *Smith* v. *Land and House Corporation*, 28 Ch. D. 16.

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pleading fraud parties are still, notwithstanding the laxity in pleading which seems now to some extent to be countenanced by the Judicature Act, bound to more than ordinary exactitude, (1) and if there were not more substantial grounds for maintaining the judgment under appeal it might be worth while to inquire whether a plaintiff could be entitled to relief in a case charging fraud, when his own statement on oath varies so materially from his pleading as we find it does here. The respondent, whilst he admits he did not know at the time he put the land up for sale at auction, nor until he examined the map on the evening of that day —the 7th of June—the locality of the piece of land part of the 13 acre parcel (X) which had been sold to the railway company, swears he did on that evening, by an examination of the map B made in the presence of the plaintiff, discover the exact quantity and situation of the piece of land, consisting of 2 acres and $\frac{29}{100}$, extending along the river front, which had been sold to the railway company. That he made this discovery on seeing the blue figures still remaining on the map (now before me) which plainly indicated these facts which, beyond doubt, they were intended to be a record or memorandum of. The exact quantity of land which the respondent had to sell in the two parcels was 18 $\frac{88}{100}$ acres, the pieces sold to the railway company being altogether 7 $\frac{87}{100}$ acres, viz.: 5 and $\frac{8}{100}$ acres, part of the 13 $\frac{1}{4}$ acres piece (Y) and 2 $\frac{29}{100}$, part of the 13-acre parcel (X). The advertisement of sale described the land to be sold as 18 acres, more or less. The respondent, in his evidence at the trial, gives the following account of what took place on the ground on the 7th June, when he put the land up for sale by auction:—

Q. Now did you offer this land for sale? A. I did.

Q. How many acres did you offer? A. 18 acres more or less.

Q. Did you announce the number of acres when you offered the land for auction on the 7th June? A. I did.

(1) See observations of Fry J. in *Redgrave* v. *Hurd*, 20 Ch. D. 1.

Q. Was the map you see before you now produced at that time shown? A. It was.

Q. What did you represent to be the boundaries of the land that you were offering? A. Well, I had this map on the ground at the time of the sale, the time I offered it for auction I had this plan and stated that the quantity was in two parcels, and one contained $13\frac{1}{4}$ and the other 13 acres, and that the quantity I had for sale was 18 acres, $\frac{88}{100}$—18 acres more or less; that one portion had been sold to the railway and was marked off; I stated there was five acres sold to the railway, five and a fraction over, and that dotted lines showed the portion sold to the railway; I stated there must have been two acres sold off the other parcel, because the quantity I had for sale was 18 $\frac{86}{100}$, and there must have been some 7 acres sold, but I did not know on what part the two acres was.

Q. And there was no fence on it to designate it? A. No.

Q. And you never had examined the deed or plan of the railway company to ascertain what portion had been sold off? A. No.

Q. Were these figures, 5.08 in parcel D referred to on that day as designating the parcel which had been sold to the railway company on that date? A. Well, I do not know whether I pointed out the figures, but I stated positively that there was about five acres sold off this piece; I pointed out the land marked off and stated it was five acres.

Q. And off the other piece about two acres? A. Yes.

Q. And I understand you to say you did not know what portion had been taken by the railway company; A. No, but I knew that about two acres must have been taken off C, but I did not know what portion.

Q. Did you describe the boundary in reference to the river Lynn and lake Erie? A. Well, I described it two or three times on the ground; I stated there is 26 acres in the two parcels; there is five acres sold on one, I know about that five, and two acres sold off the other, but I did not know what two that was.

Q. Was there any sale made on that occasion when you tried to auction it? A. No, offers were made but I refused them.

Q. Then there was nothing further done in regard to selling the property till the evening? A. No.

The plaintiff and his witnesses Foster, Passmore, and Anderson all deny having heard these statements which the respondent swears to having made. They say he described the land as bounded by the river Lynn and the lake. If there was nothing more in the case it would be very difficult to say that these denials coupled with the finding of the learned judge ought

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not to have been considered conclusive. But even if we consider this evidence by itself, isolated from the documentary proof and the other facts and circumstances of the case, and apart from the account which we have of what afterwards occurred in connection with the sale, and from the conduct of the parties, I should, notwithstanding the direct contradiction of the respondent's testimony by the plaintiff and his witnesses, still consider that there were many surrounding circumstances to be taken into consideration as tending to confirm the respondent's account of what actually occurred. The respondent swears he only offered 18 acres and a fraction of an acre for sale; in this he must state the truth, for consistently with the hand bill, by which he had advertised the sale and which was of course before him and the other parties on the ground, he could not have offered more, for the land is described in this poster as "two parcels "containing 18 acres more or less." The plaintiff and his witnesses all state that the sale was without any restriction or specification as to the contents of the two parcels beyond the exception of the land enclosed by the railway company. That the respondent did, as he states, announce that there were some two acres to be excepted from the 13 acres as having been sold to the railway company is, to say the least, extremely probable. The parties were on the land itself, they had the plan B which showed distinctly enough that the area of the two parcels were 13¼ acres and 13 acres respectively. The railway fences which were before their eyes showed that a piece of the northerly parcel (Y) was in the possession of and belonged to the railway company. It would surely be most natural that seeing this the persons present taking an interest in the sale should have asked how much was included within these fences as belonging to the railway company. A very cursory examination of the

plan would have enabled the respondent to answer, or others to see, that it amounted to 5 $\frac{8}{010}$ acres; then the most simple process of calculation would have shown any one that there was in another part of the property some 2 acres more to be deducted to reduce the contents of the two parcels to the quantity of land for sale, 18 acres or thereabouts. Everything favors the inference that the statements the respondent swears he made were, in truth, made as, in the due course of what would most naturally have occurred, they would have been.

As regards the statement of the plaintiff and his witnesses that the respondent represented the river as the boundary, I think it very likely he may have done so, but not as the boundary of what he was actually proposing to sell, but as that of the parcel of 13 acres which he offered to sell, less a piece of some 2 acres or thereabouts sold to the railway company and the locality of which he could not determine. These considerations, if I had been dealing with this case on written evidence in a court of first instance, would have appeared to me of great weight, but as the evidence was taken in open court before a judge who has found adversely to all these probabilities after having seen and heard the oral testimony I should not, if the case had rested here, have been prepared to disturb the findings.

The case however does not stop here. There remains other evidence, of even greater importance than that relating to what took place at the sale, to be considered.

In the evening of the same day that the sale by auction had been attempted there was an interview between the plaintiff and the respondent, at which the negotiations which led to the sale now impeached were entered upon. It took place in a back room in the plaintiff's hotel, at Port Dover, at which the respondent was, at the time, staying.

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What then occurred is stated by the respondent in his deposition at the trial as follows:—

Q. You were staying at the plaintiff's hotel? A. Yes.

Q. Wae there any conversation regarding this land that evening between Mr. Bell and yourself? A. Yes.

Q. Where did it occur? A. Well, it occurred in Mr. Bell's; it was in his bar-room, and then we went into his back sitting-room.

Q. Was this map in question before you at this time? A. Yes, Mr. Bell said "well, let us look at the map," and we went into the sitting-room and I produced the map.

Q. Was it spread out before you on the table? A. Yes.

Q. And did you and Mr. Bell together examine it? A. Yes, we did.

Q. Was there any discussion or talk of the portion that had been sold off the parcel C, that is the parcel nearest the lakes? A. Oh, yes, it was about that, the object of examining the map was to ascertain where the two acres had been sold off.

Q. Will you tell us what took place between you and Mr. Bell? A. I then looked over the map with Mr. Bell and I noticed the figures 2.29 in the land, and says I "Mr. Bell, I can tell you now where the parcel is off," and so I made a memo. and I numbered the two parcels $13\frac{1}{4}$, and 13 altogether, and took 5.08 and 2.29 and added them together and deducted them from $26\frac{1}{4}$ and the remainder was $18\frac{88}{100}$, and I said that is the parcel that was sold, and I said that proves that this $2\frac{29}{100}$ is the portion that had been sold to the railway company.

Q. Is there any doubt that you gave Mr. Bell to understand that a portion had been sold to the railway company off this part C? A. No, not the slightest, and I made out a memo. in writing showing the result and handed it to Mr. Bell that evening.

Q. Did you come to an agreement that night? A. Well, no.

Q. And did he make you an offer? A. He did make an offer that he would give the $1,200; I did not accept it that night, but it was accepted the next morning.

Q. And you drew up and he signed this paper? A. Yes.

Q. Was there any discussion the following morning regarding the 2.29 parcel at all, and was the map taken out and examined the following morning? A. There was no discussion; I am not sure whether the map was taken out and referred to; I accepted the offer the next morning and drew up that agreement signed by Mr. Bell as already stated.

The account of what occurred at the interview as given by the plaintiff is less positive than his evidence respecting the events of the morning. Indeed, he gives varying, if not inconsistent, accounts of it in his ex-

amination before the trial and in his evidence at the trial. Being examined previously to the trial before an examiner, his statement is as follows:—

I didn't ask Mr. Macklin about parcel "X," I paid no attention to it. I had the map and examined it, and saw the figures 13 acres. I never gave it much of a thought; I thought Macklin owned the parcel, and thought the map to be correct; I had a conversation with Mr. Macklin on the evening of the day on which the land was offered for sale on the premises; it was in the back sitting room. I think we were there alone, the agreement for sale had not then been signed, the subject of the sale of this land was being talked of between us; I don't know if the map was referred to, I won't say whether it was or not. I think we made a bargain that night, we agreed on the price I think. I don't recollect my saying to him on his retiring to bed, "you had better take $1,200 for the parcels"; I did not make Mr. Macklin an offer during the day the land was offered on the premises; I did bid $1,200 at the sale, and he refused it, he was asking $1,400 for these two parcels, and I had made up my mind not to give it.

During the afternoon I had given up all idea of buying, and during the afternoon no negotiations had taken place between me and Mr. Macklin; until we met in the evening I had given up all idea of buying, as I supposed Macklin would not take less than $1,400.

The agreement "C" was signed by me on the evening of the day when the property was offered, or on the morning of the next day; before I signed this agreement I read it, after I signed the agreement I might have looked over the map, but cannot say.

In his cross-examination the plaintiff, speaking of the map and of what occurred at the interview in the evening, does not at first deny that he then saw the map, as the following extract from the deposition shews. Speaking of the map, he is asked:

Q.—Was it before you on the evening of the day on which the auction was held, did you see it then? A.—Well, I might, I do not recollect; I recollect him leaving it with me; he left it with me that morning he was going away; I suppose that was when the bargain was made about the land.

In a subsequent part of the cross examination the plaintiff makes the following statement respecting this interview in the evening:

Q. Did you bring along with you the little memo. in pencil or ink that Mr. Macklin gave you before the agreement was signed, showing you how this 18 acres was made up? A. No.

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Q. Will you swear he did not give you such a memo.? A. No.

Q. I refer to the memo. that my client says he gave you the night before the agreement was signed, showing how the land was made up, 18 $\frac{88}{100}$? A. I have no recollection of it.

And further on we have this evidence:

Q. After the auction sale was over Mr. Macklin was staying at your hotel? A. Yes.

Q. And you talked in the evening? A. Yes.

Q. What was the subject of your conversation? A. Well, he wanted to get $1,400 for the place and I told him I would not give more than I had bid for it.

Q. Where did you go that evening to discuss the matter? A. Well, I forget where it is.

Q. He says it was in the back room, but it was in some private room; have you any doubt that was so? A. Well, I think that must have been in some room, I do not think it was in the bar-room.

Q. Had you that map before you that evening? A. No, the map was never given to me till after I signed that agreement; that was the only time I saw the map on the day of sale till after I bought it, and he gave me the map and said this would show me what I had bought.

Q. Then you swear positively that map was not before you previous- to the signing of the agreement? A. No.

Q. Were there any papers before you? A. Not any, I do not recollect any papers at all only we made the agreement and he said, I will let you have it for $1,200.

Now if the respondent did, previously to the signing of the agreement for sale, either point out to the plaintiff the actual locality of the 2 $\frac{29}{100}$ acres on the map, as he swears he did, or if he at any time before the conclusion of the contract told the plaintiff that 2 $\frac{29}{100}$ acres, part of the 13 acres, had been sold to the railway company, and that he was not able to specify the site, but that wherever it was it was to be considered as excepted from the sale, it is manifest that the action must fail, for in the first case the effect of any misrepresentation as to quantity or description would be neutralised by the disclosure of the truth, and in the second case, the plaintiff would have had before concluding his bargain ample notice that he was not to rely on any representation as to the water frontage

since the land (13 acre parcel) was sold subject to an exception of a piece of 2 $\frac{29}{100}$ acres, the locality of which was not ascertained and of which the plaintiff had to take the risk.

Is there then any evidence to be found in the case, apart from the testimony of the respondent himself, which warrants the inference that any such communications were made by the respondent to the plaintiff? Direct evidence, save that of the respondent, there certainly is none, but I think there are circumstances stated by the plaintiff himself which authorize the presumption that the facts as they now appear with regard to the locality of the land sold must have been brought to the notice of the plaintiff before he entered into the contract of purchase. In the plaintiff's examination before the examiner he made this statement:—

I thought I was buying piece marked "X" in which there was 13 acres marked. I didn't think there was 13 acres on it; I thought I was getting 8 acres, and a little less than 11 acres in the two parcels, in the neighbourhood of 18 acres altogether.

The time here referred to is, of course, that of making the agreement for sale. We have here then this most important admission from the mouth of the plaintiff himself, that at the time he made the contract to purchase he knew exactly the contents of the land he was buying, namely, "in the neighbourhood of 18 acres altogether", and he knew that he was getting 8 acres in one parcel and a little less than 11 acres in the other which was also almost exactly the truth, the fact being that the northern parcel (Y), after deducting the 5 acres $\frac{8}{100}$ sold to the railway, contained 8 acres $\frac{17}{100}$ and the southern parcel, that principally in question (X), after deducting 2 $\frac{29}{100}$ acres contained 10 $\frac{71}{100}$ acres, which the plaintiff was entitled to under his contract. All this the plaintiff swears he knew on the morning of the 8th June when he completed the bargain to purchase for $1,200 and the agreement was signed. Now, the plaintiff has sworn most positively that he did not

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know these particulars before the auction, and that he did not acquire the knowledge of them at that time. The plaintiff says nothing took place between the respondent and himself, and that nothing in the way of negotiations about the land passed until the evening interview already mentioned in the extracts given from the evidence of both the plaintiff and respondent. It is not and could not be suggested that there were any sources from which the plaintiff could have acquired this information in the interval between the date of the return from the ground after the attempted auction sale and the making of the agreement early the next morning, except from an examination of the map, or from the respondent. We are, therefore, irresistibly forced to come to the conclusion that when the plaintiff made the purchase he did so, either after an examination of the map which must have disclosed the exact position and boundaries of the excepted $2\frac{29}{100}$ acres, and therefore have entirely removed the effect of any misdescription previously made by the respondent, or the fact that $2\frac{29}{100}$ acres were to be excepted out of the 13 acres piece, as having been sold to the railway company, must have been communicated to him by the respondent, and, if so, it is to be presumed there must have been involved in that communication one or the other of three alternative explanations as to the locality of the piece so to be deducted as belonging to the railway company, for, 1st, it must either have been defined, as it actually appeared laid down in the map B; or (2) it must have been represented to have been in some other ascertained locality; or (3) it must have been stated by the respondent, that although the quantity of land to be excepted was ascertained he was not able to define its situation, and that consequently the purchase was necessarily subject to uncertainty and risk as regarded the *situs* of this piece previously sold by the respondent's authors in

title. The second alternative we must altogether reject since such a representation that the two and a half acres were in some other part of the land than the locality where it is shown on the map, would have been a distinct and independent fraud with which the plaintiff does not pretend to charge the respondent, and therefore one which cannot be presumed against him. Then the respondent's communication, if that was the source from which the plaintiff obtained his knowledge that 2 $\frac{29}{100}$ acres was to be excepted, must necessarily have been accompanied, either by a description of it according to the lines and marks on the map, or it must have involved a statement that the locality was uncertain and not within the knowledge of the respondent and so have been sufficient to give the plaintiff notice that he was running the risk which he actually took upon himself by the agreement he afterwards entered into of buying the land subject to the exceptions of the parts previously sold which remained undefined except as to quantity. Taking either of these alternatives, and one or the other of them must be true unless, indeed, the plaintiff got his knowledge from the map itself, the plaintiff cannot possibly say that he purchased on the faith of the representation that he was to get the whole 13 acres with the river for his boundary on the south; he must either have been informed of the exact truth that this frontage had been already sold, or he must have been warned, if not in express words yet by an intimation sufficiently direct for the purpose, not to rely on any representation as to the frontage which had been made at the auction by being to d that 2 $\frac{29}{100}$ acres had already been sold in some unknown situation, from which it must have been an obvious deduction to be made by any sensible man that this piece previously sold might include the river front which the plaintiff says it was his object to

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acquire in making the purchase. If, under these circumstances and in the face of either actual knowledge or of such a warning as I have mentioned, the plaintiff thought fit to conclude a bargain and enter into the contract which he signed for the purchase of the land, he did so with his eyes open and the maxim *caveat emptor* is the plain answer to the claim for relief which he now puts forward.

Another aspect in which we are, I think, entitled to view the case, by reason of this admission of the plaintiff that at the date of his purchase he knew with reasonable exactitude the quantity of land in each of the two parcels, is that taken in connection with the undeniable facts that his knowledge in this respect could only have been acquired by him at the evening interview, by a personal examination of the map, or from information which the respondent then gave him, it casts doubt and suspicion on the plaintiff's evidence as to what passed on that occasion. It will be remembered that the plaintiff in his examination before the trial says he does not know, and will not say, whether the map was referred to or not at the evening meeting in the back room, where it is to be remembered the parties were alone. Again, in the earlier part of his cross examination at the trial, he refuses to swear that the respondent did not give him the memorandum shewing the contents of the parcels and the deductions to be made, which the respondent had positively sworn to in his evidence, though later on he positively denies that he either saw the map or got the memorandum. These inconsistencies, however, when coupled with the unavoidable inferences already pointed out to be drawn from the important admission made by the plaintiff on the preliminary examination, as to the state of his knowledge at the time of the purchase, are I think sufficient

wholly to discredit his evidence as regards what passed at the interview on the evening immediately preceding the agreement for the purchase. This leaves the respondent's account of that interview uncontradicted, and having regard to the intrinsic marks of truthfulness which the respondent's statement contains, and to the subsequent conduct of the parties which is strongly confirmatory of the respondent's evidence, I am of opinion that his testimony should be accepted as worthy of credit, which is of course conclusive of the case.

I do not consider that we are precluded from acting on this view of the evidence by the rule laid down in "The Picton," (1), and in *Grassett* v. *Carter* (2), as well as in other cases decided both here and in England. I have always considered that rule which recognises the finality of the finding of the trial judge who sees and hears the witnesses as limited to cases where questions of facts are entirely dependent on the credit to be given to one witness or set of witnesses over another or others proffering testimony directly contradictory, and when neither documentary evidence nor admitted or incontrovertible facts can be called in aid to turn the scale. I adhere to the rule as laid down in the Court of Appeal in the case of *Sanderson* v. *Burdett* (3), and as there propounded there is nothing in it which excludes an appellate court from drawing inferences from documentary evidence or admitted or incontroverted facts, or from any gross inconsistencies and self contradictions which may be found in the depositions of witnesses. I find nothing in the judgments of the Court of Appeal offending against the rule in question when thus limited and defined. They have dealt with the evidence in a way they were

(1) 4 Can. S. C. R. 648. (2) 10 Can. S. C. R. 105.
(3) 18 Grant 417.

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entirely justified in doing, by drawing inferences from the surrounding facts and circumstances of the case, from documents and from the conduct of the parties, and in doing this they have not, I think, invaded in the slightest degree the province of the trial judge to determine the degree of credit to be given to the witnesses so far as that is exclusively to be determined from their demeanor while under examination. And in the scrutiny to which I have submitted the evidence I venture to say that I am equally free from any offence against the rule in question.

Another rule which I consider altogether distinct from that just adverted to is propounded by the Privy Council in *Allen* v. *Quebec Warehouse Co.* (1), according to which a second court of appeal ought not to reverse the concurrent decision of two preceding courts on a question of fact. I do not regard this as applying to the Divisional Court and therefore it was open to the Court of Appeal to review the case on the facts, within proper limits, which having done they have reversed the decisions of the Chancery Division. It is not now proposed to reverse their decision, but to affirm it. *Allen* v. *The Quebec Warehouse Co.* (1) does not therefore apply.

I should have pointed out that the conduct of the parties immediately after the sale and up to the month of July, 1883, when the plaintiff for the first time advanced the claim which he afterwards made the subject of this litigation, was entirely consistent with the view I take that the respondent's evidence of what passed during the negotiations for the sale, on the evening of the 7th June, 1882, was truthful and entitled to credit. In the first place, the respondent left with the plaintiff the map shewing clearly, as it does to this day, by figures and letters written with a

(1) 12 App. Cas. 101.

blue crayon, the exact quantity and location of the $2\frac{29}{100}$ acres to be excepted from the sale of the 13 acres, and according to the plaintiff's own evidence the respondent said that he did this in order that the plaintiff might examine it and see what land he had bought. Now, it must be remembered that this was done whilst the sale was still in an executory stage, a week before the execution of the conveyance and two months before it was completed according to the contract, by the execution of the mortgage securing the purchase money. Can it be supposed that if the respondent had induced the plaintiff to become a purchaser by gross fraud and misrepresentation, as the plaintiff contends he did, that he would thus spontaneously put into the plaintiff's hands, with a recommendation to examine it, a document the slightest examination of which would have exposed his dishonest trick, and enabled the plaintiff to set aside the contract he had just entered into? Further, is it to be supposed that if the plaintiff had for the first time become aware in the month of April, the very latest date to which the information received from Anderson can be ascribed, of the fraud which he pretends the respondent had practised upon him he would have remained silent for more than three months before making any complaint and during that time have written the letters which we find in the correspondence of June, 1883? All this is entirely inconsistent with the plaintiff's evidence but entirely in keeping with the account given by the respondent.

The arbitration agreement has, I think, but little bearing on the case. As Mr. Justice Osler points out there is nothing like an admission on the part of the respondent involved in the submission to arbitration itself. The respondent does not admit his liability to make good to the plaintiff the value of the land sold to

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the railway company, and merely refers the amount of the indemnity which he was to pay to arbitration, but according to the submission which he proposed, and both parties signed, the whole question of liability as it is now raised in this action was made the subject of arbitration. There can, of course, be no admission involved in such a reference. It is said, however, that during the negotiations about the arbitration it was admitted by the respondent that he had actually sold the land as bounded on the river Lynn. It is scarcely possible that any such admission was made, as the written documents, the contract and conveyance by which the sale was carried out, directly contradicted any such statement as the respondent well knew. It is also said that the respondent at this time admitted that he had represented the land as extending to the river. This is denied by the respondent. It is asserted by the plaintiff, by Foster and Folinsby. As regards the plaintiff his evidence is entitled to little or no weight since the discredit cast upon his testimony in other respects for the reasons already fully discussed shows that he is an unreliable witness. Folinsby's deposition, as is pointed out by Mr. Justice Patterson, contains internal evidence of his untruthfulness, and shows that he was an instructed witness; he speaks of the dispute as to the place at which the arbitration should be held as having arisen at the interview at Port Dover when the submission was signed, when, in fact, it did not arise until some time afterwards and then not at any meeting between the parties but in the course of correspondence, so that he must have been told by others what he states about it and alleges to have taken place at this time; we must therefore put aside his evidence also. There remains Captain Foster whom I must, on the finding of the learned judges, accept as a candid and truthful witness; his statement is, how-

ever, entirely inconsistent with the document drawn up and signed by the parties at the time. Moreover, he gives his evidence with a lack of clearness and precision which greatly impairs its force. His memory is not good, as he himself admits, and in the case of a witness detailing a conversation this is, of course, of importance. But granting all he deposes to to have been admitted by the respondent, I think we may safely assume that it referred only to what passed on the day of the auction sale, which the evidence already adverted to shows was explained and rendered innocuous by the subsequent information given by the respondent to the plaintiff in the evening.

On the whole, I am of opinion that the action entirely failed on the evidence and that this appeal must be dismissed with costs.

FOURNIER and TASCHEREAU JJ.—Concurred.

HENRY J.—This is an action brought by the appellant against the respondent and one David Foster for the cancellation of a conveyance of lands made by the respondent to the appellant and Foster. The conveyance in question was in pursuance of an agreement previously entered into between the parties as the result of previous negotiations between the appellant and respondent. A mortgage for the amount of the purchase money ($1,200) was executed by the appellant and Foster; after which (on the 23rd of September, 1882,) Foster, for the consideration of $200, sold and conveyed his interest in the lands to the appellant, he, the appellant, agreeing to pay the mortgage.

The appellant concludes his statement of claim as follows:—

The plaintiff claims:—

1. That the agreement for sale of said lands may be set aside and cancelled and that said conveyance by the defendant Macklin to said plaintiff and defendant Foster, and the said mortgage from the

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plaintiff and Foster to the defendant Macklin may be set aside and cancelled, and the defendant Macklin ordered to repay to the plaintiff all moneys paid by him on account of said mortgage.

2. Or that an account of the value of said lands so excepted by said conveyance may be had and taken, and the amount thereof deducted from the amount due or accruing due on said mortgage, and that the said mortgage may be reformed accordingly.

The appellant, therefore, seeks in the first place the cancellation of the conveyance with the resulting legal consequences; or if he cannot establish his right to the cancellation he asks to have compensation awarded him for what he alleges to be a deficiency in the quantity of land purchased.

The learned judge (Mr. Justice Proudfoot) gave a judgment on the hearing for relief and "referred it to the master to determine the amount that ought to be deducted from the purchase money."

If the learned judge considered that the evidence was sufficient to justify a judgment for cancellation we should necessarily consider that his judgment would have taken that shape. We have, therefore, the right, and I think we are bound, to conclude that he considered that in that respect the appellant had failed.

There was an appeal to the divisional court resulting in a confirmation of the judgment and then an appeal was taken to the Court of Appeal for Ontario and judgment rendered by the latter court, allowing the appeal and dismissing the appellant's action. From the latter the case was removed by appeal to this court. It has been fully argued and we have to give judgment.

The law is well settled that if a party agrees by a binding contract to sell a certain ascertained lot of land he is bound to convey it all. If he afterwards tenders a conveyance of less land the purchaser is not bound to accept and no court would hold him bound to do so either in a suit for specific performance or otherwise but, on the contrary, specific performance

would be decreed against the vendor. That, if his contention has any foundation, was the position of the appellant before the conveyance. It is naturally to be considered that a party selling land should know what his title to it is and the extent of it, of which the purchaser may be considered either to be wholly ignorant or, at all events, not to be so well informed. The purchaser may, therefore, be presumed to trust to his agreement and to its guarantee.

The duties and liabilities are, however, wholly changed after a conveyance is accepted. The case of *Hart* v. *Swaine* (1) has been cited and relied on by one or more of the learned judges in the courts below. It is, however, wholly inapplicable to this case. In that case a vendor sold and conveyed land as freehold, and the purchaser afterwards ascertained that the vendor had but a copyhold title. The sale was set aside with costs and expenses. The deed in that case conveyed by a title not held by the vendor. The decision in that case does not at all affect the rights involved here. The misrepresentation in that case was in the conveyance itself. In every county in Ontario there is a registry of titles and a purchaser has the right, and it is his duty, to ascertain from an inspection of the title of the seller how his title covers the lands purchased. In the written agreement for the lands in question certain portions of the two lots purchased are excepted as lands stated to have been conveyed by the original owner, Papps, who held as a trustee, to the Hamilton and North Western Railway Company. In the conveyance to the respondent of the lands sold by him to the appellant the same exception is made, so that by reference to the registry the exception to the portion would have appeared, and not only so but the description of the lands in the conveyance or conveyances

(1) 7 Ch. D. 42.

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to the railway company would have shown that the 2·29 acres, which is the subject of the present contestation, was one of the two exceptions referred to in the agreement and conveyance. If then before the acceptance of the conveyance the appellant did not avail himself of the means at his command to ascertain the extent of the portions so excepted the *laches* were his own and he cannot now be permitted to complain. The description in the agreement was of two parcels of land "saving and except thereout the portions sold, &c. The appellant was, therefore, informed that "thereout," meaning out of each parcel, a portion, if not portions, had been conveyed to the railway company and were not intended to be included in the lands sold and to be conveyed. He was thereby invited to ascertain for himself what the portions consisted of, and he had every opportunity of doing so. Besides, he lived near by; and, as far as can be gleaned from the evidence, knew really more about the land than the respondent, who lived at Toronto and had only recently got them, together with other lands in other places, for a lump sum.

I have read attentively all the judgments given, and I have no hesitation in declaring that those of three learned judges of the Court of Appeal who dismissed the action commend themselves to my judgment.

In those judgments the law is fully, and, as I think, properly stated, and the facts referred to. They are exhaustive and leave little to be added. I concur with them most fully, both as to the several questions of law involved and as to their conclusions as to the facts from the evidence.

The learned judge of first instance decided principally on the evidence of what took place at the unsuccessful attempt to sell at the auction and his decision is mainly based on what he considered the

weight of evidence as to what then was said by the respondent and others; and the same consideration seems to have influenced the decision of the Divisional Court and the learned Chief Justice. It is not a pleasure to do so, but duty compels me to say that, according to the law as found in the most controlling authorities, what passed on that occasion cannot be considered as affecting the rights of the respondent. There is a contradiction in the evidence of what then took place, but, in my view, whoever may have stated truly what then took place it does not matter. It is a well established principle in regard to evidence in a case like the present one, that recourse cannot be had to preliminary statements without actual fraud after a written agreement is entered into as to the subject matter; besides, it is proved without contradiction that the terms and particulars were agreed upon after the abortive attempt to sell by auction and without reference to what took place thereat. It is shown that a plan was exhibited to the appellant—it was critically examined by him and left with him, and he had it from thence in his possession. He had, therefore, all the information that the respondent had. He knew then that fact. There was no secreting or keeping back by the respondent of any information he had as to the excepted portions of the two lots, but there is this further conclusive evidence. The respondent says that during the negotiation which resulted in the written agreement, he made a memorandum of the 18.88 acres he was selling, and that the appellant then offered $1,200 for the lots which he did not then accept but that next morning he did accept that offer. The memorandum as is follows:—

Parcel C,	13	acres,	reserved	2.25	acres,	for sale	10.71	acres.
" D,	13¼	"	"	5·08	"	"	8.17	"
	26¼			7			18.88	

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The appellant was asked on the trial, when being examined, if he brought that memo. with him, to which he replied "no." He said he had no recollection of it, but declined to say he did not get it. He in that respect does not deny that the respondent's statement was correct. We must, therefore, conclude that the statement of the respondent was true. What then does it show? Nothing less than that the appellant well knew from the plan and the memo. that the 2.29 acres now in dispute had been sold to the railway company and formed no part of the land he was purchasing.

Then we have the letters written after the appellant made the discovery that the 2.29 acres were not included in the agreement and conveyance. In the statement of claim of the appellant the time of the discovery is put down as in the September following. In his examination he puts it down as in October or November, and said that it certainly was before December. In his evidence on the trial he puts the time as the April following. Why he was induced to finally postpone the time to the April following may be gathered from his letters to the respondent. In November, 1882, he writes to the respondent forwarding $55 on account of the mortgage, and expressing his belief that he would be able to make the first payment early in the spring.

On the 16th June, 1883, being subsequent to his admitted knowledge in April, he writes to the respondent:—

> I received yours of the eighth of June and in reply I have to say that your money is ready for you when you want it, &c.

but no intimation of the alleged discovery is given. On the 23rd of the same June he wrote again about a matter of rent and interest, and about the boundaries of lot D not in question in this suit, but made no camplaint about 2.29 acres. He wrote again on the 27th

of the same month in respect of the land conveyed to him, and there is no complaint or reference to the 2.29 acres. He must be a man of a very patient and angelic temperament, to write as he did after making the alleged discovery that the respondent had induced him by fraud and false representations to pay for land he did not own or from which there was, at least, to be deducted the most valuable part. Such praiseworthy conduct would place him far above the large majority of mortals, but as he has not been shown to occupy such an exceptionally high position, we are bound to conclude that when he wrote those letters he did not feel that he had equitably, legally or morally any cause of complaint.

Reference has been made to the fact that when about the time the second and last payment on the mortgage was falling due and the complaint now attempted to be made was started, but refused to be admitted by the respondent, he agreed to refer the matter to arbitration; and it is advanced as an argument to sustain the complaint. I cannot in deciding this case give that fact the slightest weight. The one party complained, the other denied there was any reason for it, and they agreed to refer the matter to arbitration. If admitted to have any weight in this case, why not in every other where a party resisting a claim agreed to a reference to settle the contest.

After reading the able and exhaustive judgments of the learned judges of the Court of Appeal before referred to, both as to the law governing the points in issue and as to the facts in evidence, I feel it wholly unnecessary to say more than that the declarations of the law made by them cannot by any recognised authorities be found incorrect, and I think that their estimate of the evidence is entitled to the approval of this court.

I will only add, and in general terms, that the rule

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referred to by the learned Chief Justice in regard to the finding of the judge of first instance only applies to cases where there is merely oral contradictory evidence and does not apply to a case like this where written evidence largely affecting the decision is adduced and the truth of which and its application to the issues can as well be decided by a court of appeal. In this case there is, however, more, for the learned judge admitted improperly, as we have the right to decide, evidence as to what took place at the time of the attempted and abortive sale by auction and founded his decision principally thereupon.

For the reasons given I am of opinion that the appeal should be dismissed, the judgment of the court below affirmed and the action dismissed with costs in all the courts.

GWYNNE J.—I entirely concur in the review of the evidence as made by my brother Strong and by the majority of the learned judges of the Court of Appeal for Ontario.

Too much stress appears to me to have been laid by the Court of Chancery upon the evidence as to the statements alleged to have been made by the defendant at the auction which fell through, and too little upon what took place subsequently, for those statements, assuming them to have been made at the abortive auction, cannot have had, or at least should not have had, in view of what took place subsequently, any influence in inducing the plaintiff to enter into the contract which he subsequently did enter into; and having entered into that contract the plaintiff has offered no sufficient excuse for his not having promptly taken measures to procure a rescission of the contract if he had had any confidence in the truth of those allegations of fraud which he has so freely made in his statement of claim and still insists upon.

The material points in the case appear to me to be,

that after the abortive auction and in the evening of that day the plaintiff and defendant entered into negotions for the purchase and sale of the 18 acres which the defendant had unsuccessfully offered for sale at auction they went together into a room at the plaintiff's house and the defendant produced a map, which he left with the plaintiff, and which showed the piece of land now in question as containing 2 $\frac{29}{100}$ acres; the defendant swears he then pointed out this piece to plaintiff as not being included in what the defendant was offering for sale, and as being one of two pieces previously sold to the railway company by the person from whom the defendant acquired title; the plaintiff says he does not recollect this, but he admits that the plaintiff left the map with him, at least from the time the contract was signed, which showed in blue pencil a piece of land upon the river described as containing 2 $\frac{29}{100}$ acres, which, being deducted from one of the pieces, together with 5·08 acres deducted from the other piece, which pieces together contained the 18 acres, more or less, which the defendant was offering for sale, made precisely 18 $\frac{88}{100}$ acres, whereas, if this piece should be included in what the defendant was offering for sale, the plaintiff, as it appears he well knew, would have got 26 $\frac{27}{100}$ acres for the 18 the defendant was intending and offering to sell.

Then the agreement is signed on the following morning, the map being still left in the possession of the plaintiff, and this agreement shews in express terms that at least two pieces were excepted from the description as given of the two pieces of land on which the eighteen acres the defendant was agreeing to sell were situate. The area of the excepted pieces being deducted from the whole area left the eighteen acres the defendant was agreeing to sell, and these two excepted pieces were spoken of as having been previously sold to the railway company. The plaintiff then, by

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this agreement, the existence of which he has suppressed in his statement of claim, had express notice of there being two pieces excepted, which notice rendered it incumbent upon him to find out where they were. Had he looked at the map, which he retained in his possession, that would have shewn him, or he could have ascertained their *situs* by reference to the railway company or to the registry office, if he did not already know it from what had taken place between him and the defendant on the occasion of their examining the map together the night before the contract was entered into. Then a week after the contract was signed a deed was executed by the defendant and delivered to the plaintiff, describing the land sold precisely as it was described in the contract of sale, and about two months after the plaintiff executes a mortgage back securing the purchase money. Then the plaintiff in his statement of claim, and subsequently on his examination upon his statement of claim, alleges that in the month of September or October following the execution of the deed to him he first acquired the information that the piece of land now in question containing the $2\frac{29}{100}$ acres above mentioned had been one of the pieces sold to the railway company, and therefore did not belong to the defendant at the time the contract of sale was entered into. Yet with this knowledge the plaintiff entered into possession of the land on December 1, and he wrote to the defendant the letters which have been sufficiently commented upon by the learned judges of the Court of Appeal for Ontario. Then in July, 1883, he pays the defendant $400 on account of the purchase money secured by the mortgage.

It is true that he did this when the defendant agreed to refer to arbitration a question as to whether the plaintiff should have any reduction made to him from the price agreed upon, but his paying that sum, what-

ever may have been his motive in paying it, was an express abandonment of all claim, if the plaintiff ever had any, for rescission of the contract. Upon the whole, not to repeat comments upon the evidence which has been so fully reviewed in the Court of Appeal for Ontario and by my brother Strong, in which review I entirely concur, I am of opinion that the plaintiff has completely failed in establishing the fraud alleged in his statement of claim, and that therefore the appeal must be dismissed with costs and his claim in the Court of Chancery dismissed out of that court with costs.

Appeal dismissed with costs.

Solicitor for appellant: *T. G. Matheson.*

Solicitors for respondent Macklin: *Ferguson, Ferguson & O'Brien.*

Solicitor for respondent Foster: *C. E. Barber.*

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*Mar. 19.
*Dec. 14.

THOMAS PURDOM (PLAINTIFF).....APPELLANT;

AND

DAVID NICHOL AND ZAVIER BAECHLER (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Partnership—Liability of one partner for prior debt of co-partner —Promissory note—Collateral for partnership debt—Release of maker.

P. lent N. an accommodation note which N. deposited with R. as collateral security for a mortgage debt. N. and B. afterwards went into partnership and a new mortgage on partnership property was given to R. for N.'s debt, the note being still left with R. The partnership being dissolved, B. agreed to pay all debts of the firm, including the mortgage, and in settling the accounts between himself and the mortgagees B. was given credit for the amount of the note which P. had paid to the mortgagees. P. sought to recover from B. the amount so paid.

Held, reversing the judgment of the court below, Ritchie C.J. and Fournier J. dissenting, that N. having authority to deal with the note as he pleased, and having given it as collateral security for the joint debt of himself and B., on such security being realized by the mortgagees and the amount credited on the joint debt P., the surety, could recover it from either of the debtors.

Semble,—Assuming P. not to have been liable to pay the note to the mortgagees and that it was a voluntary payment, it having been credited on the mortgage debt, and B. having adopted the payment in the settlement of the accounts between him and the mortgagee, he was liable to repay it.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Queen's Bench Division and restoring that of the trial judge who dismissed the plaintiff's action.

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

(Mr. Justice Henry heard the argument in this case but died before judgment was delivered).

(1) 15 Ont. App. R. 244.

The facts of the case may be stated as follows: The plaintiff lent to the defendant Nichol an accommodation note which the latter gave to certain creditors as collateral security for his indebtedness. Nichol and the defendant Baechler afterwards entered into partnership and a mortgage on partnership property was given to secure the above debt of Nichol the creditors still holding the plaintiff's note. The partnership only existed a few months and on its dissolution Baechler assumed the payment of all liabilities of the firm including said mortgage. An account was settled between Baechler and the mortgagees and the plaintiff having paid the note the amount was credited to Baechler on such settlement, and on the foot of the accounts he covenanted with the mortgagee to pay the balance due after crediting plaintiff's payment.

The plaintiff having brought an action to recover the amount of the note from Baechler, the latter pleaded ignorance of the dealings between the plaintiff and Nichol and claimed that Nichol had received, out of partnership funds, an amount larger than plaintiff's claim, and that plaintiff could have no higher right than Nichol.

The Chief Justice of the Queen's Bench Division, before whom the case was tried, dismissed the plaintiff's action, holding that the evidence did not establish the allegations in the statement of claim that the note was deposited as collateral security for the debt of Nichol. The Divisional Court reversed this judgment and ordered Baechler to pay the amount of the note to the plaintiff. The Court of Appeal restored the judgment of the Chief Justice. The plaintiff then appealed to the Supreme Court of Canada.

Mills for the appellant cited Coke on Littleton (1); *Belshaw* v. *Bush* (2); *Moule* v. *Garrett* (3); *Sanderson* v. *Aston* (4); *Henderson* v. *Killey* (5).

(1) 206 b.
(2) 11 C. B. 191.
(3) L. R. 7 Ex. 101.
(4) L. R. 8 Ex. 73.
(5) 14 O. R. 137.

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Idington Q.C. for the respondent referred to Lindley on Partnership (1); DeColyar on Guarantees (2).

Mills in reply cited *Jones* v. *Broadhurst* (3).

Ritchie C.J.

Sir W. J. RITCHIE CJ.—I think the evidence shows that the note was not held as collateral security for the new mortgage debt, nor was the plaintiff, that I can discover from the evidence, ever in the position of a surety for the payment of the joint mortgage. That there is nothing whatever to show the plaintiff's liability on the note was to continue as security for the new debt the evidence of McPherson would seem to be conclusive. It is as follows :—

George McPherson sworn. Examined by Mr. Purdom.

Q. You are a solicitor practicing at Stratford? A. Yes sir.

Q. For whom did you act in the matter of this bill? A. I acted for both Mr. Redford and Mr. Barton.

Q. I believe the note sued on in this action is in your handwriting, the body of it was filled up by you? A. That is my handwriting except the "Thomas Purdom," except the name of the endorser.

Q. And you witnessed the execution of that by Baechler? A. Yes sir.

Q. And some of the others? A. By all except Caroline Baechler.

Q. Can you explain to us how the amount of that mortgage was made up, what the consideration for the giving of the mortgage was? A. Yes, I gave you some statements to show how I made it up and what it was for.

His Lordship.—What mortgage are you speaking of now? A. The mortgage of the 4th April, '76. Mr. Baechler and Nichol to Redford and Barton. I have a statement which I prepared of the 4th April, '76, showing a total of $7,323.00 made up of a

Claim of Barton's amounting to.....	$3,803 00
A claim of Redford amounting to.....	3,377 00
And paid insurance and advertising.....	142 60
Making a total of.....	$7,322 60

When that mortgage was made, before that mortgage was made, on this day this was the indebtedness of Nichol alone, not the indebtedness of Baechler and Nichol, and to induce Baechler to purchase the property along with Nichol, my recollection is that a

(1) 5 ed. pp. 80–89. (2) Pp. 276, 287.
(1) 9 C. B. 173.

thousand dollars was thrown off the indebtedness by Redford and Barton, and a mortgage taken for $6,323.00, being this amount less the $1,000.00.

Mr. Purdom resuming:

Q. What mortgage was signed by Nichol—by both defendants? A. That is the mortgage that was signed by both defendants.

Q. Did that mortgage include the whole indebtedness of Nichol and Baechler to Redford? A. It included all the indebtedness of Nichol up to that time, less the thousand dollars that was thrown off.

Mr. Purdom.—We will examine Mr. McPherson further.

Q. Did the mortgage that was taken for $6,323.00 include the total indebtedness of Baechler and Nichol to Barton and Redford? A. No, it became an indebtedness of Baechler and Nichol the moment Baechler signed the agreement, previous to this it was the indebtedness of Nichol alone.

His Lordship.—Then there is a mortgage? A. On the 4th April, '76, Nichol owed Redford and Barton $7,323.00. On this day a sale of the property was made to Baechler and Nichol, who formed the partnership.

Q. You say Nichol owed Redford and Barton? A. Yes, on the 4th April, '76, $7,323.00. Redford and Barton held a deed of this property as a security for their debt.

Q. It was an absolute deed in form? A. Absolute in form but in reality a mortgage.

Mr. Idington.—Q. The one that is put in? A. Yes.

His Lordship resuming:

Q. That was signed by? A. By Nichol alone, that deed.

Q. To secure this amount? A. To secure this total amount. Then on the 4th April, '76, Baechler having formed a partnership with Nichol, purchased the property jointly with Nichol from Redford and Barton.

Q. After they formed their partnership, they did what? A. They purchased from Redford and Barton this mill property at the total indebtedness less $1,000.00 that was forgiven, and on the 4th April, '76, the conveyance was made by Bedford and Barton to Baechler and Nichol, and on the same day a mortgage was given back for the full consideration mentioned in the deed.

By Mr. Purdom.—Q. Barton had held the note of the plaintiff prior to the time that mortgage was taken? A. Yes, or I had held it for Barton and Redford, this note of the plaintiff that is sued on now.

Q. Did you continue to hold it after that mortgage was taken. A. Yes.

Q. After the mortgage was given did you hold it as collateral security to that mortgage? A. Well, I don't know whether——there was never anything said at all about how it should be held. There

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never at any time was anything said that I can recollect of of the note being held as collateral security, though that might be the effect of it.

Q. At all events did you have any claim against Nichol and Baechler outside of the amount stated in the mortgage? A. No. claim outside of the amount that was stated.

His Lordship.—Q. But the mortgage might be collateral to the note, rather than the note collateral to the mortgage? A. It might be.

Mr. Purdom resuming:

Q. Any more than the mortgage was for a larger sum. Do you know as a matter of fact whether the mortgage was collateral to the note or the note to the mortgage? A. I cannot recollect of anything being said about it at all, of there being any arrangement at all. I don't think that when the mortgage was made that Baechler knew anything whatever about the notes.

His Lordship—Well, is that all you know about the note? Do you know when it first came into Mr. Redford's hands, or Barton's hands?

Witness. My recollection is a couple of weeks after it was drawn in came into my hands and remained with me over a year.

Mr. Idington. Q. That is as attorney for Mr. Barton? A. As attorney for Mr. Barton and Mr. Redford.

His Lordship. It is dated the 14th April, 1875? A. Yes.

Q. Then it would be somewhere about the 1st May '75 it came into your hands? A. About that time.

Q. Do you know from whom you received it? A. I received it from Nichol.

Q. Why did you get it? A. Mr. Redford and Mr. Barton had arranged; I think the arrangement was that each of them should—that they should carry Nichol in equal amount, that their indebtedness should be made equal by the payment from one to the other of what the excess might be, and then they both instructed me to try and collect a couple of thousand dollars from Nichol if possible without suit. I saw him and thought his friends ought to assist him to that extent, and he said he would try, and he went away and in a week or two he came back and said he had not been able to raise any money. Then I made the other suggestion that instead of paying the cash that possibly if he could get his friends to endorse notes, and I prepared four notes for him of $500 each leaving the name blank as you see in that note, not writing in the name of the endorser, and gave him these four notes to get signed. He was away sometime, perhaps a couple of weeks and brought me back three of them. They were received in that way; whether as collateral I cannot recollect at all, or whether as payment, I cannot recollect. They remained in my safe until after this mortgage was taken.

By Mr. Idington. Q. Nichol was the only party to whom the note was given at first? A. Yes.

Q. Baechler had nothing to do with the transaction at all? A. Not for a year afterwards.

Q. And yet you say Baechler never heard of the note? A. Not that I ever heard of, not that I ever knew of.

Q. Even down to tne time you were crediting him on the mortgage? A. I think he had ceased at that time to have much interest in it.

Q. At the time he signed this agreement he was insolvent? A. Oh, yes, insolvent.

Q. It was practically a matter of no consequence what he signed? A. He never examined the agreement. He took my figures for it in signing that agreement of the 15th January '81.

Q. It was a desirable thing to get the property sold without costs? A. Yes.

Q. And he was quite willing you should sell the property and to facilitate your selling it held himself liable for anything you choose to say he was liable for? A. That was the position.

Q. At the time you got his covenant he was supposed to be quite good? A. Yes.

Q. That is the covenant in the mortgage? A. Yes.

I am of opinion that the effect of the transaction of the 4th April, 1876, without the consent or knowledge of Purdom and without any knowledge of Baechler of the existence of the note, was to discharge the plaintiff as surety for Nichol; that when Baechler discharged the mortgage of the 19th of January, 1872, for securing of which the note was held by Baechler, he thereby likewise discharged the note; and when Purdom was sued by Baechler he should have resisted payment: the mortgage having been discharged the note was thereby also discharged; the dealings between the parties changed the whole claim and all right to assert any claim on the note against the indorser ceased to exist, and therefore the payment by the plaintiff was a purely voluntary one as regards the defendant Baechler; therefore I think the Court of Appeal was right in restoring the judgment at the trial.

There is no evidence to show that Nichol ever authorised Redford and Barton to retain the note as collateral security for the debt in its altered form. I

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think the true inference to be drawn from the evidence is, that having obtained the additional security of Baechler's covenant payable at a shorter time than the note, he being proved to be at the time in quite good circumstances, might well account for the note not having been considered at all in the transaction or being entirely overlooked, and consequently did not enter into the calculation of any of the parties and formed no portion of the new arrangement but was treated as having served its purpose and as of no account in the new arrangement; it would be somewhat singular that a note not payable until the 17th of April, 1879, should be held as collateral security for a mortgage payable on the 7th of April, 1878, and as Mr. Macpherson shows nothing was said by either of the parties in reference thereto. Unless this is so I must confess it strikes me as somewhat extraordinary that a professional gentlemen who appears to have negotiated the whole transaction with reference to the note should receive and hold such a note and not be able to state whether he held it as a payment or as security, and should have allowed the new transaction to be entered into without consulting the indorser or in any way indicating to the parties that the note was to be held as a continuing security for the indebtedness secured by the new joint mortgage, but on the assumption that the note was not, or was not intended to be taken into account in the new arrangement the matter of the note might very well have escaped his memory.

At the time this note was given there was no partnership; it was to be used in payment of, or security for, Nichol's individual indebtedness to Barton and Redford secured by his mortgage to them; when the firm was formed an entirely new arrangement was entered into and the individual debt of Nichol became

a partnership debt in the new firm and the original mortgage was discharged and a new joint liability incurred, and for which a new mortgage security was taken creating an entirely different transaction. How is it possible to say that under such circumstances the liability of an accommodation indorser can be continued and he be made security without his consent for a joint indebtedness to which he never assented?

In the absence, then, of any evidence to show any request on the part of Baechler to become security or to pay this amount for him, or any facts from which such request can be inferred, or any evidence to show that the new arrangement was entered into with the consent of Purdom or that it was ever in the contemplation of the parties to the new arrangement that the liability of the accommodation indorser was to continue and become security for the new joint mortgage, and without any evidence, even, that McPherson held, or professed to hold, the note as collateral security for the debt secured by the new mortgage from Nichol and Baechler to Barton and Redford, I fail to see how the payment to the plaintiff can be looked on in any other light than as a voluntary payment.

Under these circumstances I think the appeal should be dismissed.

STRONG J.—I am of opinion that this appeal should be allowed. It appears to me that the plaintiff, the present appellant, was entitled to recover on several distinct and independent grounds Putting it merely as a voluntary payment, by Purdom, the appellant's testator, and assuming him to have been, as the appellant contends, no longer liable on the note, but considering it as a voluntary payment afterwards adopted by Baechler, as in fact it was, it seems clear, on plain principles of law, that the defendant is liable.

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An adoption of the payment by Baechler is clearly established by what took place on the 15th of January. 1881, when the three accounts *i.e.* (1) the account between Baechler and the mortgagees jointly and (2 & 3) the separate accounts between Baechler and each of the mortgagees (Barton and Hossie) showing the apportionment of the debt between the two latter, were stated and settled. In all three of these accounts Baechler was given credit for Purdom's payment. Moreover, on the foot of these accounts Baechler entered into the several covenants with Barton and Hossie which bear even date with the settlement of the accounts, in which covenants he agreed to pay the balance arrived at after crediting Purdom's payment. Baechler thus, clearly, got the benefit of the payment, and as he executed the covenants on the basis of the accounts stated between himself and the parties entitled to the mortgage in the three different forms before mentioned he thereby, beyond all question, adopted these accounts and assented to the credits therein given to him. This, by itself, is sufficient ground for reversing the judgment of the Court of Appeal, it being a well settled principle of law that a party who adopts a voluntary payment made by a third person on his behalf is liable in an action by the latter for money paid at the request of the debtor, the subsequent adoption warranting an implication of the request.

Secondly.—Mr. Justice Armour in the Divisional Court puts the Appellant's right to recover on a distinct ground, in which I also concur. This view of the case may be presented as follows :—

Nichol having sought Purdom's assistance in the way of a loan of money, Purdom, not finding it convenient to accomodate him with a loan, lent him, instead of cash, his credit in the shape of an accommo-

dation indorsement of the promissory note of the 14th April, 1875, for $500, payable four years after date. Purdom did not limit Nichol as to the use he was to make of this promissory note but left him free to use it in any way he thought fit, just as he might have used the cash if Purdom had been able to accomodate him with the loan first requested Having, thus, authority to deal with the note as he pleased Nichol, first of all, deposited it with Barton as a collateral security and afterwards, when the transaction of the 14th of April, 1876, took place, and Baechler as well as Nichol came under liability for the aggregate amounts of the debts of the latter to both Barton and Redford, Nichol allowed this note to remain as a collateral security in the hands of Barton and Redford for their consolidated debt, a disposition of it which was entirely within the authority as to its use which had been conferred on Nichol by Purdom.

Thus, it is simply the case of one of two joint debtors giving the creditors the note of a surety as a collateral security for the joint debt and the creditors afterwards realizing the security by enforcing payment from the collateral surety and giving credit on account of the joint debt for the payment so made. Surely in such a case there can scarcely be a doubt that the surety can recover, in the equitable action for money paid, against both of the joint debtors. So that, even if the transaction of the 24th February, 1877, when the deed of dissolution was executed and Baechler undertook to pay the mortgage debt, had never taken place Baechler would still, on the ground last indicated, have been liable to indemnify Purdom, whose money had gone to discharge Baechler's liability *pro tanto*, and who would, therefore, to the extent of his payment, have a good equitable claim to stand in the shoes of the creditors who had thus been partially satisfied by him.

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It is said, however, in answer to this, that Purdom was discharged on the 14th of April, 1876, by the novation resulting from the transaction which then took place. Granting, for the present purpose, that the legal effect of the transaction of that date was to operate as a novation still, as Purdom had no notice of the facts which are said to have constituted his discharge, it is plain, I think, just as Mr. Justice Armour puts it, that his payment under these circumstances is not to be considered a voluntary payment, but Purdom having paid in the *bonâ fide* belief of facts warranting the conclusion that he was still liable on the note it stood on precisely the same footing as if he had, in law, remained liable, in which case, the payment, having enured to the benefit of Baechler, he would, even without any assent or adoption of it, and that for the reasons before stated, have been liable to reimburse Purdom for the amount he had paid. The authorities referred to in the judgment of Mr. Justice Armour seem to me conclusive on this point.

Thirdly.—At all events, on equitable grounds Baechler must be held liable. Nichol, as before shown, had authority, as between Purdom and himself, to deal with the note, as he in fact did deal with it, by leaving it as collateral security for the consolidated debt of the two creditors, Barton and Redford, for which, as before stated, he and Baechler became jointly liable. Then, even though Baechler knew nothing about the disposition of the note, Purdom, on paying it, had a perfect right to be subrogated *pro tanto* to the securities held by the creditors paid by him, viz.: (1) to their rights and actions under and upon the covenant contained in the mortgage deed, and (2) to their rights as against the real security, the land. As to the latter—the land—the plaintiff cannot, in this action, to which the purchaser, Young, and his mortgagee (both of

them, probably, purchasers for value without notice) are not parties, have any relief; but under the first head the plaintiff is clearly entitled to relief, as a party entitled to be subrogated to the mortgagees' rights under the covenant in the mortgage, to the extent of the payment made by him. The only answer which, as far as I can see, can possibly be suggested to this is the state of the pleadings, but no difficulty need be felt on that score, as the Divisional Court expressly gave leave to amend the record in such a way as to adapt it to the facts in evidence.

The judgment of the Court of Appeal should be reversed and the judgment of the Divisional Court restored, with costs to the appellant in all the courts.

FOURNIER J.—I am in favor of dismissing the appeal and restoring the judgment of the late Chief Justice Cameron. I concur in the views expressed by Mr. Justice Osler in the Court of Appeal.

TASCHEREAU J.—I am of opinion that this appeal should be allowed with costs for the reasons given by my brother Strong.

GWYNNE J.—I also concur in the judgment of Mr. Justice Strong allowing the appeal.

Appeal allowed with costs.

Solicitors for appellant: *Park & Parson.*

Solicitors for respondent: *Idington & Palmer.*

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D. C. CAMERON AND W. MOFFATT JR. (PLAINTIFFS) ..... } APPELLANTS;

AND

PAXTON, TATE & CO. (DEFENDANTS)..RESPONDENTS.

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

Principal and agent—Contract by agent of two firms—Sale of goods for lump sum—Excess of authority.

An agent of two independent and unconnected principals has no authority to bind his principals or either of them by the sale of the goods of both in one lot, when the articles included in such sale are different in kind and are sold for a single lump price not susceptible of a ratable apportionment except by the mere arbitary will of the agent.

There can be no ratification of such a contract unless the parties whom it is sought to bind have, either expressly or impliedly by conduct, with a full knowledge of all the terms of the agreement come to by the agent, assented to the same terms and agreed to be bound by the contract undertaken on their behalf.

APPEAL from a decision of the Court of Queen's Bench, Manitoba, setting aside a verdict for the plaintiffs and ordering a non-suit.

The plaintiffs, Cameron & Moffatt, wishing to equip a saw mill, made a contract with a firm of Muir & Co. for the necessary plant. Muir & Co. were agents for two firms, Doty & Co. manufacturers of engines and engine machinery, and the defendants Paxton, Tate & Co. manufacturers of saw mills and saw mill machinery, under separate and distinct authorities, and a contract was made between the plaintiffs and Muir & Co. to supply, for a lump sum of $6,000 to be paid partly in cash and partly in notes, the power and the saw mill

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

(Mr. Justice Henry heard the argument in this case but died before judgment was delivered.)

and machinery. The agreement was signed by Muir & Co. agents for Doty & Co. and Paxton, Tate & Co. Subsequently Muir & Co. by letters arranged separately with the firm of Doty & Co. for the saw mill and the respondents for the machinery.

The power and machinery were supplied and Muir & Co. having received the stipulated price paid part of it to Doty & Co. for the power and arranged with the defendants as to amount to be paid them, Muir & Co. retaining for themselves the cash payment. The machinery supplied by the defendants was, however, found to be defective, and the defendants endeavored to remedy the defects, but failed to do so to the satisfaction of the plaintiffs, who brought an action for damages sustained by breach of the contract to supply machinery of a stated capacity. A verdict for $2,000 damages was rendered for the plaintiffs which was set aside by the Court of Queen's Bench and a non-suit ordered on the ground that Muir & Co. had exceeded their authority by making the contract on behalf of two principals for a lump sum. The plaintiffs then appealed to the Supreme Court of Canada.

Robinson Q.C. for the appellants.

An agent can act for more than one principal, and as to the law of this case there is no difference between a factor and an agent to procure sales. Story on Agency (1); Wharton on Agency (2); *Corlies* v. *Cumming* (3).

If the defendants had objected to the act of their agent when it first came to their knowledge the plaintiffs would have had difficulty in enforcing their contract, but the defendants ratified the contract by accepting the notes and putting in the machinery and cannot now set up want of authority in the agent.

(1) 9 Ed. ss 38, 179. (2) Sec. 764.
(3) 6 Cowen (N. Y.) 181.

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Moss Q.C. for the respondents. It cannot be said that there was any ratification for the defendants knew nothing of Doty & Co.'s connection with the contract. If the defendants are liable on this contract they would be answerable for a breach by Doty & Co. This shows that Muir & Co. could not bind the defendants by such a contract.

This is an action for breach of warranty which will not lie because the property had not passed to the plaintiffs when the action was begun, the contract providing that it should not pass until paid for. *Frye* v. *Milligan* (1); *Friendly* v. *Canada Transit Co.* (2); *Tomlinson* v. *Morris* (3).

Sir W. J. RITCHIE C.J.—I think the evidence clearly discloses a contract between the plaintiffs and the defendants through their agent, and adopted by the defendants and acted upon by both parties, and for which the defendants received from the plaintiffs large payments. A clear breach by the defendants of such contract was shown, in fact admitted throughout by the defendants without any question being raised as to their obligation to the plaintiffs for its fulfilment, all of which the correspondence between Cameron & Co., and Paxton, Tate & Co, abundantly demonstrates.

I cannot discover that Muir & Co., in acting for the two firms of Doty & Co. and Tate & Co., bound either firm beyond the goods and machinery each was to deliver; in other words the contract with Muir was not intended to make Tate & Co. liable for the performance of Doty & Co.'s undertaking or *vice versâ*; the price each was to receive was entirely independent of the other, and separate payments appear to have been made to each party irrespective of the other and separate notes appear to have been made out and delivered to the two firms respectively.

(1) 10 O. R. 509. (2) 10 O. R. 756.
(3) 12 O. R. 311.

The correspondence shows that Tate & Co. were informed that Doty & Co. were to supply the motive power while they were to supply the mill, &c. I think the correspondence cannot be read without being forced to the conclusion that the intention is most clearly shown that there should be, and was, throughout the whole, a direct privity of contract between the plaintiffs and the defendants, and I can find nothing to justify the conclusion that Muir & Co. bought the goods from the plaintiffs and resold them to the defendants; on the contrary, I think the jury were fully justified on the evidence in coming to the conclusion that the contract was made and entered into between the plaintiffs and the defendants through Muir & Co. their duly authorized agents in that behalf.

The defendants fixed the price of the machinery and the evidence very clearly shows that they looked to the plaintiffs for its payment, and not to Muir & Co. their agent. Doty & Co. appear to have performed their contract and were paid, and I can see no good reason why Tate & Co. should not perform theirs.

The only difficulty in my mind has been as to the amount of damages the plaintiffs are entitled to recover for such non-fulfilment on their part of the contract, but the case seems to me to have been very fairly left to the jury, and I can find no sufficient grounds for disturbing their finding.

Under these circumstances I think the appeal should be allowed.

STRONG J.—This is an appeal from a judgment of the Court of Queen's Bench of Manitoba, making absolute a rule for a non-suit in an action brought by the appellants against the respondents in respect of an alleged breach of warranty said to be contained in a contract for the sale of a set of machinery for a saw

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mill. The facts, so far as they are material to the present appeal, may be stated as follows: In February, 1884, the appellants, who, together with a Mr. Caldwell (since dead), were in partnership as lumber manufacturers, had had a quantity of saw logs on the shores of the Lake of the Woods and in the neighborhood of Rat Portage, which they intended to cut up at Rat Portage, for which purpose they proposed to erect a saw mill there. In order to procure the necessary machinery for this mill the appellants applied to Mr. Robert Muir, who carried on business as a machinery agent or broker at Winnipeg, and who was the agent, under separate and independent authorities, of the respondents, who were manufacturers of mill machinery at Port Perry, in Ontario, and also of the John Doty Engine Company, a company engaged in the manufacture of steam engines and steam machinery at Toronto. The authority under which Muir acted for the respondents was in writing and was as follows:

PORT PERRY, ONTARIO, 5th July, 1883.

To ROBERT MUIR, ESQ., Machinery Broker,
P. O. Box 584, Winnipeg, Man.

Dear Sir,—We hereby agree to give you the sole agency for our circular saw mills, shingle machines, turbine water wheels and mill machinery, in Keewatin, Manitoba, and N. W. Territory. You are to sell by price lists used by us upon which we will give you 12 per cent. commission on all the above excepting mill machinery, upon which we pay 5 per cent. commission. Terms of sale to be one-half cash or a reasonable cash payment upon delivery to purchasers, balance on a credit of six months and not over one year with satisfactory security. You are to use your best endeavors to sell on short time, all notes to draw seven per cent. interest per annum. While selling for us you are not to sell for any other firm. Goods as above mentioned, excepting when we cannot fill your orders, in such cases you are at liberty to get from others. You are to use a reasonable diligence in pushing the business and advancing our interest by advertising, &c., &c. We will in all practicable cases direct parties to you to close contracts. We will do all we can to make sales for you and will pay the commission as above specified on all goods ordered, excepting large contracts subject to special commission. You to

agree to accept drafts for any goods remaining in stock, with the privilege of making return drafts for what goods remain in stock when said drafts mature. Where an order is lost through our not shipping in time agreed upon we will pay you a half commission on said sale.

PAXTON, TATE & CO.

The negotiations with Muir resulted in a contract, entered into on the 8th of February, 1884, for the sale by Muir to the appellants of the machinery for the saw mill and also of the engine and machinery for motive power for working it. This contract is contained in two letters (exhibits 7 and 8) which were taken as proved at the trial and which are in the following words:—

WINNIPEG, 8th Feb., 1884.

ROBERT MUIR & Co.,

Agents for John Doty Engine Co. and Paxton, Tate & Co.

Sir,—Furnish us circular saw mill, saw not included, 240 h. p. boilers, 175 h. p. engine, 1 Stearn's double edger, 1 slab saw, 1 cut off saw, 10 live rolls, 1 bull wheel rig without chain, 1 steam pump, 3 by 5 cylinder, necessary shafting, hangers, boxing and as per your letter of 8th February, or to-day such as made by and deliver the same for us at Winnipeg about the 1st day of April, 1884, for which we agree to pay the sum of six thousand dollars on delivery in payment as follows:—Cash, a satisfactory note for $———, due 188—, with interest at —— per cent. A satisfactory note for $———, due 188—, with interest at —— per cent.

We further agree to furnish satisfactory security if required. We are to have immediate possession and use of the articles, but the property therein is not to pass to us until full payment of the price, and of any obligation given therefor, or for any part thereof. If we make any default or if the property is seized for debt or rent, the whole amount of the notes is at once to become payable, and to bear interest at ten per cent. per annum till paid, and you may resume possession and sell the articles towards paying the unpaid price or balance thereof. This order and your acceptance thereof constitute the whole contract between us, and there is no other agreement between us respecting these articles but what is herein expressed.

CALDWELL & MOFFAT.

EXHIBIT 8.

WINNIPEG, MAN., 8th February, 1884.

Messrs. MOFFATT & CALDWELL, Winnipeg:

Gentlemen,—For the sum of six thousand dollars we will deliver to you f.o.b. in Winnipeg the following machinery, viz.:—One circular

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saw mill to cut logs 30 feet long, saw not included, with all necessary shafting, pulleys and boxing, 1 Stearn's double edger, 1 slab cut off saw with four saws, 10 live rolls 9 by 20 friction bull wheel rig without chain, steam pump, Northey's, with water cylinder 3 by 5, shafting, hanger, boxing and pulleys to drive (two) boilers of 40 h.p. capacity each, one engine of 70 h.p. capacity, 60 feet of suitable smoke stack. This mill to be capable of cutting about 30,000 feet of lumber per day of 12 hours; the whole to be built in a first class workmanlike manner of good material. The chain for jacker is worth $1 to $1.50 per foot, according to weight.

Yours truly,

ROBERT MUIR & CO.,

Agents for John Doty Eng. Co. and Paxton, Tate & Co.

P.S.—The above does not include saw, belting or chain.

Immediately upon the contract being completed, Muir ordered the mill machinery from the respondents and the steam engine and the machinery connected with it from the John Doty Engine Company for separate prices, the orders so given being entirely independent of and unconnected with each other. The respondents' firm, as well as the John Doty Engine Company, accepted the orders respectively addressed to them, and in fulfilment of them manufactured and forwarded the machinery and engine to Muir & Co. at Winnipeg, who sent the same to the appellants' firm at Rat Portage. The price agreed to be paid by Muir & Co. to the Doty Engine Company and to the respondents respectively did not amount in the aggregate to the $6,000, which, as stipulated in the letter of the 8th of February, was the price to be paid by the appellants to Muir & Co. The price of $6,000 which was the amount agreed to be paid by the appellants to Muir & Co. for all the machinery, as well for the engine and machinery for motive power obtained from the John Doty & Co. as for the mill machinery furnished by the respondents, was settled by the appellants by a payment to Muir & Co. of $2,000 in cash and the delivery to them of promissory notes for the residue of $4,000. Some of these notes were handed by Muir & Co. to

the respondents, to whom they were made payable, and the others were delivered to the John Doty Company, but the whole of the $2,000 paid in cash was retained by Muir & Co., and no portion of it was paid over by them either to the respondents or to the Doty Company, nor, so far as the evidence shows, was any distribution of it between the respondents and the John Doty Company made by Muir & Co., even in the way of apportioning it as credits in account. The machinery was erected and the mill got into working order some time in July, 1884, but the appellants very soon after they had begun to saw complained that the mill was of inadequate capacity to cut the quantity of lumber stipulated for, and that it was in other respects not according to the contract. Direct negotiations for remedying the defects in the machinery of the mill were then entered upon between the appellants and the respondents, and the respondents then proposed to furnish new machinery and to enter into a new and supplementary contract for that purpose, but these negotiations never reached the stage of actual contract, and they were wholly broken off after the respondents had sent up to Rat Portage some new and additional machinery with instructions that it was not to be delivered to the appellants until certain payments were made, which payments the appellants refused to make, whereupon this proposed new arrangement came entirely to an end, and the machinery which had been forwarded was retained by the respondents. The appellants soon afterwards, and in August, 1885, commenced this action for a breach of the contract of February, 1884. The declaration as originally framed contained three counts, besides the common counts, to which an additional count was afterward added under a judge's order, but all these counts were for various breaches of the origi-

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nal contract of February, 1884, which the declaration averred to have been made with the respondents. The defendants pleaded a variety of pleas, but it is sufficient for the present purpose to say that the first plea was an express traverse of the allegations in the declaration that the contract set out in the different counts was one which had been entered into with the respondents. At the trial, which took place before the present Chief Justice of Manitoba, a number of witnesses were examined, the evidence being principally directed to the question of the sufficiency of the mill and to the damages. There were, however, four witnesses examined who were able to speak as to the contract and as to the subsequent proposals to furnish new machinery, viz., the appellants Messrs. Cameron and Moffat, Mr. Dryden, one of the respondents, and Mr. Muir, with whom the contract of February, 1884, was actually made, as already mentioned. None of this evidence established the existence, *de facto*, of any contract other than that entered into with Muir at Winnipeg, and which is contained in the two letters bearing the date of the 8th of February, 1884, already set forth. At the trial the defendants' counsel, at the close of the plaintiffs' case, moved for a non-suit upon several grounds, one of them being that there was never any privity of contract between the appellants and the respondents. At page 121 of the printed case we find this objection thus distinctly stated by the counsel for the defendants in these words:

The contract at most is only a contract of these plaintiffs with Muir & Co., and not a contract with these defendants. If we have made any contract whatever it is a contract with Muir to deliver f. o. b., at Port Perry at certain prices, and Muir's contract was not the same with these plaintiffs, but was a contract to deliver free at Winnipeg, showing that they are not the same contract. We never agreed to deliver at Winnipeg; we agreed to deliver at Port Perry, and therefore there are two contracts, and if we are answerable to any one it is only to Muir.

That would be, in effect, that Muir in this transaction was not acting as our agent, but was acting as a seller himself, to these plaintiffs.

The learned judge refused to non-suit, but reserved leave to the defendants to move in term, and the case proceeded with the result that there was a verdict for the plaintiffs for $2,500. Subsequently the respondents moved the court *in banc* for a non-suit on the leave reserved, or for a new trial, and the court after argument ordered a non-suit to be entered. The learned judge who delivered the judgment of the court, Mr. Justice Killam, expressly rests the decision upon the ground already mentioned as having been taken on the motion for a non-suit at the trial, viz., that there never was any contract such as that sued upon in existence as between the appellants and the respondents. It lies therefore upon the appellants, who now impugn the correctness of this judgment of the Court of Queen's Bench, to show that the specific ground thus taken is erroneous before they can entitle themselves to a reversal, and we must therefore proceed to inquire whether they have succeeded in doing this.

The materials upon which we must determine whether there ever was, either originally or by ratification, a contract between the parties, consist of the evidence of the depositions of the four witnesses already named, and some documentary evidence, comprising the letters of the 8th February, 1884, which contain the original contract with Muir and certain letters referred to in the appellants' *factum* which passed between the appellants and the respondents when they came into direct communication after the mill had been tried and found defective. There cannot be any doubt or question that the written contract contained in the letters signed by the appellants and Muir respectively and dated the 8th of February, 1884, (exhibits 7 and 8) was on its face a

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contract exclusively between Muir as vendor and the appellants as purchasers. Then this contract was one for the sale of the engine and the machinery required for the power and the mill machinery in one lot for one single lump price. But although this written contract on its face purports to be, and according to the only admissible construction of it is, one between the appellants and Muir exclusively, yet according to the principles laid down in the well known case of *Higgins* v. *Senior* (1) it was competent for the appellants to establish by parol evidence that, beyond and in addition to the liability of Muir, the respondents were liable as principals on whose behalf the contract had been entered into. But in order to do this it was, of course, requisite that the appellants should show, not only that Muir intended to bind the respondents, but also that he either had authority to enter into a contract on their behalf, identical in terms with that of the 8th of February, 1884, or that, if such a contract had been originally entered into without authority, it had been subsequently ratified by those whom Muir had assumed to represent and to bind by it. Then neither of these conditions has been fulfilled by the appellants. The terms of the authority which had been conferred on Muir by the respondents are to be found clearly stated and defined in the letter of the 5th July, 1883, (exhibit 9) already set forth, but they contain nothing which empowered him to enter into such a contract as that contained in the letters of the 8th February, 1884, whereby the goods to be furnished by the respondents and those of the John Doty Engine Co., are combined in one lot and agreed to be sold for one single, indivisible price. As regards the John Doty Engine Co., no written authority from them to Muir has been put in evidence, and as regards both the last

(1) 8 M. & W. 834.

mentioned company and the respondents the oral testimony is destitute of anything to show that such authority as Muir must have had, in order that he should have been authorized to bind his principals by the terms of the agreement actually made, was ever conferred upon him by either of his constituents.

Next, as to ratification. In order to bind the parties, in whose name and behalf an unauthorized person has assumed to enter into a contract, by subsequent recognition and adoption it must be shown that either expressly, or impliedly by conduct, the parties whom it is sought to bind have, with a full knowledge of all the terms of the agreement come to by the person who assumed to bind them, assented to the same terms and agreed to abide by and be bound by the contract undertaken on their behalf. But can it be said that the evidence in the present case, either oral or documentary, shows such a ratification? The answer must be that beyond all question it does not. In order to make out a ratification here it would be essential to show that both the respondents and the John Doty Company had assented to the terms of agreement and adopted the contract contained in the letters which had been interchanged by Muir and the appellants, by which as already shown all the machinery described in the letters, as well that to be supplied by the one firm for the motive power, as that to be furnished by the other for the saw mill, were included in one joint sale for one single price and by which each firm further agreed to warrant all the machinery (not only that supplied by itself, but also that to be supplied by the other firm) and its fitness and sufficiency for the purposes specified in the contract. The evidence entirely fails to establish any such joint adoption and it is impossible to point to anything in it indicating that the respondents ever assented to any such terms

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or ratified any such contract. Indeed there is nothing to show that the terms of the contract between Muir and the appellants were ever communicated to or brought to the notice of the respondents or the John Doty Company, so that each firm so far from intending to become joint vendors with the other was, as we must assume, entirely ignorant of the essential fact that Muir had included the goods of both in one contract of sale, and had agreed to such provisions that the effect of a ratification would have involved the unreasonable consequence that each manufacturer would have become a warrantor of the goods of the other.

The case which we have before us for decision may be made even more plain by a simple illustration. The owner of a carriage sends it to a repository for sale and the owner of a horse sends it to the same repository for the same purpose, the two owners having no connection but each acting independently of the other. Further, each owner gives authority to warrant his own property. The commission agent to whom the property is thus entrusted for sale thinks fit, it may be with a view of making a more advantageous sale, to include the horse and carriage in one lot and to sell them together for one price and with a general warranty of both. Could it be said in such a case that, apart from any evidence of custom or usage, the agent had properly executed the authority conferred upon him, and that the owner of the carriage was bound by the warranty of the horse and the owner of the horse by the warranty of the carriage ? And would each owner be bound to accept such proportion of the price as the agent might think fit to assign to him ? And further, if the owner of the horse were to accept such portion of the price as the agent might choose to pay over to him without informing him how the sale had really been effected, could it be said that he thereby ratified

the unauthorized mode of selling and bound himself not only to make good the warranty of his own horse but that of the other man's carriage as well ? In this plain case every one would say at once that such conclusions would be manifestly unjust and entirely inadmissible. Then in all essential features the case supposed is indistinguishable from that now before us.

The authorities referred to in the appellants' *factum* do not support the proposition for which they were cited, viz., that such a sale as that made in the present case was within the implied powers of the agent, although no express authority to that effect had been conferred. The case of a sale by a factor referred to in the passages quoted from Story on Agency and Wharton on Agency, and which was the subject of decision in the case of *Corlies* v. *Cummings* (1), where it was held that a factor could, where such a mode of dealing was sanctioned by the usage and custom of the market in which he dealt, bind two independent and unconnected principals by the sale of the goods of both in one lot, can manifestly only apply where the goods of both principals are commodities of the same kind, and are sold either at a ratable price, or at a price susceptible of a ratable apportionment, as a quantity of wheat at so much a bushel, or of flour at so much a barrel, or (as was the actual case in *Corlies* v. *Cummings*) of cheese at so much a hundred weight—all cases in which such staple merchandise having been sold in a lot for one fixed price, the factor or agent can easily apportion the price between his principals according to the quantity of goods each may have contributed to the common lot. In such cases the principals are not entirely dependent on the mere arbitrary discretion of the agent for the portion of the price which each is to receive, although they do certainly even in that case trust to the fairness

(1) 6 Cowen (N. Y.) 181.

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and good faith of their agent not to prejudice them by allotting their goods with others of inferior quality; and this last consideration shows that, even as applied to goods such as have been just referred to, this mode of selling can only be admissible, in the absence of express authority, where it is warranted by a recognized and well established mercantile usage. But where the articles included in the sale by the agent are different in kind, as in this case, and as in the case put of the horse and carriage, such a mode of executing the agent's authority cannot possibly be otherwise than *ultra vires*, for the simple reason that there is no principle or rule upon which he can apportion the price between his constituents, so that, if it is distributed, the division must be according to the mere arbitrary will of the agent to which it is not to be inferred that the principals ever intended to submit themselves for such a purpose. Applying these considerations to the facts of the case now in appeal, the inevitable conclusion is that Muir had no authority, either express or implied, to bind the respondents by such a contract as that he entered into with the appellants, and further that nothing was ever done by the respondents which could amount to a ratification of such a contract, even assuming that the evidence shows that it was Muir's intention, so far as he had it in his power to do so, to bind his principals in the terms of his own agreement of the 8th February, 1884, a question, which in the view taken of the other points, it is not worth while to consider. Therefore, save in so far as any new rights and obligations may appear to have been created in the course of the direct negotiations which sprung up between the appellants and the respondents subsequent to the delivery and erection of the machinery, there never was any contract between them such as the appellants have set

forth in their declaration, but the agreement of the 8th February, 1884, was an executory contract of sale by which Muir exclusively agreed to sell to the appellants all the machinery mentioned for $6,000; and it was in order to carry out this agreement with the appellants that Muir subsequently became himself, in his own name and in his own behalf, in separate lots and for separate prices, the purchaser from the respondents and the Doty Company of the two sets of machinery which he had thus agreed to sell to the appellants. Further, this view is confirmed by what was pointed out by the defendants' counsel at the trial, that whilst in the agreement between Muir and the appellants the former is bound to deliver f. o. b. at Winnipeg, the respondents, in their contract with Muir, only undertook to deliver at Port Perry, thus showing, as strongly as anything could, that the two contracts, containing different terms on such an important point as delivery, could not be parts of the same whole, but were, according to the foregoing conclusion, separate and distinct agreements between different parties.

It follows that for any breach of the agreement with the appellants they should have sued Muir, and not the respondents between whom and themselves there was no privity of contract.

Of course if there really had been separate prices for the two sets of machinery, that required for the saw mill and that for the steam power, it might have made no difference that in the written contract with Muir a single lump price was alone named, for in such a case it might have been said that, whilst the written contract with Muir, the agent, comprised all the machinery and bound him accordingly, there was behind this written contract two other distinct and several contracts made by parol through the agency of Muir, but with his two principals, which latter con-

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tracts having been executed by the receipt and acceptance of the goods, thus taking them out of the statutes extending the provisions of the statute of frauds to contracts for the sale of goods not in *esse*, were binding though not in writing. But there is no express evidence of any such distinct parol contract with the respondents, nor are there any facts in evidence which could properly have been left to the consideration of the jury as warranting the implication of a contract of this kind. From first to last there never was any division of the single price of $6,000 in such a way that separate prices could be assigned to the two different sets of machinery to be furnished by the respondents and the Doty Company respectively; and no principle can be suggested on which, as between the appellants and respondents, it can be said that there was a sale or an agreement for a sale of the saw mill machinery by itself for a price which the appellants were to pay. Of the whole price of $6,000 for both sets of machinery $2,000 was paid in cash by the appellants to Muir, and for the difference notes were given. As to the latter portion of the price there certainly was a division and an appropriation of it between the two vendors, but as to the sum paid in cash to Muir no division of it was ever made and no principle has been indicated or even suggested on which it could be divided. I have carefully examined the depositions of the two appellants, of the respondent Dryden, and of Mr. Muir, the only witnesses who were conversant with the facts bearing on this point, and they all fail to give any clue to a solution of the difficulty. The documentary evidence is equally deficient in this respect. Any division of the cash part of the price would, therefore, have been purely arbitrary. Therefore, even if we assume that it was open to the appellants to have established by parol evidence that there was originally a separate con-

tract for the mill machinery between themselves and the respondents, we must hold that they have failed to do so, for the reason that it is essential to a contract of sale, executed or executory, that there should be a price either ascertained or ascertainable to be paid by the vendees and received by the vendors, and in the present case it is apparent that there never was any such price as between the respondents and the appellants, the price paid to the former by Muir for the goods supplied by them having been the amount of the notes which he procured the appellants to make and handed over to the respondents and which did not represent the whole price which the appellants were to pay and did pay to him. Further, it may well be doubted, even if such a parol contract distinct from the written contract with Muir could have been implied from the surrounding circumstances, whether it would have been taken out of the provisions of the act already mentioned, inasmuch as the acceptance and receipt of the goods would have been referable, not to any separate contract with the respondents, but exclusively to the written agreement with Muir, as would have been apparent from the price actually paid. Next, it cannot be said that there was any new contract arising out of the subsequent direct negotiations between the appellants and respondents as to making good the alleged defects in the machinery. The offers and counter offers as to supplying new machinery never ripened into a contract, and there is nothing which I can find, either in the oral evidence or the correspondence, which shows that there was between the parties any binding contract or agreement operating retroactively to convert the original contract of the appellants with Muir into a several contract for an ascertained price or consideration with the respondents. To establish this, everything which is required to make

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out what is termed "novation" would have been essential, and therefore some new consideration would have been indispensable; no such new consideration can, however, be pointed out.

As regards the passages in the correspondence between the parties, in which the respondents refer to a contract between the appellants and themselves and the appellants similarly to a contract with the respondents, it is to be observed that their admissions could not by themselves have been properly left to the jury, for they show nothing more than that the parties had adopted erroneous opinions of their legal obligations and rights, and consequently the letters referred to could not possibly have had the effect of creating liabilities not otherwise existing.

Lastly, I am of opinion that there was no evidence to show that in the course of the negotiations for a settlement the respondents did or said anything to estop themselves from insisting on the defence which they distinctly put forward at the trial and afterwards successfully urged in term, viz., that there never was any privity of contract between them and the appellants; indeed it is hard to see in the present state of the pleadings how such an answer to this defence could possibly have been admissible.

My conclusion is that the non-suit was in all respects right and that this appeal should be dismissed with costs.

FOURNIER J.—I concur in the reasons given by the Chief Justice for allowing the appeal.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed for the reasons given by my brother Strong.

GWYNNE J.—The respondents who are founders and machinists trading under the name of Paxton, Tate &

Co., in manufacturing saw mill machinery at Port Perry in the Province of Ontario, in reply to an application made to them by Robert Muir, of the firm of, or trading as the firm of Robert Muir & Co., at Winnipeg in the Province of Manitoba, as jobbers and machinery brokers, appointed the said Robert Muir as their agent by a letter dated the 5th July, 1883, which is as follows (1):—

On the 21st November, 1883, Mr. Muir addressed and mailed to the defendants a letter of that date, which counsel for the defendants admitted to have been received by them, and which as read from Mr. Muir's letter book is as follows:

WINNIPEG, 21st November, 1883.

Messrs. PAXTON, TATE & Co., Port Perry:—

Gents,—I have written you a note in pencil *re* saw mill, I now give you a description of mill so that no mistake will arise. The parties to purchase are connected with the Imperial Bank here, they want a mill that will cut 30,000 feet per day of eleven hours to cut timber 30 feet long. The mill to include one double edger, one slab saw, one butting saw, the necessary shafting, pulleys, hangers, &c., required to drive them, also live rolls to carry the timber from saw as per Stearn's circular, also bull wheel for endless chain. The mill to be complete, excepting the saw, endless chain and belting, a price per foot to be given for chain. The mill would be driven by 80 h. p. boiler, with 65 h. p. engine. In my former letter I asked you to wire me a price for the mill, giving the net price to me f. o. b. I can then add my commission; if any mistake has arisen you can correct by wire. The mill would require to be first-class. The building is up and the plan could be furnished.

Yours truly,
ROBERT MUIR & CO.

The reply to this letter was not produced, but that there was one appears from a letter of 12th December, 1883, from Paxton, Tate & Co. to Muir & Co., relating to other matters, in which the following passage occurs:

In regard to the saw mill outfit you were writing us about we found on examining Stearn's catalogue you sent us that their live rolls were made of iron and much more expensive than we first included in

(1) See p. 626.

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our tender, hence our second telegram set you right. What is being done about the order?

The contract sued upon was contained in two letters dated the 8th February, 1884, one from Robert Muir & Co., written by Mr. Muir to Messrs. Moffatt & Caldwell and the other from the latter to the former. The original letters were not forthcoming, but secondary evidence was given of them. That written by Mr. Muir taken from his letter-book was as follows (1) :—

The answer to this letter was written upon a printed form of orders, of Muir & Co's., one of which Mr. Muir produced and filled in, with exception of blanks as to payment, as to which he stated that the agreement was that $2000 should be paid in cash and the balance on time in three payments at four, five and six months, but in what sums respectively did not appear. Nothing, however, turns upon this.

The reply as filled in by Mr. Muir was as follows (2) :—

Neither this contract or a copy of it was ever sent to the defendants, but on the 11th and 13th February, 1884, Mr. Muir wrote to them the following letters :—

WINNIPEG, 11th February, 1884.

Messrs. PAXTON, TATE & Co., Port Perry :—

Gents,—Have taken an order for saw mill from Messrs. Caldwell & Moffatt. It is the machinery we wrote you about on November 21. The mill is to be capable of cutting 30,000 feet of lumber per day of eleven hours. The machinery is to include circular mill with carriage to cut logs 40 feet long, without saw, one Stearn's double edger, one slab cut off saw (4 saws), one butting saw, 10 live rolls 9 by 20, and driving gear friction bull wheel, viz., without chain, all necessary shafting, pulleys and boxing. The whole to be built in a first-class workmanlike manner of good material. Will send the length of jack chain in a few days, also size of saws required. This mill is to be an A 1 mill. It will be placed at Rat Portage among mills cutting 100,000 per day, manufactured by Sterns, E. Allis & Co., and we want it to give a good account of itself. Make it heavy. See that the bull wheel is heavy enough; the butting saw, not an emery and garland trimmer, but a common butting saw. Let us

(1) See p. 627. (2) See p. 627.

know the price of butter and we will try and get the difference between it and the trimmer. This would make a much better rig. The edger now here will do for this mill. Arrange every thing in good shape for work. Will send plan of building now up, so that you can work from it. I have contracted for the complete mill delivered at Winnipeg. We have not been able to get a cash payment much larger than to cover freight. We have cash to pay for a steam pump. They will pay cash for saws and chains. The payments are four, five and six months from delivery at Winnipeg. The customers are good. They have a timber limit from the Imperial Bank at a low rate. Doty promised them six months on the power when we first made the offer. Have had to cut down, or lose this contract, to get it. The opposition was strong. We have agreed to deliver here by April 1. You will need to ship by March 1, and on no account later than 15th. The carriage should be made with platform for men to ride on. Let us know the weight of what you will ship and if it will go on one car. Doty furnish the power—80 h. p. boiler, 70 h. p. engine. They will add more machinery. Let us have a description of lath machine on list $100 and weight.

Yours truly,

R. MUIR & CO.

WINNIPEG, 13th February, 1884.

Paxton, TATE & Co., Port Perry:—

Gents,—The dogs for mill ordered were to be lever dogs. Moffatt insisted upon them. Kindly send me a price list of the different items composing this mill—that is net to us, also an estimate of probable weight of shafting, pulleys, boxing, &c., so that we may see how we stand. If we can afford it we will reduce the price of lumber trimmer so that we may get it in and make a complete outfit.

Yours truly,

MUIR & CO.

On the 25th February, 1884, Paxton, Tate & Co. wrote a letter of that date, in reply to the above, addressed to Messrs. Robert Muir & Co., as follows:—

Gents,—Your letters duly came to hand, and we would have replied promptly, but for delay in getting the plan, which only reached us Saturday afternoon. Now are we to follow Mr. Hackett's plans? If he is to do the work we presume we must work the machinery as he has drawn it out. Better telegraph at our expense who the millwright is to be, and his post office address, as we wish to get a few more particulars. We are not quite sure whether we can get all on one car, we are afraid we cannot. We will make the Lane mill, left hand, and be working at bull wheel rig in the meantime. But be sure and let us know the millwright's name and address as soon as it

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is possible to do so. Mr. Doty, jun., has gone up to see about changing the pulleys, &c., so keep us posted about the change if any. We will write you again as soon as we understand the plan better. Herewith find picture of lath mill, weight about 1200 lbs. It is liked much better than a Waterous machine. We can make a lumber trimmer, say with two saws, thus allowing room to shift the board before it reaches the second saw, so that you can adapt it to any length of boards, price, say $150. How would that do in place of an Emery and Garland trimmer? The plan shows 19 or 20 live rolls, but you only call for 10. Train just in, must close.

Yours, &c.,

PAXTON, TATE & CO.

No answer to this letter is produced unless a letter of March 18, 1884, is an answer to it. Muir having upon the 17th March arranged with the plaintiffs to make certain alterations in the contract of the 8th February, namely, to substitute a trimmer for the cut off saw and the slab saw, wrote to Paxton, Tate & Co. the 18th March as follows :—

Gentlemen,—Messrs. Caldwell & Moffatt have decided to leave out both slab and cut off saws, and in place put in an Emery & Garland trimmer to cut 12, 14, 16 feet. They are going to use the trimmer to cut what slabs they need to cut. The saws are to be solid tooth medium in guage, to be 52° and 54°, one of each. The timber is small—have teeth say 3 inches from point to point. They also want us to order the belting. Will you please take the sizes from plan giving us a list of belts and lengths? We can purchase cheaply here, but there may be some sizes that will not be in stock. We have another car leaving Doty's about April 1, and can order any belting we cannot get here. Caldwell & Moffatt have decided not to put in the shingle and lath mill at present. Ship the car *viâ* Grand Trunk R.R. to Chicago, then by Albert Lea route. Bill to us at Rat Portage as we pass customs here and forward. We presume you can put all on one car.

Yours truly,

ROBERT MUIR.

Now Mr. Muir, in his evidence, stated that what he had asked the defendants to forward to him as to quotations was—that they should quote prices of the several articles they should supply free on board at Port Perry and that the order would be filled when put on board there free; he said further that the

defendants did supply him with their prices for the articles supplied by them as asked for, which, as appears by the letter of the 13th February, 1884, was "net" to them, Muir & Co. Mr. Moffatt, one of the plaintiffs, in his evidence stated that the plaintiffs knew nothing about the detailed prices of any of the articles supplied, whether those which were supplied through Doty or through the defendants, that they knew nothing about what portion of the articles to fulfil the contract they made, as contained in the letters of 8th February, 1884, would be supplied by Doty or what by defendants—that they had nothing to say to apportioning the $6,000 they agreed to pay for the whole work between Doty & Co. and the defendants. In short his evidence amounted to this, that they paid Muir & Co. in cash, as they had agreed, $2,000 of the disposition of which the plaintiffs knew nothing and that they signed six notes which Muir had drawn in favor of Paxton, Tate & Co.

The plaintiffs having declared upon a contract alleged to have been made between them and the defendants for the specific articles mentioned in the declaration, which articles as delivered to the plaintiffs they contend are not conformable to the contract, and the contract relied upon being that contained in the letters of the 8th February, 1884, the case seems to be resolved into a simple question of construction of those letters. If they do not contain in them the contract declared upon, that is to say, a contract between the defendants and the plaintiffs for the sale and delivery to the plaintiffs, by the defendants, of the specific articles mentioned in the declaration, the nonsuit ordered by the Supreme Court of Manitoba is correct, and no question of ratification can arise, for if the true construction of the contract as contained in the letters be that it is a single contract between the

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plaintiffs and Muir & Co. for all the work therein specified, and not two separate distinct contracts, the one with Doty & Co. for part, and the other with the defendants for other part, in such case there was nothing for the defendants to ratify; and, moreover, there is no evidence or suggestion that the defendants had any knowledge as to the terms of the actual contract entered into by Muir & Co. with the plaintiffs, until those terms appeared in evidence upon the trial of this cause; so that in either case ratification by the defendants of the contract, as appearing in the letter of the 8th February, appears to be out of the question. What then is the true construction of the contract as appearing in the letters of the 8th February, 1884? That seems to me to be the simple question to be determined. And, in my opinion, the true construction is that the contract entered into by the plaintiffs was one indivisible contract entered into by them with Muir & Co. as principals for goods, which, it is true, the latter contemplated procuring, partly from Doty & Co. and partly from the defendants, but with which the plaintiffs had nothing to do. The plaintiffs knew nothing as to what parts were to be procured from Doty & Co., and what from the defendants, or what should be the prices to be paid to Doty & Co. and to the defendants respectively, for such parts as they should respectively supply. These were matters in which the plaintiffs were in no way concerned nor, in fact, were they concerned whether Muir & Co. should get any part of the articles contracted for, either from Doty & Co. or from the defendants. Then, again, the contract is for a sawmill complete, with all the articles specified, including steam power and steam engine and everything else; now if the steam engine and power should not have been supplied at all there is no obligation upon the plaintiffs to take the remain-

ing articles or *vice versâ*. The plaintiffs were by their contract entitled to have the whole of the things contracted for by them before they could be obliged to pay anything under the contract. Mutuality of obligation under the contract can alone exist by treating the plaintiffs and Muir & Co. as the sole parties to it and as principals. It is incapable of being construed to be a separate contract made by the plaintiffs with the defendants for the sale and delivery, by the latter to the former, of the specific articles mentioned in the declaration, in respect of which the contract provides for no price or terms of payment, and a separate contract entered into by the plaintiffs with Doty & Co. for the sale and delivery, by the latter to the former, of the steam power and engine, &c., &c., as to which neither does the contract specify any price or terms of payment. The last clauses of the document of the 8th February signed by the plaintiffs shews, conclusively I think, that the plaintiffs were entering into and perfectly understood that they were entering into one indivisible contract with Muir & Co. as principals, namely, "this order and your acceptance thereof constitute the whole contract between us and there is no other agreement between us, respecting those articles but what is herein expressed."

Muir & Co. were, as it appears to me, dealing with the defendants in the matter from November, 1883, in such a manner as to enable them to determine whether they should enter into a separate contract for the defendants with the plaintiffs, as to the articles manufactured by the defendants on the agreed terms of agency and commission; and another contract between Doty & Co. and the plaintiffs as to the articles manufactured by Doty & Co., or whether they could purchase from the defendants and Doty & Co. the articles manufactured by them respectively upon such

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terms as would enable them to enter into an independent contract themselves with the plaintiffs which would probably give to them, Muir & Co., a greater profit than their commission upon separate contracts, entered into by them as agents of Doty & Co. and the defendants respectively would give them, and that they finally concluded to enter into such an independent contract themselves as principals. Their letters of the 21st November, 1883, and the 11th and 13th February, 1884, in my opinion support this view. In that of the 11th February, it appears that they and not the defendants determined that the edger of the defendants, then in Winnipeg in the hands of Muir & Co., would fill the contract they had entered into, and it is in the alleged utter insufficiency of this edger to meet their contract that the plaintiffs' chief complaint consists. Then the letter of the 13th February seems to me to be conclusive as to Muir & Co's. intention being that the contract was their own as principals with the plaintiffs. No stress or argument whatever can be laid or founded upon the acts of the defendants done by them to remove the plaintiffs' complaints whether these were well or ill founded, for the defendants had no knowledge then of the precise terms of the contract entered into by Muir & Co., and their reputation as manufacturers was equally at stake, whether they should be liable to the plaintiffs or to Muir & Co. for any defect there might be in goods manufactured by them, and they would naturally desire to remove any just grounds of complaint, to whomsoever they might have been liable. They knew that Muir & Co. had authority to have entered into a contract on their behalf and binding upon them with the plaintiffs, and that they might have entered into a contract upon their, Muir & Co's., own account, supplying themselves from the defendants with articles manufactured by the latter, but the de-

fendants do not then appear to have known which course Muir & Co. had adopted. The defendants' acts, therefore, after the plaintiffs complained of the insufficiency of the articles which Muir & Co. had procured from the defendants, cannot be regarded as in ratification of a contract made by Muir & Co. upon behalf of the defendants and as their agents with the plaintiffs, no such contract having ever been entered into as by the written contract which was entered into by Muir & Co. with the plaintiffs, I think, appears.

The appeal therefore, in my opinion, should be dismissed and the non-suit affirmed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Aikins, Culver & Hamilton.*

Solicitor for respondents: *J. W. E. Darby.*

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*Mar. 21,
*Dec. 14.

PHILIP R. PALMER (DEFENDANT).....APPELLANT;

AND

JANE ALEXANDER WALLBRIDGE (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mining lease—Covenants—Liability to pay rent—Quantity and quality of ore found—Right of lessee to terminate lease.

In a lease of mining lands the reddendum was as follows: "Yielding and paying therefor unto the party of the first part one dollar per gross ton of twenty-two hundred and forty pounds of the said iron stone or ore for every ton mined and raised from the said lands and mine payable quarterly on the first days of March, June, September and December in each year."

The lease contained, also, the following covenants by the lessee:—

"The parties of the second part for themselves, their executors, &c., covenant and agree to and with the party of the first part, her heirs, &c., that they will dig up and mine and carry away in each and every year during the said term a quantity of not less than two thousand tons of such stone or iron ore for the first year, and a quantity of not less than five thousand tons a year in every subsequent year of the said term, and that they will pay quarterly the sum of one dollar per ton as aforesaid for the quantity agreed to be taken during each year for the term aforesaid."

"And the said parties of the second part covenant and agree to and with the party of the first part that they will pay the said quarterly rent or royalty in each year, and if the same shall then exceed the quantity actually taken, such excess shall be applied towards payment of the first quarter thereafter, in which more than the said quantity shall be taken, and that they will protect such openings as they shall make so as to insure the same against accident, and will indemnify the party of the first part in the event of the same happening and against all costs of prosecution and defence thereof."

There was a provision that the lessor should be at liberty to terminate the lease in case of non-payment of rent for a certain period,

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

(Mr. Justice Henry heard the argument in this case but died before judgment was delivered.)

and if the iron ore or iron stone should be exhausted, and not to be found or obtained by proper and reasonable effort in paying quantities, then the lessee should be at liberty to determine the lease.

Held, affirming the judgment of the court below, Ritchie C.J. and Fournier J. dissenting, that this lease contained an absolute covenant by the lessee to pay the rent in any event, and not having terminated the lease under the above proviso he was not relieved from such payment in consequence of ore not being found in paying quantities.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment for the defendants on the trial and ordering judgment to be entered for the plaintiff.

This was an action for royalty or rent under a mining lease in which the plaintiff Jane A. Wallbridge was lessor and the defendant Philip Palmer and others were lessees. The habendum of the lease and covenants affecting this case are as follows:—

"To have and to hold the said close piece or parcel of land and also the said mines unto the said lessees, their executors, administrators and assigns, from the first day of December instant, for and during and unto the full end and term of 10 years thence next ensuing and fully to be complete and ended, yielding and paying therefor unto the party of the first part $1 per gross ton of 2,240 pounds of the said iron stone or ore for every ton mined and raised from the said land and mine, payable quarterly on the first day of March, June, September and December in each year.

"The parties of the second part, for themselves, their heirs, executors, administrators, or assigns, covenant and agree to and with the party of the first part, her heirs, executors, administrators and assigns, that they will dig up and mine and carry away in each and every year during the said term a quantity not less than 2,000 tons of such stone or iron ore for the first year, and a

(1) 14 Ont. App. R. 460 sub nomine *Wallbridge* v. *Gaugot*.

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quantity not less than 5,000 tons a year in every subsequent year of the said term, and that they will pay quarterly the sum of $1 per ton as aforesaid for the quantity agreed to be taken during each year for the term aforesaid.

"And the said parties of the second part covenant and agree to and with the party of the first part that they will pay the said quarter's rent or royalty upon the said quantity quarterly in each year, and if the same shall then exceed the quantity actually taken, such excess shall be applied towards payment of the first quarter thereafter in which more than the said quantity shall be taken."

The lease also contained the following provisoes:—

"Provided, that if the rent or royalty hereby reserved shall be behind in arrear or unpaid for two quarters, then the lessor may at her election then or at any time before actual payment declare the lease void and the term hereby created at an end, and the term shall cease and be determined.

"Provided also, that if the iron ore or ironstone shall be exhausted and not to be found or obtained there by proper and reasonable effort in paying quantities, then the parties of the second part shall be at liberty to determine this lease in the manner provided therefor."

On the trial before Mr. Justice Ferguson there was conflicting evidence as to the quantity and character of the ore mined from the land, and the learned judge found, as a fact, that it was not found, by reasonable and proper effort, in paying quantities; he therefore held that the defendant was relieved from his liability to pay rent under the lease and gave judgment in his favor. The Court of Appeal reversed this judgment, holding that there was a liability on the lessee to pay rent in any event. From the latter decision the defendant appealed to this court.

S. H. Blake Q.C. and *W. Cassels* Q.C. for the appellants, argued that as the subject matter never existed the contract never took effect and cited Bainbridge on Mines (1); Rogers on Mines and Minerals (2); *Griffiths* v. *Rigby* (3); *Clifford* v. *Watts* (4); *Earl of Beauchamp* v. *Winn* (5); *Daniell* v. *Sinclair* (6).

Robinson Q.C. and *Dickson* Q.C. for the respondents. The lessees had a right to terminate the lease if ore was not found. They could only do so by notice in writing to the lessor which was not given until after this rent accrued.

The lessor was kept out of possession of the land and is entitled to the rent.

SIR W. J. RITCHIE C.J.—By the terms of the lease the lessee is to yield and pay $1 per gross ton of iron stone or ore for every ton mined and raised.

The covenant is that the lessee shall dig up and mine in each and every year a quantity not less than 2000 tons for the first year and not less than 5000 tons in every subsequent year, and will pay quarterly $1 per ton for the quantity agreed to be taken during each year.

And further, that they will pay said quarter's rent or royalty upon said quantity quarterly in each year, and if the same shall exceed the quantity actually taken such excess shall be applied towards the payment of the first quarter thereafter in which more than the said quantity shall be taken.

With this proviso, that if the rent or royalty shall be unpaid for two years the lessor may at her election then, or before actual payment, declare the lease void and the same shall cease and be determined.

And also provided, that if the iron ore, or iron stone, shall be exhausted, and not to be found or obtained by

(1) Pp. 492, 495.
(2) Pp. 394, 402, 405.
(3) 1 H. & N. 237.
(4) L. R. 5 C. P. 577.
(5) L. R. 6 H. L. 223.
(6) 6 App. Cas. 181.

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proper and reasonable efforts in paying quantities, then the lessee shall be at liberty to determine this lease.

I think that the right to recover the rent was dependent on the existence of ore on the premises which could be mined or raised by the defendant, and that the defendants did not agree to pay a dead or sleeping rent. The learned judge who tried this case says that "there is no doubt that at the time of the execution of the lease all parties to it believed that there was a valuable mine on the premises in question." This was not denied by any one. At page 351 the learned judge says :—

All I desire to say is, that after having examined and considered it as well as all the evidence respecting the assays of the ore made by professional men, and as to the bearing of such assays as evidence of the practical fact from a mining point of view, I am as I was at the close of the evidence clearly of the opinion that the defendants (even assuming that the burden of proof was upon them throughout in respect of this subject) have succeeded in establishing as a fact that the iron or iron stone became exhausted and was not to be found or obtained by proper and reasonable efforts in paying quanties. The pocket south of the shaft was exhausted and I think that ore in paying quantities was not found in the shaft, that is, although there were pieces of fairly good ore in the shaft and drifts these were so intermixed with rock and lean and poor ore that the real fact for all practical or mining purposes is reasonably and accurately stated by saying that iron ore or iron stone was not to be found or obtained there by proper and reasonable efforts in paying quantities; and upon the evidence I have no hesitation in finding and I do find that the iron ore and iron became exhausted and not to be found or obtained by proper and reasonable efforts in paying quantities.

Here, then, both parties assumed, in good faith, the existence of a valuable mine on the premises and must, I think, be assumed to have contracted, in good faith, on the assumption of its existence; and it seems to me that when the act or thing contracted to be done by either party cannot be performed by reason of the non-existence of the subject matter assumed to be in question the contract in respect to it must be considered to be at an end and not enforceable.

A dead rent may be reserved in respect of a license to enter and search, and in such case is payable whether there is ore or not, because there is nothing to exempt the defendant from paying the dead rent; but in this case the parties have not chosen to agree on a dead rent payable at all events, but have made the rent dependent on the ore raised; they only undertook to pay so much on every ton raised; if no ore they could have nothing to pay, because there was no ore to raise. Therefore, in this case the defendants have not got what they contracted for, and for which they agreed to pay rent or royalty. It is the iron ore which is the subject of the grant, on the raising of which the rent was reserved. How, then, can there be any rent payable when it is ascertained there was no such ore there? The covenant to pay rent is, in my opinion, only applicable if the ore is there, and does not amount to a warranty on the part of the lessee that the ore was there, or to an engagement to pay the royalty if there was none, in which event there was nothing on which the rent could attach. The intention and meaning of the covenant, in my opinion, was that the plaintiff should receive the royalty on the ore if it was found on the premises, the covenant being then based on the assumption of both parties that the ore was there; if no ore then the covenant became inapplicable. There is, it is true, a provision that either party could put an end to the lease, the one if the rent reserved should be in arrear, the other, if the ore should be exhausted and not to be found or obtained, by proper and reasonable efforts, in paying quantities, but I cannot see that this interfered with the right of the lessees to resist payment on the ground that the rent agreed to be paid never accrued due, by reason of the rent being payable only for every ton mined and raised, and no tons could be raised because none existed to be mined and raised.

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It seems to me that the quarterly payments, at the rate of $1 per ton for every ton mined and raised for the minimum quantity agreed to be raised each year, and the provision that if the fixed quarterly payments should exceed the quantity actually taken out from the mine, the excess should be applied in payment of the next quarter in which more than the quantity is taken, is based on the assumption that the mine will, at any rate, produce the minimum quantity, that the ore is there and can be mined and raised but for the default of the lessees, and does not, in my opinion, justify the conclusion that it was thereby intended that there should be a fixed payment of the stipulated sum per quarter whether there was ore on the premises or not.

I think the payment made before it was established that the ore did not exist, must be held to have been made conditionally on the contingency that ore would be found, and no ore having been found they amounted to payments made under a mistake of fact, with the exception of the payment of $937.32, paid voluntarily after knowledge of the non-existence of the ore, and of the sum of $306, the amount of royalty on the ore actually taken by the defendant.

I may say that I find it difficult, and even impossible, to distinguish this case from the case of *Clifford* v. *Watts* (1), in which Willes J. says:—

The indenture also contains a covenant that Watts shall dig and raise from the land an aggregate amount of not less than 1000 tons, or more than 2000 tons, of pipe or potter's clay, the defendant was to pay a royalty of 2s. 6d per ton. The breach assigned on that covenant is that with which we have to deal on this occasion; it is that the defendant has not dug an aggregate amount of not less than 1000 tons of pipe and potter's clay in each year of the demise. The plea, the validity of which is now in question is, that the defendant could not dig 1000 tons of clay each year according to his covenant, because there was not at the time of the demise nor since existing

(1) L. R. 5 C. P. 577.

under the lands 1000 tons of such clay, that the performance of the covenant had always been impossible, and that such impossibility was unknown to the defendant at the time, and he had no reasonable means of knowing or ascertaining the same.

* * *

The second, and with reference to this case the most important consideration, appears to me to arise from the question whether the defendant has by this covenant contracted to perform an impossibility, or whether the true meaning of the covenant construing it by the rest of the deed, is, not that the defendant undertakes to get the stipulated quantity of clay whether it be there or not, or to pay the stipluated tonnage as if the clay had been raised, but rather dealing with it as subsidiary to the main object of the demise, that he will raise such pipe or potter's clay as may be found under the land, at the rate and price specified. If the latter be the true construction of the covenant, it is not an independent covenant to do the thing contracted for, whether possible or not, but only a stipulation as to the rate at which that is to be done which both parties at the time contemplated. According to that construction of the covenant, the plea is a good defence to the second breach. And this is the view to which, after the best consideration I am able to bring to the case and after having heard the very learned arguments on both sides, my opinion inclines.

I think the appeal should be allowed and the judgment of Ferguson J. in the Chancery Division restored.

STRONG J.—For a statement of the facts of this case I refer to the very full and carefully prepared judgment of Mr. Justice Ferguson, before whom the action was tried in the Chancery Division. The learned judge found in the appellant's favor as to the principal questions of facts involved in the issues raised by the pleadings, that as to whether or not the premises comprised in the lease contained ore in paying quantities, the finding in question being thus distinctly stated in the judge's own words:—

I am, as I was at the close of the evidence, clearly of the opinion that the defendants (even assuming that the burden of proof was upon them throughout in respect of this subject) have succeeded in establishing as a fact that the iron or iron-stone became exhausted and was not to be found or obtained, by proper and reasonable efforts, in paying quantities.

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This question, therefore, being purely one of fact, and the learned judge having rightly held that the onus was on the appellant to establish the affirmative of it, we must, of course, regard this finding as conclusive, and confine ourselves to the question what effect the fact thus established ought to have on the rights of the parties, having regard to the proper legal construction of the lease. This question of the construction of the lease is, indeed, the principal difficulty in the case, and when that is solved a conclusion as to the proper determination of the appeal is easily reached.

Then, to consider the several clauses and provisions material to be considered, as bearing on the liability of the lessees to perform the covenants to pay the rent or royalty reserved in the event which has been established, that with the exception of some 306 tons of ore extracted the land demised was wholly barren and unproductive of ore in paying quantities, we find first in order the reddendum which is in the following words:—

Yielding and paying therefor unto the party of the first part, one dollar per gross ton of twenty-two hundred and forty pounds of the said iron stone or ore for every ton mined and raised from the said land and mine, payable quarterly on the first days of March, June, September and December in each year.

It is to be remarked of this reddendum that it is, by itself, only a reservation of a royalty and not of a dead or sleeping rent, *i.e.*, a rent payable absolutely. It is, however, followed by a covenant thus expressed:—

The parties of the second part * * * covenant and agree to and with the party of the first part, * * * that they will dig up and mine and carry away in each and every year during the said term a quantity not less than two thousand tons of such stone or iron ore for the first year and a quantity not less than five thousand tons a year in every subsequent year of the said term and that they will pay quarterly the sum of one dollar per ton as aforesaid for the quantity agreed to be taken during each year for the term aforesaid.

It appears to me that it is upon the construction of

this covenant, read in the light of that which immediately follows it, that the whole question depends. If the lessees had merely covenanted to dig up 2000 tons of ore during the first year, and 5000 in every subsequent year of the term, this case would have been undistinguishable from *Clifford* v. *Watts* (1); but it will be observed that the covenant is not so restricted, for after the agreement to dig the stipulated quantity we find, expressed in absolute terms, the following additional agreement :—

And that they will pay quarterly the sum of one dollar per ton as aforesaid for the quantity agreed to be taken during each year for the term aforesaid,

thus making the lessees liable to pay a sum equivalent to the amount of the tonnage on the prescribed quantity of ore, at the stipulated rate, whether it should be taken or not. And then, as though it had been intended to remove any possible ambiguity which might be supposed to arise upon the words "agreed to be taken," we find the following covenant coming immediately after that just stated :—

And the said parties of the second party covenant and agree to and with the party of the first part that they will pay the said quarterly rent or royalty in each year, and if the same shall then exceed the quantity actually taken, such excess shall be applied towards payment of the first quarter thereafter in which more than the said quantity shall be taken,

a covenant which, beyond all doubt or question, contains an absolute undertaking to pay the rent or royalty in each year without reference to the quantity of ore actually extracted. This provision conspicuously and decisively distinguishes this case from Lord *Clifford* v. *Watts* (1), where Willes J. (2) expressly remarks on there being no covenant "to pay the stipulated tonnage as if the clay had been raised," in such a way as clearly to imply that if there had been

(1) L. R. 5 C. P. 577. (2) At p. 583.

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such a covenant similar to that now before us, it would have amounted to a covenant to pay a dead rent.

I construe these covenants which have just been set forth as if they had been expressed in the form of absolute covenants to pay a dead rent, or in other words, to pay a gross rental of $2000 for the first year and $5000 for each subsequent year of the term.

Such then being the *primâ facie* construction of the covenants for the payment of rent standing alone, the next question which arises is what effect, on that construction, is to be attributed to the clause that if the rent shall exceed the quantity actually taken the excess in payment shall be applied to any excess in quantity the first quarter thereafter in which more than the stipulated quantity should be taken. This provision merely enables the lessees to recoup themselves by setting off the excess of their payments over the tonnage of the ore excavated in any year against their liability for ore excavated in excess (if any) of the prescribed quantity in succeeding quarters. Why should such a provision have the effect of cutting down an absolute covenant to pay rent to one dependent on a condition that the land should contain ore in paying quantities, words of qualification not to be found in the covenant itself? Surely the clause in question should not be held to have such a violent operation unless it can be shown that it is so entirely inconsistent with the preceding covenants to pay a fixed dead rent that the two cannot subsist together; then, so far from this being the case, the two are quite consistent if we consider the proviso as having been intended for the very reasonable and just purpose of enabling the lessees, in the case of there being a sufficiency of ore, to take a ton of ore to recoup themselves for every dollar of royalty which they should happen to pay in advance; in other words, that although the lessees should be bound to

pay absolutely, and whether they took out ore or not, they should not be compelled to pay twice over, but should be entitled to a quantity of ore in the aggregate equal in value to their aggregate payments, at the stipulated rate of $1 per ton, provided ore was to be found to enable them to do so. I can see no repugnancy nor inconsistency between such a provision and the absolute covenant to pay, nor anything but the most natural consistency and concordance. Then this still leaves the covenant to pay for the stipulated quantities an absolute covenant equivalent to one for the payment of a dead rent.

The only other provision of the lease which can have any bearing on this question is that which enables the lessees to avoid the lease if the iron ore should be exhausted, or it should prove that there was none to be found in paying quantities on the demised premises. It is as follows :—

Provided also, that if the iron ore or iron stone shall be exhausted and not to be found or obtained by proper and reasonable effort in paying quantities, then the party of the second part shall be at liberty to determine this lease.

Taking the covenants already considered to be, as I hold they are, absolute covenants for the payment of a dead rent during each and every year of the term of ten years this power given to the lessees to determine the lease at their option in the event of the failure of the iron ore, or in the case of the unproductiveness of the demised land being ascertained, so far from influencing the construction in such a way as to reduce the clear, absolute terms of the preceding covenants, has precisely the opposite tendency since it shows that the case which has actually happened was in the contemplation of the parties and was provided for by the introduction into the lease of this important proviso enabling the lessees to relieve themselves from liability by putting an end to the term. The inference from

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this is so strong as almost to be irresistible that if, for any cause, they did not think fit to avail themselves of the remedy thus afforded them their liability to pay the rent was intended to continue.

Supposing the lease had contained a covenant, in terms, to pay a rental of $2000 for the first year and $5000 for the subsequent years of the term without any reference to the quantity of ore taken out, it would have been impossible in that case to say that this proviso could, though no minerals were found, have constituted any answer to a claim for rent actually accrued due prior to a determination of the lease by the lessees for the cause mentioned. Then, as I interpret it, the covenant is, in legal effect, the exact equivalent of such an absolute covenant to pay the rental as an ordinary dead rent. The clause enabling the lessees to determine the lease is then, in truth, their only protection from liability to pay in case of failure of the ore, and until they exercised their election, and gave notice of it to the lessor, they are bound by the plain and unequivocal words of the covenants they have entered into.

As to the sufficiency of the notice given by the lessees of their intention to avoid the lease, I agree with the Court of Appeal that we must accept the conclusion of Mr. Justice Ferguson that the evidence establishes a determination of it sufficiently early to afford a defence to the claim for the quarter's rent which accrued due on the 1st of December, 1884, though not for that which was payable on the 1st of September preceding.

The appeal should be dismissed with costs.

FOURNIER J.—I am of opinion that the appeal should be allowed and the judgment of Mr. Justice Ferguson restored.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed for the reasons given by my brother Gwynne.

GWYNNE J.—By an indenture made on the 30th December, 1882, in pursuance of the act respecting short forms of leases, between the plaintiff, therein called the lessor, of the first part, and the defendant and others therein named and called the lessees of the second part, the said party of the first part in consideration of the royalty, rents, and covenants thereinafter mentioned did grant, demise and lease unto the lessees, &c.

(His lordship here read the provisions of the lease.)

At the time of the execution of the lease all parties thereto believed, as the learned judge who tried the case has found, that there was abundance of ore in the demised piece; there was then an iron mine being profitably worked upon a piece of land which was separated by the distance of four perches only from the demised piece, and upon the demised piece there was already a shaft dug which gave indications of the presence of iron ore.

Upon the execution of the lease the lessees proceeded to sink shafts for the purpose of working the mine, and, in the year 1883, they took out about 300 tons of ore which, however, they allege turned out not to be good. They paid the quarterly rents which accrued due under their covenant in the lease up to and including that which fell due on the 1st June, 1884, but they refused to pay any more rent for the reason that, as they allege, and as is now admitted to be the fact, there never was any iron ore on the demised piece in excess of the 300 tons which they had taken out; and in the month of September, 1884, availing themselves of the clause in the lease enabling the lessees to deter-

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mine the lease, they abandoned the premises and gave notice to the lessor that they determined the lease. The plaintiff brought her action in the month of December, 1884, to recover the two quarters rent which she claimed to have accrued due on the first of September and December, 1884, contending that the lease could not be determined by the lessees otherwise than by a deed, and that it was not determined until some time in 1885, when the lessees executed (*ex majori cautelâ*, as they contend) a deed of surrender of the lease to the lessor, which deed the lessor did not produce, a circumstance which drew from the learned judge who tried the case the observation that he could not say what it may have contained; it may possibly have recited the fact that the lessees had determined the lease in September for the reason that the iron ore had been exhausted. The defendant Palmer, in whom the interest of his co-lessees had become vested, defended the plaintiff's action upon the ground and contention that there never was on the demised premises any iron ore whatever other than the 300 tons taken out, and that as the rent is reserved only in respect of iron ore mined and raised, and that as under the circumstances no more could by possibility be raised, the consideration of the lease had wholly failed, and there never accrued due to the plaintiff anything in excess of $1 per ton on the 300 tons, and the defendant therefore counterclaimed for the monies paid in excess of such sum as for monies paid without consideration and under a mistake of fact, namely, as to there being iron ore on the demised premises capable of being taken out. The learned judge who tried the case acceded to this contention, and he dismissed the plaintiff's claim and gave judgment in favor of the defendant on his counterclaim for the amount claimed by him, less the sum of $937.50 which was, as he

found, voluntarily paid by him on the 3rd of July, 1884, at a time when, as he also found, the defendant was as much aware that the mine had been exhausted as he was when the notice of determination of the lease for that cause was given, which he found to have been some time, but when in particular is not stated, in September, 1884.

On appeal from this judgment the Court of Appeal for Ontario has allowed the rent which accrued due on the 1st September, 1884, viz., $1250 dollars, but has not allowed that claimed to have become due on 1st December for the reason that (in this respect affirming the view taken by the learned judge who tried the case) the lease was effectually determined by the notice to that effect given in September 1884, and that to determine it a deed of surrender was not necessary, but they wholly disallowed the defendant's counter-claim, holding that no part of the monies paid could be recovered back.

The question wholly turns upon the construction of the lease, and it is to be observed, first, that the moving consideration for the execution of the lease by the lessor consists of the royalty and rent thereby reserved and the covenants of the lessees therein contained; secondly, that the habendum is "to have and to hold the said close or parcel of land" (in the lease described) "and also the said mines" and the reddendum therefor is of a money rent issuing not out of the iron ore but out of the said piece of land and also the mines of iron ore therein, payable quarterly on the 1st days of March, June, September and December in each year, the maximum amount of which rent is determinable by the quantity of iron ore mined and raised, but the minimum amount payable in each quarter is expressed to be the fourth part of $2000.00 or $500.00 per quarter in the first year, and the fourth part of $5000.00 or $1250.00 per quarter in each succeeding year.

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Upon the execution of the lease the lessees were entitled to enter upon and enjoy the exclusive possession of the piece of land demised, and to retain such possession during the whole period of ten years or until the lease should be determined by the lessor or by the lessees under the clause in the lease which authorises them respectively to determine the lease; they acquired the right of digging and prospecting for iron ore by sinking shafts to any depth they pleased (provided only it should be done in a proper and skilful manner) in as many parts of the demised piece of land as they pleased, and in such kind of work they might, if they pleased, have been engaged for nine, twelve or any other number of months without raising any ore. Having this privilege it was natural and reasonable that the quarterly rent of not less than $500 in each quarter of the first year and $1250 in each quarter of each subsequent year should be, as in point of fact it was, made payable by the lease. Accordingly the lessees for themselves and each for himself his heirs, &c., covenanted with the lessor to pay such minimum quarterly rents notwithstanding that in any such quarter in which such rent should become payable no ore should be raised, and the only indemnity which the lessees contracted for, and which is provided by the lease for such payments of rent in advance of any ore being raised, is that the amount so paid in excess of any ore raised within the quarter shall be allowed in any quarter in which ore should be raised in excess of the quantity represented by the minimum amount made payable in such quarter, and only as against such excess in quantity so raised. The rent was made payable quarterly, and the intention of the parties is, I think, plainly expressed upon the lease to be, that the quarterly rents of $500 in the first year and of $1250 in each quarter of each succeeding year,

should be and are made payable whether or not there should be any iron ore raised in any of the quarters upon the determination of which such rents respectively were made payable. Those specific quarterly rents so made payable have all the character of minimum rents covenanted to be paid whether any iron ore should or not be raised in any such quarter. The case of *Bridges* v. *Potts* (1) is the nearest case to the present, and in my opinion the present comes within it. There the royalty agreed upon was a stated sum per ton and it was provided and agreed that:—

If in the 1st and 2nd years the royalties above provided for should not amount to the sum of £500 each year then the lessees shall advance and pay to the lessor for each of the years such sum of money as with the amount of the royalties for that particular year will make up the full sum of £500, if in the third and any subsequent year of the said term the said royalties do not amount to the sum of £1500 each year the lessees shall pay to the lessor such sum as with the royalties will make up the full sum of £1500, and if any sum of money be so advanced to make up the said respective minimum rents in any one year the amount of such advance may be deducted out of the excess of royalties above such minimum rent accruing during any succeeding year.

Now a minimum fixed rent payable either by the year or the quarter may be reserved and made payable absolutely without the use of the words "minimum rent" which were the words used in *Bridges* v. *Potts* (1). In the present case the language is that the lessees covenant

That they will in each and every year during the said term dig up and mine and carry away not less then 2000 tons of such iron ore for the first year and not less than 5000 tons in every subsequent year, and that they will pay quarterly the sum of $1.00 per ton for such quantities and will pay the said quarter's rent or royalty upon the said quantity so agreed to be taken out, quarterly in each year, and if the same shall then exceed the quantity actually taken, such excess shall be applied towards payment of the first quarter thereafter in which more than the said quantity shall be taken.

Now these provisions in the present lease, applying

(1) 17 C. B. N. S. 314.

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the judgment in *Bridges* v. *Potts* (1) to them, are in effect that rent is to be paid quarterly to the amounts mentioned but that the lessees were to have the benefit of rent paid in one quarter in excess of ore raised as or towards payment of any excess in a subsequent quarter of ore raised exceeding the quantity represented by the rent made payable in such quarter. Rent so reserved is clearly, in my opinion, a minimum fixed rent payable quarterly whether any ore may have been raised or not. The covenant to pay it is as much an absolute unqualified covenant as was the covenant in *Jervis* v. *Tomkinson* (2), and the quarterly payments are as much a determined rent absolutely payable so long as the term shall endure, which the lessees can themselves determine, as was the rent in the *Marquis of Bute* v. *Thompson* (3), or that reserved in *Bishop* v. *Goodwin* (4). The lease does not operate by way of warranty by the lessor that there is to be found iron ore in the demised premises which can be worked profitably or at all (5); and in *Gowan* v. *Christie* (6) Lord Cairns says that the instruments which are called mineral leases

when properly considered are sales out and out of a portion of the land. He says it is liberty given to a particular individual for a specific length of time to go into and under the land and to get certain things there if they can find them and to take them away just as if he had bought so much of the soil.

Lord Clifford v. *Watts* (7) was a case very distinguishable from the present. There the rent reserved was a royalty of 2s 6d per ton of clay which might be found upon or under the lands described; habendum for 12 years reddendum the 2s 6d per ton; there was a covenant that the defendant would dig and remove from the land an aggregate amount of not less than 1000

(1) 17 C. B. N. S. 314.
(2) 1 H. & N. 195.
(3) 13 M. & W. 487.
(4) 14 M. & W. 260.
(5) *Jefferys* v. *Fairs*, 4 Ch. D. 448.
(6) 2 Sc. App. 284.
(7) L. R. 5 C.P. 577.

tons nor more than 2000 tons of pipe or potter's clay in each year of the term ; but there was no covenant for the payment of any fixed sum either by the year or by the quarter as there is in the present case ; the action therefore had to be brought upon the covenant to dig and take out not less than 1000 tons in each year and the breach laid was that the defendant had not dug an aggregate amount of not less than 1000 tons of pipe and potter's clay in each year of the demise that had elapsed ; to this breach the defendant pleaded upon equitable grounds in substance that there was no pipe or potter's clay in the demised premises, and that it was impossible for the defendant to have dug and gotten out any. Under these circumstances judgment was rendered for the defendant. The covenant was held to be a bare stipulation for payment for the clay which should be raised, which the fact that there was no stipulation, as there in the present case, for payment of a fixed rent quarterly during the term, or a stipulation, as there is also in the present case, that the lessees might upon finding the ore to be exhausted instantly determine the lease and all liability thereunder, showed to be the intention of the parties. That case therefore seems to be an authority in support of the judgment of Court of Appeal for Ontario, rather than against it. The contention that the defendants are entitled to be relieved from their covenant to pay the quarterly rents as upon a total failure of consideration for their entering into the covenant, and that they are entitled to recover back the rent paid as paid without consideration and under a mistake of fact, is quite untenable. There is no room here for the application of the doctrine of total failure of consideration ; it was in fact upon the faith of and in consideration of the lessees' covenant to pay the rent at the times and in the amounts in the covenants stated that the lessor granted to them the

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exclusive possession of the demised premises for the term of ten years, to prospect for and get out and take out all the iron ore which might be found thereon as to the existence of which in sufficient quantities to justify the lessees in entering into the covenant, it was their business to satisfy, and they appear to have satisfied themselves; moreover, they did in fact take out 300 tons of such iron ore and what has occurred is what the lessees took care to provide for as being possible to occur, namely, that the iron ore has become exhausted, in which case the lessees were given power to relieve themselves from all future liability under their covenant by determining the lease, a privilege of which they did not avail themselves until the month of September, 1884, until which time they retained to themselves that exclusive possession which in consideration of their covenants the lease granted to them. Then as to the rent which was paid having been paid under a mistake of fact, what is here called a mistake of fact was, in truth, an error of judgment, not a mistake of fact in the recognized sense of that term, but an erroneous conclusion drawn by the lessees from such facts as were known and apparent, but which experience has shown to have been insufficient to justify the conclusion which the lessees formed upon them as to the value of the speculation they were entering into. The Court of Appeal for Ontario was clearly right in not allowing any thing to the defendant on his counter claim for the rents which he had paid, which rents were paid in compliance with, and discharge of, the covenant he had entered into, and in consideration of which he and his co-lessees acquired for a term of ten years exclusive possession of the ten acres mentioned in the lease, for the purpose therein stated, and with the powers therein mentioned to be exercised thereon; there is no principle of law upon which money so paid

can be recovered back. For the same reason, I am of opinion that the $1250 allowed by the Court of Appeal for Ontario, as for rent covenanted to be paid on the 1st September, 1884, was properly allowed to the plaintiff. The covenant sued upon is express that such sum should be paid in each and every quarter in the second and each succeeding year of the term until the expiration thereof by lapse of time or sooner determination thereof by the lessees themselves, who, in the event which has happened, were empowered to determine it. The covenant is absolute in its terms not qualified by any condition that iron ore should have been raised at the respective times when the sums which were covenanted to be paid quarterly became payable.

The appeal therefore, in my opinion, must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Bell & Biggar.*

Solicitor for respondent: *Francis S. Wallbridge.*

Solicitor for third party: *S. B. Burdett.*

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THE MERCHANTS' BANK OF CANADA (PLAINTIFFS) ..... } APPELLANTS;

AND

WILLIAM McKAY AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Surety—Mortgage to bank—Continuing security—Present indebtedness of principal—Commercial paper—Mode of dealing by bank.

McK. gave a mortgage to the M. Bank as security for the present indebtedness of, and future advances to, a customer of the bank. By the terms of the mortgage McK. was to be liable, amongst other things, for the promissory notes, &c., of the customer outstanding at the date of the mortgage, and all renewals, alterations, and substitutions thereof.

Held, per Ritchie C.J., Fournier and Taschereau JJ. That the bank having given up the said promissory notes, etc., and accepted, as renewals thereof, forged and worthless paper, McK. was, to the extent of such worthless paper, relieved from liability as such surety.

Held, per Strong J.—That the bank having accepted the renewals in the ordinary course of banking business, and it not being shown that they were guilty of negligence, the surety was not relieved.

Held, per Gwynne J.—That as there was a reference ordered to take an account of the notes alleged to be forged, the consideration of the surety's liability should be postponed until the account was taken.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment of the Chancery Division (1) in favor of the defendants.

The action in this case was brought for foreclosure of a mortgage given by the defendants as security to the plaintiffs for the indebtedness of the firm of Wm. Kyle & Co., and to enable said firm to increase their

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

(Mr. Justice Henry heard the argument in this case, but died before judgment was delivered).

(1) 12 O. R. 498.

credit with the plaintiffs' bank. The obligation of the defendants under the mortgage is thus provided for:—

"Provided, this mortgage to be void on payment of twenty-six thousand five hundred and thirteen $\frac{04}{100}$ dollars of lawful money of Canada, as follows: in two years from the date hereof, and all bills of exchange, promissory notes and other paper upon which the said firm of William Kyle & Co. were liable to the said mortgagees on the 24th day of November, A.D. 1883, together with all renewals, substitutions and alterations thereof, and all indebtedness of the said firm to the said mortgagees in respect to the said sum. This indenture being intended to be a continuing security to the said mortgagees for the above amount, notwithstanding any change in the membership of the said firm, either by death, retirement therefrom or addition thereto, and also to secure and cover any sum due or to become due in respect of the interest, commission upon the said notes or renewals, or other commercial paper, and taxes and performance of statute labor."

At the time this mortgage was given the greater part of the business of Kyle & Co. with the bank consisted of the discount of their customers' bills, a small portion being the discount of their own bills with the customers' paper given as collateral. When the suit was brought the greater part of the indebtedness consisted of discounts of the latter character.

The defendants raise two objections to the proceedings against them on the mortgage, namely, that the bank had given up the good paper, which they formerly held, of the customers of Kyle & Co., and had taken in renewal or substitution thereof forged and worthless paper, and that by increasing the discounts with collaterals they had facilitated the giving of such forged paper, inasmuch as the customers would not be notified, as they would in the case of straight discounts.

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The action was tried before Mr. Justice Ferguson, and referred, by consent of counsel, to the Divisional Court. The judgment of the Divisional Court exonerated the defendants from liability on the mortgage, in so far as the bank had parted with the valid securities aforesaid and accepted forged and worthless securities therefor, and an account was ordered. This decision was affirmed by the Court of Appeal. The plaintiffs then appealed to this court.

Robinson Q.C. for the appellants cited *Loomis* v. *Fay* (1).

McIntyre for the respondents, referred to *Sutton* v. *Wilders* (2); *Re Speight* (3).

Sir W. J. RITCHIE C.J.—The mortgage recites that the firm of Kyle & Co. were indebted to the Merchants' Bank, in the course of banking, for debts contracted by the said firm to the bank and for which the bank then held the commercial paper of the customers of the firm upon which the said advances were made, and that the said firm had applied to the bank for additional advances for a limited period, to which the bank had agreed upon receiving security for the present indebtedness, and that the mortgage was intended to carry out that agreement.

The consideration of the mortgage was stated to be $26,513.04, the amount due the bank from the said firm on November 24, 1883, and then unpaid; and the mortgagors conveyed their respective interests in the lands mortgaged to the bank as additional security for such indebtedness.

There was a proviso that the mortgage should be void on payment, in two years from the date of the mortgage, of the above amount and all bills of exchange, promissory notes and other paper upon which the said

(1) 24 Ver. 241. (2) L. R. 12 Eq. 377.
(3) 22 Ch. D. 727.

firm were liable to the bank on November 24, 1883, and all renewals, substitutions and alterations thereof, and all indebtedness of the said firm to the bank in respect of the said sum; and also a proviso that the bills, notes and other commercial paper should not be deemed to be merged in the mortgage.

In my opinion the bank was not justified in parting with any of the securities held by them at the time of the making of the mortgage unless the same were paid or renewed with valid paper of the same character; that if the bank gave up the paper so held by them, and took in lieu of it forged paper, they must be answerable for the loss sustained thereby; that the securities held by the bank at the date of the mortgage were held as well for their own benefit as for the benefit of the sureties, the mortgagors; and that if they gave up such paper, and did not obtain renewals or other commercial paper therefor, but gave up said notes and accepted in lieu thereof forged and invalid instruments, they discharged the defendants from the payment of the said mortgage to the extent of the paper so given up, without any evidence of negligence *pro* or *con.*; I think the bank was bound to see before giving up the notes they held at the date of the mortgage that the notes they took in renewal or substitution therefor were genuine, valid notes. I think the distinction is most manifest between the *bonâ fide* taking a valid note, though the party might not be solvent and the note consequently, for the time being, apparently worthless, and the bank taking a forged note. In the first case the surety, on payment, would be entitled to the note and to hold it for what it might be, or at any time afterwards become, worth; in the latter the forged note, by no possibility, could ever be of any value. To my mind the clear intention of all parties, to be gathered from the deed,

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is that the renewals, substitutions and alterations were to be by valid, binding commercial paper of the customers of the firm, and not by taking, in lieu of such paper, not commercial paper of such customers but utterly worthless and forged paper. I think that in accepting this security from these sureties the bank, by clear implication of law, undertook that they would do nothing in reference to the paper held by them in derogation of the rights of the sureties; that they would take in renewal or substitution thereof paper of the same character as that then held by them, namely, commercial paper of the customers of the firm; and I think, in favor of the sureties, the giving up of valid commercial paper, which, when paid, the sureties had a right to have the benefit of, and taking forged and invalid paper in lieu thereof, was necessarily, as against the sureties, a negligent and improper act. I think the bank was bound to be in a position to hand over, on payment, to the sureties good and valid commercial paper of the customers of Kyle & Co., such as they held at the date of the mortgage, and if they had given up such paper, and not taken, in lieu thereof, good, valid, commercial paper, and cannot give them securities of such a character but have only forged and invalid paper to offer them, the sureties, in my opinion, are thereby relieved to the extent of such invalid paper.

It must be borne in mind that between the surety and the principal debtor there is no privity of contract. The surety contracts with the creditor; therefore, it is what the creditor does that alone has to affect the surety. The creditor has no right to deal with the principal debtor in derogation of the rights of the surety, behind the backs of the sureties and without their consent, whether such dealings were induced by negligence, carelessness, or over-confidence in the

debtor. The right of subrogation attaches as soon as the liability of the surety attaches. If this is so, and the surety is entitled to be subrogated to the position of the creditor in respect to any valid securities of the principal debtor held by him, how can it be in the mouth of the creditor to allege that he, without the assent of the sureties, gave up such valid securities, and, in lieu thereof, took valueless, invalid and forged securities, which the surety must accept as and for the valid securities he gave up?

There can be no doubt, in this case, that the dealings of the bank with the principal debtor were, in the highest degree, prejudicial to the surety. There was, in my opinion, a clear duty on the bank to ascertain, before they gave up any of the securities they held alike for their own benefit as for the benefit of the sureties, that they were justified in doing so; and if they gave them up without receiving the money therefor, or valid commercial paper of the customers of Kyle & Co. in renewal or substitution therefor, they did so at their own risk and peril, whether the same was caused by negligence, carelessness, over-confidence in Kyle & Co., or any other cause, so long as the sureties were no parties, directly or indirectly, to the action of the bank. To hold that they could do so, and force the loss on the sureties, would be, in my opinion, at variance with the well-established rights of sureties.

If the bank held collateral security to the benefit of which the sureties were entitled, upon what principle, by any act of the bank, could the sureties be deprived of such, their unquestionable right?

Why, then, should the sureties and not the bank bear any loss arising from the loss of these collaterals? As between the bank and the sureties the loss was, no doubt, occasioned by the misconduct of a third party

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and by the action or misapprehension of the bank in reference thereto, but in no way by or through the action, interference or consent of the sureties. Upon whom, then, should the loss fall but upon the bank through whose instrumentality the collaterals were lost? To adjudge otherwise, and make the loss fall on the innocent sureties, would be a strange way indeed of treating them as "favored debtors."

I cannot discover a particle of evidence to justify the suggestion of the learned Chief Justice of the Court of Appeal "that from all that appears on the evidence a portion of this paper might have been forged at the time of the execution of the mortgage." I am at a loss, in the absence of any evidence to that effect, to understand how such a contention can now be urged or such a conclusion implied. On the contrary, the mortgage distinctly recognizes that the collaterals then held were valid securities, and I fail to see a suspicion cast on them, or even a contention that such might have been the case.

The cases, both in England and the United States, leave no doubt on my mind as to the law governing this case. I will refer to the following. In *Pearl* v. *Deacon* (1) the Master of the Rolls says:—

In the judgment of Vice-Chancellor Wood in *Newton* v. *Chorlton* (2) there is a statement, in every word of which I concur. He says, as regards the creditor, "He is bound to give to the surety the benefit of every security which he holds at the time of the contract—every security which he then holds; and he is not allowed in any way to vary the position of the surety with reference to those securities. That has been decided most distinctly in *Mayhew* v. *Crickett* (3) by Lord Eldon, where there was a warrant of attorney in the hands of a creditor put into operation by the creditor, and a judgment obtained, from which he afterwards discharged the principal debtor. Lord Eldon held it utterly immaterial whether the warrant of attorney was known to the surety at the time he entered into the contract or not. The surety had a complete right to the benefit of it, and if the benefits were lost to him he was at once discharged."

(1) 24 Beav. 191. (2) 10 Hare 651.
(3) 2 Swanst. 185.

In *Wheatly* v. *Bastow* (1), per the Lord Justice Turner:

The creditor is, no doubt, under the obligation of preserving the securities which he takes from the principal debtor, for (as observed by the Vice-Chancellor) the surety may entitle himself to the benefit of the securities, and if any of them be lost by the act or default of the creditor the surety may be wholly or partially discharged (2), but the creditor enters into no contract with the surety not to assign the debt or the securities.

In *Wolff* v. *Day* (3), per Hannen J:

We are not bound by the exact terms of it; but I take it to be established that the defendant became surety upon the faith of there being some real and substantial security pledged, as well as his own credit, to the plaintiffs; and he was entitled, therefore, to the benefit of that real and substantial security in the event of his being called on to fulfil his duty as a surety, and to pay the debt for which he had so become surety. He will, however, be discharged from his liability as surety if the creditors have put it out of their power to hand over the surety the means of recouping himself by the security given by the principal. That doctrine is very clearly expressed in the notes in *Rees* v. *Barrington* (4). As a surety on payment of the debt is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship, if the creditor, who has had or ought to have had, them in his full possession or power, loses them, or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice, the surety to the extent of such security will be discharged. A surety, moreover, will be released if the creditor, by reason of what he has done, cannot, on

(1) 7 DeG. M. & G. 280.

(2) See Chitty Contr., 10th Am. ed. 583; *Law* v. *East India Co.*, 4 Ves. 824; *Capel* v. *Butler*, 2 S. & S. 457. A creditor who has his debt secured by a surety, and has also property pledged to him by the principal debtor as security, is bound to keep the property for the benefit of the surety as well as of himself, and if he surrender the property without the knowledge and consent of the surety he loses his claim against the surety to the extent of the property given up. *Baker* v. *Briggs*, 8 Pick. 122; *Bank of Manchester* v. *Bartlett*, 13 Vt. 315; *Lichtenthaler* v. *Thompson*, 13 Serg. & R. 157; *N. Hamp. Savings Bank* v. *Colcord*, 15 N.H. 119; *Watriss* v. *Pierce*, 32 N. H. 560, 573; *La Farge* v. *Hester*, 11 Barb. (N. Y.) 159; *Taylor* v. *Morrison*, 26 Ala. 728; *Neimcewiez* v. *Ghan*, 3 Paige 614; *Smith* v. *Tunno*, 1 McCord, Ch. 443. The fact that other security, as good or better than that surrendered, was substituted for it, will not preclude the surety from availing himself of the discharge. *N. Hamp. Savings Bank* v. *Colcord*, 15 N. H. 116.

(3) L. R. 7 Q.B. 763.

(4) 2 White & Tudor's L. C. 4th ed., p. 1002.

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payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands." And numerous cases are cited in support of those statements.

In De Colyar's Law of Guarantees (1), the law is thus laid down :—

Between the surety and the principal debtor there is no privity of contract for the surety contracts with the creditor.

183.—* * In all these cases there is a privity between the parties which constitutes an identity of person ; but there is no privity between the surety and principal,for the surety contracts with the creditor. They do not constitute one person in law, and are not jointly liable to the plaintiff.

290.—Another right is, that he is entitled to the benefit of all the securities, whether known to him (the surety) or not, which the creditor has against the principal. And it is the duty of the creditor, as soon as the surety has paid the debt, to make over to him all the securities which he, the creditor, holds, in order that the surety may recoup himself. In the case of a person who becomes surety for a limited amount of a debt he has, on payment of the amount for which he is liable, all the rights of a creditor in respect of that amount and is entitled to a share in the security held by the creditor for the whole debt.

391.— We have already seen that a surety is entitled to the benefit of all securities which the creditor has against the principal. It follows, therefore, that if the surety be deprived of this benefit by the act of the creditor he will be discharged to the full extent of the security to which he was entitled ; and, consequently, a creditor is bound to use diligence and care with regard to securities held by him. Thus, for instance, a creditor holding a mortgage for a guarantee debt is bound to hold it for the benefit of the surety so as to enable him, on paying the debt, to take the security in its original condition, unimpaired. The right of the surety is to have the same security in exactly the same plight and condition in which it stood in the creditor's hands.

In *Watts* v. *Shuttleworth* (2) Pollock C.B. says :—

The rule upon the subject seems to be that if the person guaranteed does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged. Story's Equity Jurisprudence (3). The same principle is enunciated and exemplified by the Master of the Rolls in *Pearl* v. *Deacon* (4), where he cited with approbation the opinion of

(1) P. 181.
(2) 5 H. & N. 247.
(3) Sec. 325.
(4) 24 Beav. 186, 191.

Lord Eldon in *Craythorne* v. *Swinburne* (1), that the rights of a surety depend rather on principles of equity than upon the actual contract; that there may be a *quasi* contract; but that the right of the surety arises out of the equitable relation of the parties. The Master of the Rolls also referred to the judgment of Vice-Chancellor Wood in *Newton* v. *Chorlton* (2), where he laid down that a creditor is bound to give the surety the benefit of every security he holds at the time of the contract; that the surety has a complete right to the benefit of it, and if the benefit be lost he would be discharged.

In *Newton* v. *Chorlton* (3) the marginal note thus states the law:—

The contract of suretyship entitles the surety to require that his position shall not be altered by any arrangement between the creditor and the principal debtor, from that in which he stood at the time of the contract; and it, therefore, entitles him absolutely to the benefit of all the securities for the debt which the creditor held at the time of the contract.

In *Springer* v. *Toothaker* (4) per Hathaway J.:—

In equity, a creditor who has the personal contract of his debtor with a surety, and has also or takes afterwards, property from the principal as security for his debt, is to hold the property fairly and impartially for the benefit of the surety as well as for himself, and if he parts with it without the knowledge or against the will of the surety he shall lose his claim against the surety, to the amount of the property so surrendered.

The People v. *Janson* (5), *Rees* v. *Berrington* (6), *Law* v. *E. I. Co.* (7), *Baker* v. *Briggs*; 2 ed. of 1 Story's Eq. (8).

In *Green* v. *Millbank* (9), N. Y. Sup. Court, per Van Vorst J.:—

In *Hinckley* v. *Kreitz* (10) Church C.J. adopts the comprehensive statement of Story, that if a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do and the omission proves injurious to the surety, in all such cases the latter will be discharged. 1 Story's Eq. Juris. (11).

In *N. H. Savings Bank* v. *Colcord* (12) Parker C.J. speaking of the principles of equity which regulate the relation of principal and surety, says:—

(1) 14 Vesey 164, 169.
(2) 10 Hare 651.
(3) 10 Hare 647.
(4) 43 Maine Rep. 384.
(5) 7 Johns 337.
(6) 2 Vesey Jr. 542.
(7) 4 Vesey 849.
(8) 8 Pick. 132.
(9) 3 Abbott's New Cases 152.
(10) 58 N. Y .583-592.
(11) Par. 325.
(12) 15 N. H. Rep. 122.

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Among these, as we have had occasion to notice in other cases, is one which requires a creditor, who has an obligation, executed by principal and surety, and who has also collateral security from the principal, to appropriate the avails of the security to the payment of the debt, or to hold it for the benefit of the surety, who, if he pay the debt, will be subrogated to the rights of the creditor * * * * If he surrenders such collateral security without the knowledge of the surety the latter will be discharged entirely, or *pro tanto*, according to the value of the security thus surrendered. *Law* v. *East India Co.* (1); *Baker* v. *Briggs* (2); 1 Story's Eq. Jur. (3); *McCollum* v. *Hinckley* (4); *Bank of Manchester* v. *Bartlett* (5); *Commonwealth* v. *Vanderslice* (6); *Lichtenthaler* v. *Thompson* (7). But if the surety assent to the surrender it will not affect his liability.

I think the judgment of the Divisional Court should be restored and the matter referred to the master, to take the accounts directed in that judgment.

STRONG J.—The mortgage for the foreclosure of which this action was brought was executed by the respondents as sureties to secure a large debt due to the appellants by Kyle & Co., a firm of wine and spirit merchants carrying on business in Toronto. The appellants also held as collateral security for the same debt negotiable paper, consisting of bills of exchange and promissory notes, made and accepted by the customers of Kyle & Co. and endorsed by the latter. The proviso for the defeasance of the mortgage was as follows:—

Provided, this mortgage to be void on payment of twenty-six thousand five hundred and thirteen $\frac{94}{100}$ dollars of lawful money of Canada, as follows: in two years from the date hereof; and all bills of exchange, promissory notes and other paper upon which the said firm of Wm. Kyle & Co. were liable to the said mortgagees on the 24th day of November, A.D., 1883, together with all renewals, substitutions and alterations thereof, and all indebtedness of the said firm to the said mortgagees in respect of the said sum. This indenture being intended to be a continuing security to the said mort-

(1) 4 Vesey 824.
(2) 8 Pick. R. 122.
(3) Par. 326.
(4) 9 Verm. R. 147.
(5) 13 Verm. R. 35.
(6) 8 Serg. & Rawle 457.
(7) 13 Serg. & Rawle 157.

gagees for the above amount, notwithstanding any change in the membership of the said firm, either by death, retirement therefrom or addition thereto, and also to secure and cover any sum due or to become due in respect of the interest, commission upon the said notes or renewals or other commercial paper, and taxes and performance of statute labor.

The respondents in their defence insist that the security has been discharged by reason of the appellants having renewed the original notes, bills and negotiable paper held by them as collateral securities at the date of the mortgage, and taken in substitution therefor renewals which turned out to be forged, as regards the names of the parties to such paper other than that of Kyle & Co., by whose fraud the appellants were induced to take these forged renewals, and the respondents further insist that the acceptance of such forged paper in lieu of the original genuine paper was such negligence on the part of the appellants that they are thereby exonerated from liability, either wholly or *pro tanto* to the extent of the value of the notes and bills which were exchanged for forged renewals.

The action came on for trial before Mr. Justice Ferguson who, at the conclusion of the evidence and with the consent of the parties, adjourned the cause for its further disposal into the Divisional Court, where it came on for argument before the Chancellor and Mr. Justice Proudfoot who gave judgment for the defendants (the present respondents). The appellants then appealed to the Court of Appeal, with the result that the judges being equally divided the appeal was dismissed.

Upon the general question of law involved there can be little doubt. The duty of a creditor as regards collateral securities in his hands to which a surety on payment of the debt would be entitled to be subrogated has long been well settled by courts of equity. The creditor is bound to conserve the securities for the

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benefit of the surety, and if he parts with them in such a way as to put them beyond the reach of the surety on payment, or does anything which a prudent owner of such securities, acting in his own interest and in the regular course of business, would not do, or if he omits to do anything which such a prudent owner would do for the preservation of the securities, and they are thereby lost or deteriorated in value, or the surety is prejudiced, the latter is wholly or *pro tanto* (as the case may be) discharged from liability. That this is the rule to be applied in the present case does not indeed seem to have been questioned by any of the learned judges whose opinions have been adverse to the appellants. The Chancellor, in delivering the judgment of the Divisional Court, places the decision upon the ground of default on the part of the appellants, and in the Court of Appeal both the learned judges who agreed with the Chancery Division most distinctly place their judgments on the ground that the bank, in giving up the original genuine paper in exchange for forged renewals, was guilty of neglect and breach of duty as regards the respondents. The defendants themselves have, indeed, placed their defence on this same ground, for in the eighth paragraph of their statement of claim, where they put forward the principle of law on which they rely, they propound their defence as follows:

8. The defendants further says that at the time of the execution of the said mortgage the plaintiffs held commercial paper of the said Kyle & Co. to an amount exceeding in value the amount secured by the said mortgage, and it was the duty of the plaintiffs to keep the same, or if they give up the same, or any part thereof, to obtain renewals thereof, or other commercial paper of the customers of said Kyle & Co., in substitution thereof, and to have said commercial paper ready to transfer and hand over to the defendants upon payment by them of the amount secured by the said commercial paper or procure other such paper in its stead, but negligently and improperly gave up the valid commercial paper held by them, and took instead thereof forged and invalid instruments, and they have not now commercial paper of the customers of the said Kyle & Co.,

to which the defendants would be entitled upon payment of the amount secured by the said mortgage, and the defendants say that they are discharged and released from the payment of the said mortgage, or any part thereof.

Both the Chief Justice and Mr. Justice Osler, who gave judgment in the Court of Appeal in favor of the appellants, adopt the same view of the case, conceding that if the bank was "guilty of negligence" the consequence would have been that the respondents, as sureties, would have been discharged, and they base their judgments on the inference of fact that there was no such negligence. There is, therefore, so far as both the courts below are concerned, a general consent of judicial opinion as to the abstract rule of law, by the application of which to the facts the case must be decided; and the difference of opinion which has arisen must be referred entirely to the different views taken by the several judges of what constitutes negligence in the circumstances of this particular case. In other words, the difficulty which has led to the conflict of opinion has arisen, not in laying down the legal principle applicable, but in applying it to the facts in evidence.

In order to ascertain whether the appellants have failed in their duty so as to render themselves liable to the imputation of negligence we must in the present, as in all cases where negligence is charged, and whether the question is to be determined by a jury under the direction of a judge, or by a court having in its own hands the decision of both law and fact, first of all enquire and endeavor to define, with as much exactitude as the nature of the case admits of, what is the standard of duty to which the appellants were bound to conform. In doing this the respondents will certainly have no right to complain if it is held that the creditor, in a case like the present, is bound to the same degree of diligence as a trustee in dealing with securities belonging to the trust, and to no greater, for it might easily

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be shown, as Mr. Justice Osler has said, that the analogy is not perfect and that the creditor in his dealings with collateral securities is not so strictly dealt with as is an express trustee in his management of the trust fund. But in doing this I am certainly not prepared to consider the instance of strictness in adjudicating on the liability of a trustee afforded by Lord Romilly's decision in *Bostock* v. *Floyer* (1) as conclusive, but I prefer to adopt the rule propounded by the higher authority of the House of Lords in the well-known case of *Speight* v. *Gaunt* (2), and apply it to the facts of the case before us.

Then, in *Speight* v. *Gaunt* (2) the House of Lords plainly and authoritatively state the law to be that a trustee ought to conduct the business of the trust in the manner an ordinarily prudent man of business would conduct his own affairs and that beyond that there is no obligation binding him. Applying that rule here, and always bearing in mind the facts that the creditors holding the collateral notes here were a banking corporation, that the notes had come into their hands, and the debt of the principal debtors had been contracted, and the whole transaction had occurred, in the ordinary course of the business of banking, and in the usual way of managing the bank account of a mercantile customer, our actual enquiry here is still further narrowed to this: Did the appellants, in accepting the fabricated renewals, do any act or fail to take any precaution which a prudent bank manager would not have done or would have taken under the circumstances?

In order to ascertain what is to be considered the duty of a banker in taking renewals of a large line of commercial paper, such as the appellants were the holders of in the present instance, we must, of course, have regard to the evidence so far as it is that of persons who may

(1) 35 Beav. 603. (2) 9 App. Cas. 1.

be regarded as experts, as to the course of business as carried on by bankers in such cases. But the court is not to confine itself to the evidence. It is also bound to bring its own common experience to bear and to take into consideration the practicability or impracticability of adopting the precautions which it is suggested ought to have been taken, and which might have prevented the loss. Then, considering the facts and the evidence in this way it certainly appears to me that it would be utterly impracticable to carry on the business of banking if every transaction, like the renewal of a note, was required to be attended with a degree of suspicious vigilance against forgery which no ordinarily prudent bank manager would ever think of exhibiting or could exhibit, without insult and injury to his customers, unless his suspicions had previously been aroused by circumstances warranting an exception to the usual course of dealing. Here there were no such circumstances; Kyle & Co. were traders in fair credit, and doing a large business in the same place as the bank itself, and immediately under the eyes of the bank officers, and no taint of suspicion had ever been attached to them. Under such circumstances an enquiry directly by the bank of each one of the customers of the firm, whose names appeared on notes presented for discount or as renewals, would not only have been out of the regular course, in the absence of cause for suspicion, but would have been an unwarranted injury to their commercial credit, and if they had turned out to be honest dealers, as the bank had every right to suppose them to be, would have been considered as an insult to be resented by the withdrawal of their account.

It seems to me, therefore, that it is most unjust and unreasonable now, because it has turned out that Kyle & Co. were a dishonest and bankrupt firm, engaged in

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practising a series of frauds upon the bank, to say that the appellants ought, at their peril, and by going out of the usual course of their business and of the business of all bankers, to have discovered that the notes which were put off upon them as genuine were, in truth, forgeries. Such a proposition is, I think, well answered by reference to the judgment of Bramwell, L.J., in *Baxendale* v. *Bennett* (1) when the learned judge says, in the passage which has been quoted by Mr. Justice Osler, "Every one has a right to suppose that a crime will not be committed, and to act on that belief." If the appellants had omitted any usual precaution, or had blindly persisted in dealing with the firm after circumstances had occurred calculated to rouse the suspicions of not merely a prudent man but of a prudent banker, who, I concede, ought to be more on his guard against such frauds than one not engaged in banking business, then the case would have admitted of very different considerations; but nothing of the kind is established by the evidence.

As to the omission to give notice of notes about to fall due it has, in my opinion, no bearing on the case, the practice not having been universal or even general and having for its object not the detection of frauds or forgeries but the insuring of punctuality by the parties primarily liable on the paper, a precaution sometimes adopted but not in the interest of the parties to the paper but purely for the convenience of the bank itself, and therefore one which it was not bound to take and was at liberty to omit or discontinue as suited its own convenience without being subjected to any imputation of negligence for so doing. On the whole I am unable to see that any act or default can be imputed to the appellants, which amounted to

(1) 3 Q. B. D. p. 530.

misfeasance or negligence in taking the forged renewals in substitution for the genuine notes originally held by the bank.

Had the mortgage not contained a clear recognition by the sureties of the creditors' right to renew the case would have been susceptible of very different considerations. In that case the appellants would have parted with the genuine notes at their peril; and besides, as Mr. Justice Burton says in his judgment, there would then have been another independent ground of discharge, arising from the giving of time implied in taking the renewals.

There is, however, an express assent, as I construe the mortgage deed, to the course of renewal and substitution adopted, and, indeed, having regard to the way in which a bank account of this kind with a wholesale firm, having a large number of small customers, retail sellers and hotel keepers, scattered over the Province, is carried on it is scarcely to be conceived as possible that the bank would have taken a security which so restricted and fettered them as to have disabled them from renewing the notes which might be in their hands. There need, however, be no difficulty about this for it is not possible, upon any ordinary principles of construction, to do otherwise than hold that the sureties have, in the language used in the proviso in the mortgage deed (before extracted), stated their acquiescence in the mode of dealing which was subsequently adopted. The sole question is that already considered, whether the appellants, in renewing the notes as they were entitled to do by the terms of the mortgage, were guilty of negligence in allowing forged paper to be imposed upon them, and this to the best of my ability and to my own satisfaction I have already answered in the negative.

Therefore, I have come to the same conclusions as

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were arrived at by the Chief Justice in appeal and by Mr. Justice Osler, and in the main for the same reasons. The judgments of both the courts below should be reversed and discharged, and the usual foreclosure decree should be entered in the Chancery Division, with costs to the appellants in the Court of Appeal and in this court.

FOURNIER J.—I concur in the judgment delivered by His Lordship the Chief Justice.

TASCHEREAU J.—I would dismiss this appeal with costs for the reasons given by Patterson J. in the court below.

GWYNNE J.—The sole question appears to be as to the proper form of the decree to be made in this suit, which was instituted by the plaintiffs, as mortgagees of certain real estate against the defendants, the mortgagors thereof, who, by the mortgage, became sureties only for the payment of a debt therein mentioned as being then due by a firm named Kyle & Co. to the plaintiffs. The suit was brought for the purpose of realising out of the mortgaged premises the amount remaining due in respect of the debt so guaranteed.

The question arises out of the ordinary course before the taking of the accounts of the debt secured by the mortgage, under the following circumstances. A firm carrying on in the city of Toronto a large wholesale business, as dealers in liquors and tea, under the name of Kyle & Co., were, upon the 24th November, 1883, indebted to the plaintiffs in the sum of $26,513 for monies advanced to them upon the discount of commercial paper of the said firm, and the plaintiffs refused to give the firm any further accommodation unless they should furnish them with additional security for the said debt; the defendants having agreed to become

such security by giving a mortgage upon real estate, the plaintiffs procured the mortgage which is sued upon to be prepared by their solicitor for execution by the defendants, and it was executed by them accordingly.

(After reading the recitals and covenant for payment in the mortgage His Lordship proceeded):

Now, it being by the Banking Act illegal for the plaintiffs to take security by mortgage upon real estate for future advances to be made thereon to any one, this mortgage, to be valid, must be construed, as indeed is also provided by the express terms of the instrument, as a security only for the debt of Kyle & Co. as it existed on the 24th day of November, 1883, and as represented by the commercial paper recited in the mortgage as having been before then discounted by the plaintiffs for Kyle & Co. The plain intent of the mortgage appears to me to be that the defendants should become, and they did thereby become, sureties for the due payment of such commercial paper, or of such other commercial paper as the plaintiffs in the ordinary and proper course of their business should take, by way of renewals thereof or in substitution therefor, during the period of two years. Any payments made to the plaintiffs by any of the parties primarily liable, or by Kyle & Co. themselves, upon any of the commercial paper then in existence, or upon any renewals thereof, would be a satisfaction *pro tanto* of the defendant's liability. Provision is made in the mortgage for the plaintiffs taking renewals of the then existing paper, and so on of such renewals during the two years, and the plain intent of this provision appears to me to be, that the defendants should exercise equally as sound a discretion as to the commercial paper which should be taken by them by way of renewals of, or in substitution for, the paper represent-

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ing the debt, as it stood on the 24th of November, A.D. 1883, as they would and should have taken in case they had renewed such paper from time to time without having had the additional security of the mortgage. They were not, by getting the additional security from sureties, to be less careful in the conduct of that part of their business with Kyle & Co., in which the sureties were concerned, than they would have been if they had given time to Kyle & Co. for the payment of their then existing debt without having the additional security given by the sureties. They were not to be at liberty to be indifferent to the interest of the sureties. Their plain duty, as it appears to me, was to keep the account of the debt of Kyle & Co., for which the defendants were sureties, and of the plaintiffs' dealings with the commercial paper in existence, recited in the mortgage, as representing such debt when the mortgage was executed, and of their dealings, also, with all the commercial paper which they should take from time to time by way of renewal of such paper, or by way of renewal of such renewals, during the whole period of the two years mentioned in the mortgage, wholly separate and distinct from the account the plaintiffs should keep with Kyle & Co. of all subsequent advances the plaintiffs should make to them upon other paper with which the defendants had nothing to do.

What the plaintiffs now appear to have in fact done was to mix the two accounts together and to keep them as one account, just as if the defendants were sureties for the future advances as well as for the existing debt, thus mixing the account of the transactions with which the defendants as such sureties were concerned, with transactions with which they had no concern whatever ; and the plaintiffs continued this mode of keeping their accounts until the month of September, 1885, when Kyle & Co. became insolvent and all further dealing with them ceased. At the time of their

becoming insolvent Kyle & Co. are said to have been indebted to the plaintiffs on the footing of the single account so kept by them in a sum exceeding $57,000, for which the plaintiffs held paper of the customers of Kyle & Co., endorsed by them to, and discounted by, the plaintiffs to the amount only of about 25 per cent. of the whole amount, and for the balance or 75 per cent. all they held was Kyle & Co.'s own promissory notes to the plaintiffs, together with which certain paper purporting to be the paper of customers of theirs, and payable to them, was deposited with the plaintiffs as collateral on collection for Kyle & Co., but this paper was not indorsed to, or discounted by, the plaintiffs, and nearly all of this latter paper the plaintiffs allege that they now believe to have been forged by Kyle & Co. At the time the defendants became sureties by the mortgage which they executed, it now appears that the debt for which they became sureties, that is to say, the $26,513 due on Nov. 24th, 1883, was, when the defendants executed the mortgage, represented by what are called straight discounts, that is to say, the paper of customers of Kyle & Co. payable to and endorsed by them to the plaintiffs and discounted by the latter for Kyle & Co., to the amount of $21,745 and the balance of $4,768 by Kyle & Co.'s own notes to the plaintiffs, accompanied with collaterals deposited on collection. The plaintiffs' manager, in his evidence, admits that by reason of the difference in the manner in which the plaintiffs were accustomed to deal with what he calls the straight discounts, and the paper deposited by way of collateral to Kyle & Co.'s own notes on collection, the result of the change made by the plaintiffs to take such a large amount of Kyle & Co.'s own notes with collaterals, instead of the customers' paper on discount, was that thereby Kyle & Co. were the better enabled to commit the forgeries which it is alleged

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they have committed, and that if the plaintiffs had only discounted customers' paper, indorsed by Kyle & Co. to the plaintiffs, the forgeries could hardly have been successfully committed at all. The plaintiffs are now claiming, under these circumstances, the right to recover from the defendants, under their mortgage, the whole $26,513, with interest, as still due and payable by them. The Chancery Division of the High Court of Justice for Ontario made a decree, whereby it was declared:

1. That the defendants are exonerated from liability upon the mortgage in question in this action, in so far as they have been prejudiced by the conduct of the plaintiffs in surrendering the securities held by them on the 20th December, 1883, on the indebtedness of Kyle & Co., secured by the said mortgage,or any securities, received by the plaintiffs in renewal or substitution of such securities or in renewal or substitution of any such renewals or substitutions, and receiving in renewal or substitution therefor forged instruments from the firm of Kyle & Co., and doth order and adjudge the same accordingly.

And the court did further declare:

2. That *primâ facie* the plaintiffs are bound for the face value of all securities held by them on the 20th December, 1883, or at any subsequent time, on the indebtedness of Kyle & Co., secured by the said mortgage which they the said plaintiffs may at any time have surrendered on receiving forged securities in lieu thereof, but the plaintiffs are to be at liberty to adduce evidence to reduce such liability to the amount which the said defendants have been actually damnified by the plaintiffs' acceptance of such forged securities, and subject to these declarations the court referred it to the master to take the account for redemption of sale of the mortgaged premises.

Upon an appeal taken from this decree to the Court of Appeal for Ontario that court was divided in opinion, and thereupon the case has been appealed to this court.

In my judgment, the case is not yet ripe for a decision upon the question whether the defendants are relieved from liability in respect of such forged paper, if any, as the plaintiffs may have taken from Kyle & Co., which can be held to be referable to the particular tran-

saction for which the defendants are guarantees. Nor can the question properly arise until the court shall be furnished with evidence (to be produced on the taking of the account, which the defendants are entitled to have taken) showing the circumstances under which such forged paper was received by the plaintiff, and what was the particular paper given up by the plaintiffs upon every occasion upon which such forged paper came into their hands.

As at present advised, it appears to me (assuming any of the paper which the plaintiffs now hold to have been forged by Kyle & Co., and which in the present state of the case can be assumed only) that before any question can be effectually raised between the plaintiffs and the defendants as to any such paper it must be made to appear that such paper, is legitimately referable to and connected with the original debt which was secured by the mortgage—that is to say, that such forged paper is paper which the plaintiffs actually received in renewal of or in actual substitution for paper which they held at the time of the execution of the mortgage, or by way of renewal of or in actual substitution for any renewals of such paper; and for this purpose it is necessary that an account should be taken of the particular dealings of the plaintiffs with the several bills of exchange and promissory notes which, at the time of the execution of the mortgage, represented the debt guaranteed by it, apart from and unaffected by any dealings between the plaintiffs and Kyle & Co. subsequently to the mortgage, and not guaranteed thereby, and of all renewals from time to time of all such original paper so guaranteed by the mortgage, and of all renewals of such renewals, respectively, and of all paper received by the plaintiffs in actual substitution for such original paper, or for any renewals thereof, and of all payments from time to time made to or received by the

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plaintiffs on account of or properly referable to such paper or any part thereof. Until such an account shall be taken it cannot be determined whether any paper in particular now held by the plaintiffs does or does not represent any part of the original debt guaranteed by the mortgage. In the case, as it at present stands, no question arises as to appropriations of payments under the rule in *Clayton's case* (1). *The City Discount Co.* v. *McLean* (2) and *Fenton* v. *Blackwood* (3), and cases of that description, have no application to the present case. But the defendants being guarantees for particular distinct transactions which constitute part only of the plaintiffs' dealings with Kyle & Co., and having no connection with large advances made by the plaintiffs to Kyle & Co., subsequently to the transactions guaranteed by the defendants' mortgage, are entitled, whatever may have been the mode in which the plaintiffs kept their accounts with Kyle & Co., to have an account taken of the transactions in respect of which the defendants are guarantees, wholly unprejudiced by and separated from the dealings of the plaintiffs with Kyle & Co., with which the defendants have no concern. They have as much right to call upon the plaintiffs to account for all paper from time to time accepted by them by way of renewal of the original commercial paper mentioned in the mortgage as then existing as they have for an account of all monies paid by any of the parties primarily liable upon any such paper, or by Kyle & Co. themselves, upon the occasion of the plaintiffs giving up, if they did give up, any of such paper to them, and of the circumstances under which the plaintiffs parted with any such original commercial paper or any renewals thereof. This case differs from *Moffatt* v *Merchants Bank* (4) in this, that the guarantee there was by

(1) 1 Mer. 572.
(2) L. R. 9 C. P. 962.
(3) L. R. 5 P. C. 167.
(4) 11 Can. S. C. R. 46.

bond a mode of security which it was competent for the plaintiffs to take by way of security for future advances as well as for a debt already incurred, and which the majority of the court held was in its terms a security for such future advances. While referring to this case, I wish to observe that the head note of the case, as reported in 11 Can. S.C.R. 46, is very inaccurate and misleading. It is there in substance said that the judgment of the majority of the court was that the obligor in the bond was liable upon it according to its tenor and effect, a point as to which there could not well be any difference of opinion; but I am represented as having dissented from this proposition, whereas the only difference of opinion which existed between me and the majority of the court was as to what was the tenor and effect of the bond, they being of opinion that it covered the future advances, I that it was limited to the then existing debt alone.

The decree should, in my opinion, be varied and should be to the effect following: declare that the defendants are sureties only for the debt of $26,513 in the mortgage in the pleadings mentioned as represented by the commercial paper in the said mortgage also mentioned as constituting such debt, and that as such sureties they are entitled to have an account taken of all the plaintiffs' dealings with such commercial paper, and of all payments, if any made in respect thereof, or properly referable to, and which should have been credited by the plaintiffs to any of such paper, and in the taking of such account the defendants are to be kept free from all prejudice, if any there be, arising from the fact of the plaintiffs having in the account kept by them with Kyle & Co. mixed up their, the said plaintiffs', dealings in respect of the paper held by them representing the said $26,513 from subsequent advances made by the plaintiffs to Kyle & Co., with which the defendants had no concern. Refer

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it to the master to take an account of all such securities as aforesaid so recited in the said indenture of mortgage, and of all the dealings of the plaintiffs in respect of each and every such securities, and of all payments, if any, made thereon or on account thereof, and also of all securities from time to time taken and received by the said plaintiffs by way of renewal of or in substitution for any such original securities, or by way of renewal of or in substitution for any of such renewals, and of all sums of money paid directly to the plaintiffs by any of the parties to any of such securities other than Kyle & Co, or by the said Kyle & Co., either directly in respect of any of such securities or properly referable thereto ,and which should have been credited by the plaintiffs to any of such securities, or to the original debt of $26,513 represented thereby ; and the said master is to report what amount, if any, appears to remain due upon or in respect of said original securities, or of any other and what securities in particular from time to time received by the plaintiffs in renewal of or in substitution for any of them ; and what are the particular securities, if any there be, now held by the plaintiffs which have at any time or times been received by them in renewal of or in substitution for any of such original securities, or by way of renewal of or in substitution for any of such renewals ; and under what circumstances each of such securities was taken and received by the plaintiffs, and whether any of the paper now held by the plaintiffs representing any part of the said original securities is for any and, if any, what reason valueless. And whether, in the opinion of the said master, any diminution in value from the face amount of such securities,or any of them, if any there be, has arisen from any and, if any, what neglect or disregard by the plaintiffs of any duty due by them to the defendants as such sureties as aforesaid. The master to report such further special cir-

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cumstances, if any there be, appearing in evidence before him.

Reserve further consideration and costs.

Appeal dismissed with costs.

Silicitors for appellants: *Smith, Rae & Green.*

Solicitors for respondents: *McKays, McIntyre & Stewart.*

Solicitors for respondent Clarkson: *MacLaren, MacDonald, Meredith & Shepley.*

THOMAS FOOT AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

AGNES E. FOOT AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

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*Oct. 9.

*Dec. 15.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Devise under—Absolute—Subsequent restriction—Repugnancy

A testator directed his real estate to be sold and the proceeds, after payment of debts and certain legacies, to be divided into twelve equal parts, "five of which I give and devise to my beloved daughter C. M., four of which I give and devise to A. E. F. (daughter), and three of which subject to the conditions and provisions hereinafter set forth, I reserve for my son C. W. M. But in no case shall any creditor of either of my children, or any husband of either of my children, daughters have any claim or demand upon the said executrices, &c., but their respective shares shall be kept and the interest, rents, and profits thereof shall be paid and allowed to them annually * * * during their respective lives." In an action by the daughters to have their shares paid over to them untrammelled by any trust.—

Held, affirming the judgment of the court below, that it was clearly the intention of the testator that the daughters should only receive the income from the shares during their lives.

APPEAL from a decision of the Supreme Court of

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

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Nova Scotia (1) giving judgment for the defendants on a special case.

This action arose from the provisions of the will of the Hon Jonathan McCully, which contained the following clause, after directing that the real estate be sold and certain debts and legacies paid out of the proceeds:—

"I order and direct that the whole balance of proceeds of the estate be divided into twelve equal parts, five of which I give and devise to my beloved daughter Celeste Marie, four of which I give and devise to Agnes E. Foot, and three of which, subject to the conditions and provisions hereinafter set forth, I reserve for my son Clarence W. McCully. But in no case shall any creditor of either of my children or any husband of either of my children, daughters, have any claim or demand upon the said executrices, executors or trustees, but their respective shares shall be kept and the interest, rents and profits thereof, shall be paid and allowed to them annually by their co-trustees and the survivors of them during their respective lives and their receipts only shall operate as discharges."

The action was brought by the above devisees Celeste Marie and Agnes E. Foot and their respective husbands to have the several shares devised to them paid over at once untrammelled by any trust, they claiming that the gift of five-twelfths and four-twelfths so devised was absolute and could not be cut down by doubtful words or by implication, and that the restrictions as to claims of creditors and husbands were repugnant and illegal.

The Supreme Court of Nova Scotia held that the clear intention and direction of the testator was, that the shares of the daughters should be held and invested by the trustees during coverture and the income only paid to them, and gave judgment for the defen-

(1) 20 N. S. Rep. 71.

dants The plaintiffs then appealed to the Supreme Court of Canada.

Henry Q.C. for the appellants.

Protecting the property devised from claims of creditors is against public morality and protecting it from claims of a husband of the devisee is an infringement of his marital rights as given by law. Therefore, either of these limitations standing alone would be void.

The following authorities deal with the question of restrictions on alienation, *Brandon* v. *Robinson* (1); *Hulme* v. *Tenant* (2); *Tullett* v. *Armstrong* (3); *Percy* v. *Percy* (4); *Re Bown* (5); Gray's Restraints on Alienations (6).

Graham Q.C. for respondents referred to *Re Grey's Settlements*, *Acason* v. *Greenwood* (7); *D'Oechsner* v. *Scott* (8); *Doolan* v. *Blake* (9); *Freeman* v. *Flood* (10).

Sir W. J. RITCHIE C.J.—(His Lordship read the material clauses of the will and then proceeded as follows.)

To hold that the plaintiffs are entitled, under the said will and codicils, to have the relief claimed, and to have it declared that Celeste Marie James and Agnes E. Foot and their husbands are entitled to have their respective shares passed over to them absolutely, would be, in my opinion, to ignore and set at defiance the, to my mind, very clearly expressed intention of the testator which, I think, was to withhold the principal from his daughters and their husbands and to allow the daughters only the annual income thereof during their respective lives, and this intention the provision seems to me very clearly to express.

If these principal moneys are now to be handed over

(1) 18 Ves. 434.
(2) 1 Bro. C. C. 16; 1 White & Tudor's L. C. 536.
(3) 1 Beav. 1; 4 Mylne & C. 377, 390.
(4) 24 Ch. D. 616.
(5) 27 Ch. D. 411.
(6) Secs. 125, 131, 142, 269, 274-5.
(7) 34 Ch. D. 712.
(8) 24 Beav. 239.
(9) 3 Ir. Ch. 340.
(10) 16 Geor. 534.

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to the daughters and their husbands, and they are to have the right to the absolute control of them free from all trusts and therefore free from the control of the trustees, how can it be said that their respective shares shall be kept and the interest, rents, and profits thereof shall be paid and allowed to them annually by their co-trustees and the survivors of them during their respective lives, and their receipts only shall operate as discharges? If the *corpus* is handed over how can the income be paid annually?

Then we have a provision for allowing Celeste Marie an amount suitable to her rank until she arrives at the age of twenty-one years, but not to exceed the interest on her five-twelfths, and this clause:—

> In case of the death of Celeste before she becomes of legal age or before marriage, or in case of her death without issue, then her interest and share shall be inherited and become the property of Agnes E. Foot, her sister and her heirs as fully and completely as if devised herein and hereby. Subject only to the same provisions as in the hands of her deceased sister Celeste.

very clearly shows that the trusts were to be continued, and that the testator never intended that they were not to exist at all as to Agnes E. Foot who was married at the time of the making of the will, which would, practically, be the result of the plaintiffs' contention, or as to Celeste Marie to cease on her attaining twenty-one years of age.

Under these circumstances I think the decision of the Supreme Court of Nova Scotia quite right and that the appeal should be dismissed.

STRONG J.—The question presented for decision by this appeal is purely one of construction arising on the will of the late Hon. Jonathan McCully, and relates to the bequests of certain shares of the residue of the testator's estate, made respectively to his two daughters, Agnes E. Foot and Celeste Marie McCully.

The clause of the will which we are now called upon to construe is in the following words:—

I release and discharge each of my children from all debts due and owing to me, and for all advances made previous to my death, and in order that there may be as nearly as can be ascertained a fair division of what shall remain after payment or deduction of the legacies herein named, I order and direct that the whole balance of proceeds of the estate be divided into twelve equal parts, five of which I give and devise to my beloved daughter Celeste Marie, four of which I give and devise to Agnes E. Foot, and three of which subject to the conditions and provisions hereinafter set forth I reserve for my son Clarence W. McCully. But in no case shall any creditor of either of my children or any husband of either of my children, daughters, have any claim or demand upon the said executrices executors or trustees, but their respective shares shall be kept and the interest, rents and profits thereof shall be paid and allowed to them annually by the co-trustees and the survivors of them during their respective lives and their receipts only shall operate as discharges.

At the time of the testator's decease his daughter, Mrs. Foot, was married ; his other daughter, Celeste Marie, was unmarried, but previous to the time of the institution of the present action she had married, and both daughters were under coverture when the action was brought.

The daughters and their husbands by this action seek to have it declared that they are entitled to the immediate payment over to them of the capital of the funds respectively bequeathed to them. The defendants, who are the trustees under the will, submit that they are not entitled to such payment, inasmuch as the legacies were for their separate use, and as regards the *corpus* at least, without power of anticipation.

The court below has determined both these questions against the plaintiffs, and I am of opinion that their decision is entirely right and ought to be affirmed.

As regards the question of separate use the exclusion of the husbands of the daughters from any right to call for payment of the legacies, and the direction that the legacies "shall be kept" (by which, of course, it is meant that the *corpus* of the respective funds shall be retained in the hands of the trustees) are conclusive to

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show that it was the testator's intention to limit the legacies to the separate use of his daughters. It would be idle and superfluous to cite cases in support of this construction, since it suffices to refer to the general principle that in order to create a limitation to the separate use of a married woman all that is required is the demonstration of an intention to exclude the husband. Then, there could not be a plainer indication of an intention to that effect than we have in the present instance.

As regards restraint upon anticipation that is divisible into two heads—first, in relation to the *corpus*, secondly, with reference to the income.

The words "shall be kept" which, as I have already said, are equivalent to an expression that the *corpus* of each legacy shall be retained by the trustees, and can have no other meaning than that, coupled with the direction to pay the income to the legatees, clearly exclude the inference that the legatees were entitled to call for payment of the funds to themselves. Whatever doubt there may have previously been as to the sufficiency of such a direction to constitute a restraint on anticipation, modern decisions of the highest authority and of very recent date (1) have conclusively established that where there is anything to show that the fund is to be retained by the trustees, and the income only paid to the married woman during coverture, the restraint takes effect. (2).

The will now before us undoubtedly complies with these conditions. It contains a distinct direction that the *corpus* shall be retained by the trustees and the income only paid to the married women, beneficiaries. Consequently, the gift to separate use with the restriction on all power of disposition during coverture as regards the *corpus* took effect, as regards the bequest to Mrs. Foot, immediately on the testator's death. And

(1) *Re* Bown 27 ch. D. 411. (2) Theobald on Wills, 3 ed., p. 437.

in the case of Mrs. James, when she married without having, in the interval between the testator's death and her marriage, made any disposition of her legacy the same result followed.

I find nothing in the will indicating any intention to restrain anticipation of the income. The direction that the receipts of the married woman alone shall operate as discharges, the only grounds in this will which can be referred to as affecting the right of disposition of income, have been held ineffectual for this purpose (1).

The appeal must be dismissed, but I think it reasonable that the costs should come out of the estate, inasmuch as the testator himself, by the loose and inaccurate language in which he expressed himself, has really been the cause of doubts which the parties were justified in asking the court to solve.

FOURNIER J.—I am in favor of dismissing this appeal for the reasons given by the Chief Justice of the Supreme Court of Nova Scotia.

TASCHEREAU J.—I would dismiss this appeal for the reasons given in the court below. Upon the reading of the will alone, without reference to authorities, I would determine that these plaintiffs are not entitled to the capital of the moneys in question.

GWYNNE J.—I agree with the opinion expressed by my brother Strong.

Appeal dismissed with costs.

Solicitors for appellants: *Henry, Ritchie & Weston.*

Solicitors for respondents: *Graham, Tupper, Borden & Parker*; *Sedgewick, Ross & Sedgewick.*

(1) *Ross's Trust*, 1 *Sim, M. S.*, 524; *Acton* v. *White*, 1 *Sim. &* 196; *Wagtaff* v. *Smith*, 9 Ves. *Stu.* 429.

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JOHN ROBERTSON AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

JOHN PUGH (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Mar. Ins.—Warranty in policy—Time of sailing—Action on policy—Limitation of time—Defective proof—Whether time runs from filing of.

A vessel insured for a voyage from Charlottetown to St. Johns, Nfld., left the wharf at Charlottetown on December 3, with the *bonâ fide* intention of commencing her voyage. After proceeding a short distance she was obliged, by stress of weather, to anchor within the limits of the harbor of Charlottetown and remained there until December 4 when she proceeded on her voyage.

Held, that this was a compliance with a warranty in the policy of insurance to sail not later than December 3, but a breach of a warranty to sail *from the Port of Charlottetown* not later than December 3.

A clause in a marine policy required action to be brought out on it within twelve months from the date of depositing claim for loss or damage at the office of the assurers. A protest was deposited accompanied by a demand for the insurance. The protest was defective and some months later an amended claim was deposited.

Held, affirming the judgment of the court below, that an action begun more than twelve months after the original, but less than twelve months after the amended, claim was deposited was too late.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) sustaining, by a divided court, the judgment for the defendant on the trial.

This is an action on two marine policies of insurance issued by the Chebucto Marine Association, whereof defendant was a member, to the plaintiffs, bearing date

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

(1) 20 N. S. Rep. 15.

the 29th November, 1882, one for $1,500 upon the hull of the schooner "Marion Robertson," the other for $500 upon the freight laden on board thereof, on a voyage from Charlottetown, P.E.I., to St. John's, Nfld. Each policy contained the following clauses :—

"All losses and damages which shall happen to the aforesaid vessel shall be paid within sixty days after proof made and exhibited of such at the office of the association.

"No suit or action of any kind for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after claim for loss or damage shall be deposited at the office of the assurers; and in case any such suit or action shall be commenced against the assurers after the expiration of twelve months next after claim for loss or damage shall be deposited as aforesaid, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

The policy on hull contains this clause: "Warranted to sail not later than 3rd December, 1882."

That on freight the following clause: "Warranted to sail from Charlottetown not later than 3rd December, 1882."

The vessel sailed from Peake's Wharf, Charlottetown, on the 3rd December, 1882. After proceeding two and and a half or three miles she came to anchor at Three Tides, "half way down the harbor, inside of the headlands" of the harbor of Charlottetown, and inside the lighthouse at the mouth of the harbor. She remained there until December 4 when she proceeded on her voyage. The vessel on the 9th inst., went on shore at Langlade, Miquelon.

A paper signed by the master at the place of the loss represented the date of sailing from Charlottetown as

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December 4, and on January 22, 1883, the master made an extended protest in which he also gave December 4 as the day of sailing. This protest was, on January 14, 1883, received by defendants as part of the proofs of loss.

The defendants refused to pay the insurance on the ground that the proofs of loss showed a breach of the condition as to time of sailing. In October, 1883, a declaration made by the master of the vessel, stating that the true date of sailing was December 3 and explaining how it was wrongly stated in the protest, was delivered to the defendants, and in February, 1884, a statement by the supercargo of the vessel confirming that of the master was also delivered.

The case was tried before a judge without a jury and the following facts were found among others :—

That the vessel sailed on the 3rd December, 1882, being then ready for sea, and that the master left the wharf with the *bonâ fide* intention of commencing the voyage and proceeding to sea that day.

That the vessel was so much injured by the perils insured against that she could not be floated without repairs, and that she could not be repaired at Langlade or any where in its vicinity at that season of the year, or taken to a place of repair.

That this action was commenced on the 5th April, 1884, as proved by the copy of pleadings filed by the plaintiffs to be used on the trial.

On this last finding judgment was given for the defendants, the judge holding that the twelve months limited for the bringing of the action ran from the date of delivery of the protest to the defendants, January 22, 1883, and not, as claimed by the plaintiffs, from the filing of the amended proofs. This judgment was sustained by the Supreme Court of Nova Scotia the judges of the court being equally divided in their opinions. The plaintiffs then appealed to the Supreme Court of Canada.

Henry Q.C. for the appellants cited *Kimball* v. *Hamilton Fire Ins. Co.* (1); *Chandler* v. *St. Paul Ins. Co.* (2); *Mayor* v. *Hamilton Fire Ins. Co.* (3); *Campbell* v. *Charter Oak Ins. Co.* (4).

Graham Q.C. for the respondent referred to Parsons on Marine Insurance (5); *Cossman* v. *West* (6); Arnould on Marine Insurance (7).

Sir W. J. RITCHIE C.J.—I think there was a strict compliance with the warranty in the policy on the hull not to sail later than the third of December, 1882, because I am of opinion that the ship broke ground for her sea voyage, and got fairly under sail for her place of destination on the day limited in the warranty and that there was a *bonâ fide* commencement of the voyage insured on the given day, and that she was undoubtedly detained and delayed in pursuing her voyage by stress of weather and as there was a beginning to sail on the voyage insured on the day named in the warranty the warranty was complied with.

I am equally clear the warranty that she should sail from Charlottetown not later than the 3rd of December, 1882, was not complied with because it is clear that she did not leave, but was in, the port of Charlottetown until the 4th of December; therefore, the warranty was not complied with and the learned judge should have found on the 17th plea to the third count on the policy on freight, that the said vessel did sail from the port of Charlottetown later than the 3rd of December, to wit, on the 4th of December, 1882.

In Arnould on Marine Insurance the law is thus stated (8).

We now proceed to notice those cases which have been decided

(1) 21 N. Y. (S. C.) 495.
(2) 5 Bennett's Fire Insurance Cases 606.
(3) 39 N. Y. 45.
(4) 10 Allen (Mass.) 213.
(5) Vol. 2 p. 473.
(6) 13 App. Cas. 160.
(7) 6 Ed. vol. pp. 610-18.
(8) 6 Ed. vol. 2 ch. 3 p. 619

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on warranties "to depart" and "to sail from." *Moir* v. *Royal Exch. Ass. Co.* (1).

Under a policy "lost or not lost, at and from Memel from her port of discharge in England, warranted to depart on or before the 15th of September." The "Neptunus" having completed her loading, and clearing at the Custom House of Memel on the 9th September, in a state of perfect readiness for her voyage hove up her anchor, and dropped down the river, with the intention of at once proceeding to sea; a change of wind, however, obliged her to lie to at a place in the river, still within the limits of the port of Memel, till the 21st, when she finally got to sea. Lord Ellenborough, at the trial, held that a warranty, "to depart on or before the 15th of September, must mean that she should be out of the port of Memel and at sea by the given day, but she was still in that port on that day, and, therefore, the warranty was not complied with." The Court of King's Bench supported this ruling (2); and in another action on the same policy in the Court of Common Pleas, the unanimous judgment of the court was given in the same way (3).

A warranty "to sail from" receives precisely the same meaning as the warranty "to depart"; this was admitted in the following case, (citing *Lang* v. *Anderdon* (4)) the only question being as to what in mercantile usage were the limits of the port of departure, with references to ships of the burden of the ship insured.

But it is not necessary to pursue this discussion further because the next objection, which applies alike to both policies, must, in my opinion, prevail, viz., was the action brought within the time limited under the clause in the policy which provides that :—

No suit or action of any kind for the recovery of any claim upon, under or by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after claim for loss or damage shall be deposited at the office of the assurers; and in case any such suit or action shall be commenced against the assurers after the expiration of 12 months next after claim for loss or damage shall be deposited as aforesaid, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

The claim of loss and a protest in proof thereof made

(1) 4 Camp. 84.
(2) 3 M. & S. 461.
(3) 6 Taunt. 240; 1 Marsh. R. 570.
(4) 3 B. & C. 495.

on the 22nd of January, 1883, at Buctouche was furnished to and deposited at the office of the assurers on the 24th of January, 1883. The claim is as follows:—

Buctouche, December 19, 1882.

Mr. G. A. MACKENZIE:—

We beg to inform your company of the loss of our vessel or schooner called the "Marion Robertson," at Miquelon, which happened on the 9th inst. We hold policy upon the said vessel and freight to the extent of two thousand dollars—fifteen hundred dollars upon the vessel, and five hundred dollars upon the freight, &c., which policies were effected through the agency of your company at Charlottetown, P. E. Island. You will please give the matter your earliest attention, and oblige yours,

G. & J. ROBERTSON.

In this protest there is the statement that the said vessel "did, on the 4th day of December last past, sail from her last mentioned place of loading (viz., Charlottetown,) bound directly for the port of St. John's. This plaintiffs insist was an accidental error, which they subsequently corrected by papers furnished to defendants in October, 1883, and confirmed by McMillan's statement sworn on the 1st of February, 1884, and they seek to make the date of the alleged correction the time from which the twelve months is to commence to run. But the fact appears to have been entirely overlooked that the vessel actually sailed from Charlottetown on the fourth, for though she did leave the wharf and did sail on her voyage on the third, she was after such sailing, by reason of stress of weather, detained in the said port of Charlottetown and did not sail therefrom until the fourth.

Unless this provision of the contract is to be entirely ignored, which it cannot be on any principle of the law of contracts of insurance, I cannot escape the conclusion (I wish I could) that the learned judge was quite right in finding that the claim for loss or damage under the policies sued on was deposited by the plaintiffs at the office of the insurers before February, 1883,

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from which time the limitation commenced to run; and as the action was not commenced until the 5th of April, 1884, and so not brought within the time limited therefor by the policies, the judgment must be for the defendants.

STRONG J.—This action is brought upon two separate policies of insurance, one on the hull of the schooner "Marion Robertson," the other on the freight to be carried by the same vessel on a voyage from Charlottetown, P. E. Island, to St. John's, Newfoundland. The policies were both dated the 24th of November, 1882, and each contained a limitation clause in the following words:—

No suit or action of any kind for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after claim for loss or damage shall be deposited at the office of the assurers; and in case any such suit or action shall be commenced against the assurers after the expiration of twelve months next after claim for loss or damage shall be deposited as aforesaid, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

The policy on the vessel contains also the following warranty: "Warranted to sail not later than 3rd of "December, 1882," and that on freight contained the clause, "warranted to sail from Charlottetown not "later than 3rd of December, 1882."

The vessel sailed from Peake's wharf at Charlottetown on the 3rd of December, 1882, but owing to a snow storm and bad weather did not go to sea, but came to anchor at a place within the harbor called "Three Tides," from which she again sailed on the 4th of December, 1882, and was subsequently lost on the 9th of December, 1882, at Langlade, Miquelon, where she was surveyed and sold by the master.

The master afterwards went before a notary public at Buctouche, N.B., who on the 22nd of January, 1883,

drew up a formal protest of the loss. This protest was lodged with the secretary of the underwriters on the 24th of January, 1883.

The action was not brought until the 5th of April, 1884. As regards the policy on freight it is clear that the appellants are precluded from recovering by reason of the admitted fact that the vessel did not sail from the port of Charlottetown until after the 3rd of December, 1882, that is to say, not until the 4th of December. The passage quoted from Arnould on Insurance (1) by the respondents in their factum, and the authorities there referred to, are conclusive on this point. Sailing on the voyage is not a compliance with a warranty to sail from a particular port before a named date, if the vessel does not actually leave the port or harbor before the day indicated. The proposition that a sailing from one point within a port to another within the same port, though it may be a *bonâ fide* sailing on the voyage, is not equivalent to a sailing from the port has long been so well established that it cannot now be called in question.

As regards the warranty in the policy on the vessel which only required that she should sail on the voyage not later than the third December, there was a sufficient compliance with its terms, inasmuch as it is not disputed that the vessel, in good faith, left her moorings at Peak's wharf, Charlottetown harbour, and proceeded on her voyage on that day, but was detained by bad weather from leaving the bounds of the port until the next day (2).

Then the underwriters (the present respondents) rely on the limitation clause as an answer to the action as respects both policies, and if we are to consider the lodging of the protest with the underwriters, on the 24th January, 1883, as a depositing of the claim for loss within the meaning of those words as used in the

(1) 6th Ed, p. 619,

(2) Arnould, 6 ed., p. 610.

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clause under consideration, it is clear that this action instituted on the 5th April, 1884, was too late. The appellants contend, however, first, that the protest was not a claim for loss within the meaning of the limitation clause, and second, that though it might have been so considered if it had been accurate, yet, inasmuch as it contained an inaccurate statement of the date of sailing it was not to be considered a complete claim. The answer to this is, however, very plain. The "claim for loss or damage" is manifestly the same thing as the "proof" referred to in the preceding clause, which provides that "all losses and damages" shall be paid within sixty days after "proof," made and exhibited at the office of the association.

Then the protest was intended and drawn up as a formal record of the loss and the facts attending it, and is to be considered as having been lodged with the secretary as a compliance with the limitation clause, and also as showing a title to be paid the indemnity. The case of *Cossman* v. *West* (1), in the Privy Council, shows that this is to be considered proof of the loss.

Further, there was no mistake or inaccuracy either in the protest or in the master's declaration before the French authorities at Langlade. Both these documents were strictly accurate in stating that the schooner sailed from Charlottetown on the 4th December, but even if it were otherwise, and she had in fact sailed from that port on the 3rd (the day on which she actually commenced her voyage, though she did not leave the harbor until the next day), that would not have disentitled the plaintiff to show the real fact at the trial. So that even if the protest had been inaccurate, it would nevertheless have been a "claim and proof of loss" within the terms of the policy. It follows that the 24th of January, 1883, the date on which it was deposited with the secretary of the association must be

(1) 13 Appeal Cases 160.

considered as the date from which the period of one year prescribed by the limitation clause began to run. The action was not brought within a year from this date, and therefore the court below were right in holding the plaintiff debarred from recovering. The appeal should be dismissed with costs.

FOURNIER J.—I concur in the judgment delivered by the Chief Justice.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed for the reasons given by Ritchie J. in the court below that the action was too late.

GWYNNE J.—Concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Henry, Ritchie & Weston.*

Solicitors for respondents: *Graham, Tupper, Borden & Parker.*

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*Oct. 13.
*Dec. 15.

EDMUND BARNARD (OPPOSANT IN THE COURT BELOW) ..... APPELLANT;

AND

ALEXANDER MOLSON (DEFENDANT CONTESTING THE OPPOSITION IN THE COURT BELOW) ..... RESPONDENT.

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

Attorneys lien for costs—Opposition en sous ordre—Moneys deposited in hands of prothonotary—C. C. P. Art. 753.

Held, per Ritchie C.J., Strong and Taschereau JJ., affirming the judgment of the Court of Queen's Bench, Montreal, that where moneys have been voluntarily deposited by a garnishee in the hands of the prothonotary, and the attachment of such moneys is subsequently quashed by a final judgment of the court, there being then no longer any moneys subject to a distribution or collocation, such moneys cannot be claimed by an opposition *en sous ordre.*

Fournier and Gwynne JJ. dissenting, on the ground that as the moneys were still subject to the control of the court at the time the opposition *en sous ordre* was filed, such opposition was not too late.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), affirming two judgments of the Superior Court (2), which dismissed an opposition *en sous ordre* of the appellant fyled in the original case of *J. T. Carter* v. *Alexander Molson.*

On the 11th September, 1885, the respondent, without giving notice to the appellant, who had been his attorney in the case of *Carter* v. *Molson* and *Freeman, tiers-saisi*, applied through new attorneys to the Superior Court for an order upon the prothonotary to pay

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

(1) M. L. R. 3 Q. B. 348. (2) M. L. R. 2 S. C. 143.

him the moneys deposited in court by Freeman, and a judgment was rendered accordingly, the prothonotary, however, being directed by the judgment to retain the court house tax and the poundage.

By an opposition, dated 22nd September, 1885, the appellant alleged that in cause No. 1135 S. C., *Carter* v. *Molson* and *Freeman*, *tiers-saisi*, the said *tiers-saisi* deposited certain moneys in court, and that the moneys in question were the proceeds of a legacy made by the late Hon. John Molson in favor of the defendant, his wife and children, and were declared by a judgment of the Privy Council alimentary and *insaisissable*. He also alleged the insolvency of the defendant and claimed $3,932.17, by special privilege *en sous ordre*, for professional services incurred in the proceedings for the protection of the legacy. The opposition was supported by an affidavit stating that all the facts alleged in the opposition were true.

The respondent began by moving that the opposition should be dismissed as irregular and illegal, but the motion was dismissed.

The respondent, on 26th October, demurred to the opposition on the following grounds:—

1. Because the opposition *en sous ordre* is on its face a proceeding by way of execution, and there is nothing to show that opposant's claim carries execution.

2. Because the moneys are declared in the opposition to be exempt from seizure.

3. Because the opposition, though styled an opposition *en sous ordre*, is on its face not such an opposition, but an attempt to attach moneys of a defendant in the hands of third parties, before judgment, without issuing a writ of attachment, and without compliance with the requirements of law necessary to entitle opposant to such a writ.

4. Because the affidavit forming part of the opposition is illegal and insufficient.

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5. Because the moneys attached are in the hands of the prothonotary merely as a conservatory process between the parties in the original suit, and are not moneys levied subject to an opposition as made.

Opposant answered generally.

There was also a motion presented on behalf of the respondent in the Superior Court for an order to the prothonotary of said court, notwithstanding the said opposition to pay to respondent contesting the sum of $9,572.65, with costs, being the balance between the amount in his hand ($13,504.10) after deduction of the amount claimed by opposant:—

1st. By the judgment Mr. Justice Mathieu (20th January, 1886), maintained the demurrer to the opposition *en sous ordre* filed by the appellant.

2nd. By the judgment (rendered at the same time) the motion of respondent was granted.

The Court of Queen's Bench for Lower Canada (appeal side) affirmed the judgments of Mr. Justice Mathieu, but resting the decision on the ground that after the 11th of September, 1885, there was no longer any case pending wherein an opposition *en sous ordre* could be fyled, and that in consequence the appellant could only proceed by *saisie-arrêt* before judgment, accompanied by an affidavit of secretion.

On appeal to the Supreme Court of Canada.

Lacoste Q.C. and *Beique* for appellant contended:—

1st. That appellant has, under the French law, a privilege for his costs of the nature of a solicitor's lien under the English law, which necessarily involves the right to stop the moneys without an affidavit;

2nd. That even if he had no solicitor's privilege or lien, the respondent's insolvency alone, under article 753 C.C.P., gave him the right, by means of an opposition *en sous ordre*, to stop the moneys without an affidavit, and referred to Arts. 602, 603, 604, 612, 616,

622, 629 and 630 C. C. P. *Martin* v. *Labelle* (1); *Doutre* v. *Leblanc es-qual* (2);

3rd. That his opposition *en sous ordre* was equally regular whether it came after or before the judgment of the 11th September, 1885, so long as the moneys were still in the hands of the prothonotary.

Citing Jousse Ordonnance 1667 (3); Ferrière Grand Coutumier (4); *McDonnell* v. *Buntin* (5); *Molleur & Marchand* v. *The Atty. Gen.* (6); Pigeau (7).

Laflamme Q.C. and *Robertson* Q.C., for respondent, contended:

That Art. 753 C. C. P. governed oppositions *en sous ordre*. At the time of the present opposition there were no moneys which could be distributed, and as the respondents had not been collocated therein under Art. 724 C. C. P., the appellant could not claim by a sub-opposition. Moreover, the moneys which were in the hands of the prothonotary at the time of the opposition were not moneys levied.

The deposit in the hands of the prothonotary was a mere substitution of one garnishee under the control of the court for another. The final judgment, as alleged, having declared the money to be the property of defendant, respondent, he immediately became entitled to withdraw it, and any creditor wishing to attach it before obtaining a judgment must do so in the usual way by a *saisie-arrêt*, supported by a legal affidavit, and third parties can have no greater rights to interfere with respondent's enjoyment and possession of his property, because it has been placed temporarily in the hands of the prothonotary, than they could have were it in the respondent's personal possession. The attachment, in fact, by the effects of the judgment set up in the opposition, became of no effect, and was declared null.

(1) 7 Leg. News 174.
(2) 16 L. C. Jur. 209.
(3) 2 Vol. p. 191.
(4) P. 1377 No. 4.
(5) M. L. R. 1 Q. B. 1.
(6) 5 Rev. Leg. 379.
(7) 1 vol. p. 486.

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There is no pretence that respondent was collocated for any sum. The money in question was his from the beginning, and held by the prothonotary only to abide a judgment on a claim made on it, but subsequently declared to be unfounded.

It is also necessary to make a claim by means of a sub-opposition, as laid down in Art. 753, that the debtor be insolvent, or the creditor's claim must carry execution. There is no pretence that the latter is the case; but there is an allegation of insolvency. Respondent submits, however, that the insolvency contemplated by the article is such insolvency as would be sufficient for a writ of seizure before judgment. A sub-opposition is really of the nature of a *saisie-arrêt* before judgment, and therefore should be accompanied with an affidavit, as required by Art. 834 and 855 C. C. P. This was the view taken in *Sterling* v. *Darling & Fowler* (1) by three judges of the Superior Court, and which has never been over-ruled.

The fact is, that the appellant, considering that he has a claim against respondent, is desirous of attaching his debtor's property before obtaining a judgment against him. This the law gives him a right to do, but only in certain cases, viz.:—those specified in Arts. 834 and 855 of the Code of Civil Procedure To avail himself of this remedy he must bring his case within the provisions of the law and also comply with the formalities the law requires. He must allege not insolvency only, but fraud. If appellant found the respondent attempting to defraud him out of a just debt he might easily have attached the money by a writ in the usual way; but evidently knowing that he could not take the affidavit necessary for an attachment before judgment, he styles his opposition an *opposition en sous ordre*, and endeavors to evade the law and accomplish his object in an indirect way.

(1) 1 L. C. J. 161.

Secondly,—As to the appeal from the judgment ordering the payment to defendant of balance after holding $3,932.17 to secure appellant's claim. If the judgment on the demurrer is maintained, the judgment on the motion will be maintained at the same time; but even should the demurrer be overruled, respondent submits that it is contrary to all law and equity that opposant's pretension with regard to this balance should be upheld. On his own showing opposant claims $3,932.17. He asks, in addition to this, a further sum of $9,572.65 to be held,—for what purpose, unless it be to harass the respondent by keeping him out of his money, it is hard to tell. He can have no interest, save as security for costs in case he succeeds, and respondent being a resident in Lower Canada and a defendant, it is difficult to see on what grounds such security can be demanded; and the amount the opposant attempts to hold as security is $9,572.65. The proposition carries its own condemnation.

SIR W. J. RITCHIE C.J.—I think the appeal must be dismissed, agreeing, as I do, with the reasons which Mr. Justice Taschereau will state.

STRONG J. was also of opinion that the appeal should be dismissed.

FOURNIER J.—Le présent appel est d'un jugement de la cour du Banc de la Reine, en date du 17 septembre dernier, confirmant pour d'autres raisons, un jugement de la cour Supérieure du district de Montréal, renvoyant une opposition en sous-ordre, produite par l'appelante dans une cause entre *John T. Carter* v. *Alexander Molson*, et *Freeman*, tiers-saisi. L'instance entre ces derniers avait été commencée par un bref de saisie-arrêt entre les mains de Freeman en exécution du juge-

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ment obtenu par Carter contre Molson. La contestation fut soulevée sur le caractère d'insaisissabilité des deniers saisis, entre les mains de Freeman, déposés plus tard en cour.

Ce procès qui a duré plusieurs années et a été même porté deux fois en appel au Conseil Privé, avait pour but de faire déclarer saisissables certains biens de Molson et d'en amener le produit devant la cour pour en faire la distribution entre ses créanciers.

L'appelant Bernard, dans tout le cours de cette longue contestation et de ses nombreux incidents, a représenté comme avocat et procureur, non seulement les intérêts de Molson, mais aussi ceux de sa femme et de ses enfants, intéressés comme lui à faire déclarer que les biens qui lui avaient été légués par l'honorable John Molson, son père, avec clause d'*aliment* et d'*insaisissabilité* ne pouvaient pas être saisis et exécutés pour ses dettes. Les frais qu'il a ainsi encourus se montaient à la somme de $3,932.67. Le tiers-saisi Freeman ayant déposé entre les mains du Protonotaire de la cour Supérieure, district de Montréal, une forte somme d'argent provenant des revenus des biens de Molson, l'appelant a produit une opposition en sous-ordre sur ces deniers, pour être payé du montant de ses frais. Lorsque cette opposition a été produite, le 22 septembre 1885, le protonotaire avait déjà, le 11 du même mois, sur la demande de l'intimé, et sans avis à l'appelant, ordonné de remettre à Molson les argents déposés en cour par Freeman, sous la déduction des taxes judiciaires. Cependant, les deniers étaient encore entre les mains du protonotaire lorsque l'opposition fut reçue. Le paiement s'est en conséquence trouvé arrêté.

Une première motion de l'intimé demandant le renvoi de cette opposition a été rejetée. Il a ensuite invoqué les mêmes moyens par des plaidoyers au mérite et en droit. Ces moyens sont :

1o. Que l'appelant ne peut saisir les argents sans faire un affidavit que l'intimé cache ses effets ou se soustrait à l'action de ses créanciers. 2o. Que les argents déposés en cour n'ont pas été prélevés en vertu d'une exécution et ne peuvent être arrêtés par une opposition en sous-ordre. 3o. Que ces deniers étant exempts de saisie, l'insolvabilité de l'intimé n'est pas un motif suffisant pour les arrêter par opposition en sous-ordre. Il fit aussi une autre motion pour que l'excédant du montant de la créance de l'appelant lui fut remis en attendant la fin de la contestation. La cour Supérieure a renvoyé l'opposition pour les deux premières raisons, et accordé la motion pour paiement d'une partie des deniers déposés.

Sur appel, la cour du Banc de la Reine a confirmé le jugement sur le principe qu'après le 11 septembre 1885, il n'y avait pas alors de cause pendante dans laquelle une opposition en sous-ordre pût être produite, et que l'appelant ne pouvait alors procéder que par voie de saisie-arrêt avant jugement, en produisant l'affidavit ordinaire. Toutefois la cour intima qu'il en eût été autrement si l'opposition eût été produite avant l'ordre du 11 septembre 1885. La raison qu'il ne pouvait pas être produit d'opposition, parce que l'instance avait été éteinte par le jugement du 11 septembre, n'a pas été invoquée par l'intimé dans sa défense ni mentionnée dans le jugement de la cour Supérieure. C'est un nouveau moyen soulevé par la cour du Banc de la Reine elle-même.

L'appelant demande l'infirmation du jugement en s'appuyant sur les trois propositions suivantes : 1o. Qu'il a en vertu de la loi de la province de Québec un privilège sur les deniers en question pour les frais de justice qu'il a encourus pour leur conservation dans l'intérêt des parties intéressées; 2o. Qu'indépendamment de ce privilège, son débiteur Molson étant insolvable,

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l'appelant a droit en vertu de l'art. 753, C. P. d'arrêter ces deniers par une opposition en sous-ordre et sans affidavit; 3o. Que son opposition en sous-ordre ait été produite avant ou après le 11 septembre, elle l'a été toutefois en temps utile puisque les deniers étaient encore entre les mains du protonotaire.

La première de ces trois propositions relative au privilège de l'appelant pour les frais de justice qu'il a encourus pour la conservation des deniers dans l'intérêt des parties intéressés, ne semble pas avoir été sérieusement contestée. Elle avait déjà été amplement débattue et plusieurs fois décidée par les cours qui, après quelques différences d'opinions ont fini par s'accorder sur la manière de donner effet à un prévilège qui ne peut certainement plus être contesté en face de l'article 2007, C. C. Il suffit maintenant de référer aux principales décisions sur ce point. Au 29 vol. de L. C. Jurist. (1), on trouve la cause de *Normandin* v. *Normandin*, où cette question a été savamment discutée par feu l'honorable juge Loranger en s'appuyant sur les principales autorités de notre droit. Le même principe a été soutenu dans la cause de *Wilson* v. *Leblanc* et *Doutre et al*, créanciers colloqués, et *Leblanc èsqualité* (2). Dans cette dernière cause comme dans la présente, l'avocat représentant le propriétaire d'un bien qu'il avait fait déclarer alimentaire et insaisissable, se voyait contester son droit aux frais sur ces mêmes biens qu'il avait conservés à son client, mais la cour décida que l'avocat avait acquis contre son client une créance alimentaire pour la répétition de ses déboursés et honoraires, conformément à l'article 558 C. P. C.

L'appelant dont presque tous les frais ont été encourus pour soutenir dans l'intérêt de l'intimé le caractère de biens alimentaires et insaisissables aux biens qui lui

(1) P. 111. (2) 16 L. C. Jur. 197.

avaient été légués, veut maintenant se prévaloir à l'encontre de son avocat du caractère particulier de ces biens pour refuser de le payer. La loi s'oppose à ce qu'il commette un acte aussi injuste que le serait celui-là. Par ses procédés pour la conservation des biens légués, l'avocat a acquis contre ces mêmes biens une créance alimentaire pour assurer le paiement de ses frais et honoraires. Le jugement cité plus haut l'a décidée formellement en conformité de l'art. 558 C. P. C., qui a consacré un principe depuis longtemps reconnu dans le droit français.

Je crois qu'il serait inutile d'insister davantage sur l'existence du privilége pour les frais de justice. Dans le cas dont il s'agit il ne peut être contesté.

L'instance entre *Carter* v. *Molson* était sans doute terminée. Barnard n'avait rien à y voir et n'émet aucune prétention d'y prendre part. Mais la cour ayant encore sous son contrôle, comme Molson le reconnaît, les deniers soumis à son prévilège l'appelant ne se présentait-il pas en temps utile pour le faire valoir. Il lui était indifférent qu'il existât une instance entre Carter et Molson, ce qui importait à l'appelant c'était de pouvoir en soulever une entre Molson et lui. Puisque son privilège n'est pas contesté, que peut lui faire le jugement du 11 septembre 1885, ordonnant de remettre les deniers déposés à Molson? Est-ce que ce jugement a pu anéantir le privilège de l'appelant ou le transformer en aucune manière? Personne n'a prétendu cela. Les deniers sont toujours restés soumis au privilège qui ne pouvait cesser que par leur remise actuelle entre les mains de Molson. Même, en passant par les mains d'un tiers pour arriver à lui, ils restent toujours soumis au privilège.

Cette raison que l'instance était terminée aurait sans doute toute sa force s'il s'agissait d'une intervention dans le débat entre Carter et Molson. Mais ce n'est

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pas le but de l'opposition de l'appelant. Il trouve des deniers réalisés et déposés en cour en vertu de procédés judiciaires, en exécution d'un jugement, sur lesquels il a un privilège réel, et il demande à le faire valoir; c'est une nouvelle instance qu'il introduit, il n'a à débattre ses prétentions qu'avec celui qui réclame ces deniers. Celles qu'avait avancées Carter ont été finalement rejetées. Il est maintenant tout-à-fait sans intérêt. Le fait que l'instance Carter est terminée est donc sans importance, et ne peut nullement influer sur la nouvelle instance soulevée entre Barnard et Molson.

Admettre dans le cas actuel que l'opposition est venue trop tard, ce serait presque dire que les créanciers d'un défendeur dont la propriété a été vendue en justice et le prix déposé en cour, ne peuvent pas faire valoir leurs créances sur ces deniers, parce qu'ils se présentent après la contestation principale terminée, entre le demandeur et le défendeur. Il est évident qu'on ne pourrait pas plus leur faire cette objection qu'on ne peut l'opposer à l'appelant, car dans l'un et l'autre cas les deniers sont apportés en cour et prélevés en vertu de l'exécution d'un jugement rendu le 20 Mars 1883, par la cour Supérieure, à Montréal, et d'un autre, rendu par la même cour, le 31 octobre 1884; que c'est en exécution de ces jugements que la saisie-arrêt a été émanée entre les mains de Freeman qui a fait en cour le dépôt des deniers saisis. Contrairement à la prétention de l'intimé que ces deniers n'ont pas été prélevés par le shérif, ni par aucunc autre autorité judiciaire, il est évident qu'ils n'ont été mis sous le contrôle de la justice que par la seule voie admise, lorsque les deniers ou effets du débiteur sont en mains tierces—la voie de la saisie-arrêt après jugement. C'est le mode indiqué par l'art. 612 C. P. C. L'exécution des effets mobiliers du débiteur qui sont en possession d'un tiers peut, dans

tous les cas, et doit, lorsque ce tiers ne consent pas à leur saisie immédiate, se faire par la voie de la saisie-arrêt. L'art. 613 indique la procédure à suivre pour opérer cette saisie, et l'article 616 en déclare les effets légaux, comme suit :—

L'effet de la saisie est de mettre les effets et créances dont le tiers-saisi est débiteur, sous la main de la justice, et de séquestrer les objets corporels entre ses mains, de même que s'il en était nommément constitué gardien.

On voit par ces articles que c'est par saisie en exécution d'un jugement que les deniers se trouvent en cour et qu'ils y sont, sous la main de la justice comme le dit l'art. 616. L'intimé l'a lui-même reconnu dans sa défense en droit où il s'exprime ainsi :

Because the moneys of defendant in the hands of the Superior Court through the Prothonotary without levy by the Sheriff or other judicial officer are not subject to seizure and are under the control of said Court as a conservatory proceeding between the parties in the said suit and which were and are the property of defendant.

Puisque les deniers mis sous le contrôle de la cour en vertu d'une exécution y sont encore, le droit de l'appelant de se présenter comme opposant ne peut être contesté, pourvu qu'il soit dans l'une ou l'autre des deux conditions requises par l'art. 753 C. P. C., savoir, que son débiteur soit insolvable ou qu'il ait un titre exécutoire contre lui. Il n'a pas de titre exécutoire, mais l'insolvabilité incontestable et notoire de son débiteur lui donne le droit de se porter opposant sur les deniers lui appartenant, et qui, malgré l'opinion contraire exprimée par l'hon. juge Mathieu, sont des deniers prélevés en exécution d'un jugement et conséquemment soumis à la distribution et à l'opposition en sous-ordre.

Il est vrai que la saisie qui a amené ces deniers en cour a été déclarée nulle, mais pour une raison qui n'affectait nullement la validité de la saisie. Elle était régulière de tous points. Mais comme elle ne portait que sur des deniers et des effets qui, sur une contes-

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tation entre Molson et Carter, portée jusqu'au Conseil Privé, avaient été déclarés insaisissables, la saisie en fut déclarée sans effet. Cette raison d'insaisissabilité affectait Carter qui n'avait pas fait preuve d'une créance alimentaire lui donnant droit d'être payé sur ces deniers, mais elle ne pouvait être opposée à l'appelant dont la créance est reconnue par la loi comme ayant le même caractère que les deniers saisis et se trouvait privilégiée sur ces mêmes deniers. Quoique légalement annullée par rapport à Carter, cette saisie n'en a pas moins valablement amené les deniers saisis devant la cour en vertu d'une exécution, et les parties intéressées peuvent y faire valoir leurs droits. Ce principe est consacré par l'ordonnance de 1667, voir Jousse (1).

Mais lorsque la saisie est déclarée nulle sur le fondement que le saisi ne doit rien au saisissant, soit parce que l'obligation portée par le titre était acquittée ou prescrite, etc., alors cette nullité ainsi prononcée n'empêche pas que les oppositions subsistent pourvu que la saisie ait été faite avec toutes les formalités nécessaires.

Ce principe ne saurait recevoir d'application plus juste et plus équitable que dans le cas actuel, où les deniers encore sous le contrôle de la cour sont soumis à un privilège reconnu qui serait inévitablement frustré, s'ils étaient remis au débiteur, puisqu'il est insolvable. D'ailleurs, tant que les deniers ne sont pas actuellement remis à la partie colloquée, et qu'ils sont encore entre les mains de la cour, ils sont toujours sous son contrôle et le créancier qui arrive à la dernière heure n'arrive pas trop tard, s'il arrive avant que les deniers aient été payés, ainsi qu'il est établi par l'autorité suivante (2) :

La contribution se peut demander tant que les choses sont entières, c'est-à-dire avant que le créancier ait touché les deniers, quoique par sentence ou arrêt il eût été ordonné qu'il les toucherait, car avant la délivrance d'iceux tout autre créancier est recevable à demander la

(1) 2 Jousse Ordinance 1667 p. 191.

(2) 2 Ferrière, No. 4, Grand Coutumier, p. 1377.

contribution en cas de l'insolvabilité du débiteur comme remarque Brodeau, No. 7, *in fine*, qui dit l'avoir vu juger ainsi par plusieurs arrêts tant du Parlement que de la cour des Aides et notamment par un du 17 février 1622 au rapport de Monsieur Foucault, au profit de Maître Pierre Durier, contre Maître Pierre de la Biothade et dit avoir écrit au procès.

Rien dans le code de procédure n'autorise à dire que l'opposition a été produite trop tard. L'art. 755 semble indiquer que l'opposition en sous-ordre ne sera produite qu'après le rapport de distribution lorsque le droit à une collocation a été constaté, la distribution en sous-ordre peut être faite à la suite de l'ordre et dans le même rapport ou par un rapport séparé. Dans le code de procédure français le sous-ordre n'a lieu qu'après la collocation. Il est défini par Bioche (1), *la répartition d'une somme colloquée dans un ordre.* Le même auteur au 580, dit:

De nouveaux opposants pouvant se présenter jusqu'à la clôture, le sous ordre ne doit se faire qu'après cette époque. Au No. 586. Après la clôture de l'ordre, il est procédé au sous-ordre dans la forme prescrite pour la distribution par contribution.

Je crois avec l'hon. Sir A. A. Dorion que l'ordre du 11 septembre, peut dans les circonstances, être considéré comme un rapport de distribution ou du moins comme l'équivalent. En effet, les derniers avaient été déposés en cour en conséquence de l'exécution d'un jugement par voie forcée, et étaient sujets à la distribution, si les créanciers s'étaient présentés Ce n'est qu'en conséquence de leur absence, due sous doute, à leur connaissance du caractère d'insaisissabilité de ces deniers, que Molson s'est trouvé seul et qu'un ordre de lui remettre les deniers a été prononcé. Mais ce fait ne change pas le caractère de l'ordre rendu. Les deniers dans ce cas pas plus que dans celui d'un rapport de distribution, n'étaient payables qu'à l'expiration de quinze jours en vertu de l'art. 757 C. P. C. et se trouvaient encore sous le contrôle de la Cour

(1) Vol. 5, p. 368, No. 570.

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comme l'admet Molson dans sa défense. Il y a cependant une différence essentielle entre cet ordre et une collocation dans un rapport de distribution. Par la clôture de l'ordre il s'opère au profit du créancier un transport des deniers pour lesquels il est colloqué, il en devient propriétaire ; l'ordre dont il s'agit n'a pu avoir un semblable effet à l'égard de Molson qui en était le propriétaire avant et en est resté le propriétaire après. L'ordre n'a produit aucun transport des deniers qui étaient toujours sa propriété quoique sous le contrôle de la justice. Son seul effet légal se bornait à autoriser le dépositaire à se dessaisir après le délai de quinze jours, des deniers alors sous le contrôle de la justice. L'appelant trouvant encore les deniers entre les mains de cet officier, a pu, vu l'insolvabilité de Molson, faire son opposition de même qu'il aurait pu le faire entre les mains d'un syndic à la faillite de Molson.

J'aurais été d'opinion de confirmer le jugement de la cour Supérieure sur la motion pour paiement d'une partie des deniers déposés, mais la majorité de la cour étant d'avis de renvoyer l'appel en entier, cette opinion ne peut plus avoir d'effet.

Par tous ces motifs je suis d'opinion que l'appel devrait être accordé avec dépens.

TASCHEREAU J.—This appears to be a very simple case.

One Carter, having obtained a judgment against Molson, the present respondent, issued a *saisie-arrêt* in the hands of one Freeman. Freeman declared to have in his hands as belonging to Molson a sum of $13,712.50, which sum he, afterwards, was allowed by consent to deposit into court to abide the final judgment. Molson fyled a contestation of this *saisie-arrêt*, and by a judgment of the Court of Appeal (1), confirmed in the Privy Council (2), obtained the

(1) 6 L. N. 372. (2) 10 App. Cas. 664.

quashing of the seizure and *main-levée* thereof.

Subsequently, before the said monies were paid over to Molson, Barnard, the present appellant, fyled, as a creditor of Molson, an opposition *en sous ordre*, claiming to be paid on these monies the sum of $3,932 by privilege.

To this opposition Molson demurred, and by a judgment of the Superior Court his demurrer was allowed and the opposition was dismissed. The Court of Appeal confirmed this judgment, and Barnard now appeals to this court. I am of opinion that the appeal should be dismissed. The conclusions reached in the court below are clearly right. When a *saisie-arrêt* has been quashed by a final judgment, the garnishee's hands are freed *instanter*, and he becomes liable towards his original creditor, as he was before the seizure. A *saisie-arrêt* is a provisional order, and a conservatory process, attaching monies or movables in the garnishee's hands till otherwise ordered by the court, till the final judgment on the attachment. This garnishee is a mere sequestrator. Arts. 612, 613, 616 C. C. P. (1). If the attachment is declared valid he then pays over to the seizing party, or if he has declared to have in his possession movables belonging to the defendant, they are sold *en justice*. Arts. 629, 630 C.C.P. If the attachment is quashed he has to pay his original creditor, or hand him over whatever movables belonging to him he has in his hands. There is then no *distribution de deniers*, no *collocation*, and it is clear that it is only in the case of such a *distribution de deniers* and *collocation* that an opposition *en sous ordre* lies. Art. 753 C.C.P.

Le créancier qui voudrait avoir part à une somme frappée de *saisie-arrêt* par un autre, (says Roger, Sa-ar., page 23,) ne pourrait atteindre ce but en se bornant à intervenir dans l'instance en validité de cette saisie. Il devrait lui-même former une saisie-arrêt en suivant la même marche que le premier saisissant.

(1) Roger, Sa.-Ar, p. 2.

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It is evident here that what this appellant under this guise of an opposition *en sous ordre* has attempted was to seize before judgment these monies belonging to Molson, without the affidavit and formalities required for that proceeding.

Mais aussi même cette opposition est *subordonnée* à la validité de la saisie-arrêt, says (Roger, Sa.-ar., page 24,)si celle-ci n'est pas déclarée valable, les oppositions au prix de la vente resteront sans effets.... S'ils (les opposants) craignent que la saisie—exécution ne soit déclarée nulle, la prudence exige qu'ils pratiquent sur les objets saisis une saisie-arrêt suivie d'une demande en validité dans toutes les formes voulues pour les modes d'exécution de ce nom.

In the same sense, an *arrêt* of 30th August, 1811, Dalloz (1), declares that:

Attendu que les saisies-arrêts ne peuvent avoir de suites et d'effets qu'après avoir été jugées valables contre les parties saisies.

Jousse, Ordonn, 1667 (2), has been cited by the appellant, but a reference to it will show that the passage referred to herein is probably not at all applicable to our system for procedure on the matter, has reference to a *fieri facias* and not to a *saisie-arrêt.* I refer on the same question to Bioche (3).

Lorsque la saisie-arrêt a été déclarée valable, (says this author under No. 251,) et que les deniers arrêtés sur les prix des effets ne suffisent pas pour désintéresser les créanciers, il y a lieu à distribution par contribution. *Only where the attachment has been declared valid.*

Same author (4), *Ordre entre créanciers* (5). Not a single case has been cited by the appellant to support the proposition that when a *saisie-arrêt* has been quashed, there can be had a *distribution de deniers* or an opposition *en sous ordre*, for any creditor, privileged or not. A reference to many of these authorities he has cited leaves me under the impression that he may have been misled by the confusion of the two words *saisie-arrêt* and *opposition*, which in many books, specially under

(1) Rep. Vo. Sa.-Ar. No. 249.
(2) P. 464.
(3) Vo.Sa.-Ar. No. 3,130,245,251.
(4) No. 736 and 2 Barret.
(5) Proc. page 583.

the old system, are used as meaning the same proceedings.

Bioche Vo. Sa.-Ar. No. 1. This author himself entitles his article on the subject: *Saisie-arrêt ou opposition.*

As to the motion ordering the payment to the respondent of $9,572.72, not only must the appeal be dismissed, but as the case now stands it seems to me that the respondent is entitled to the whole of the monies deposited, in accordance with the judgment of the 11th September, 1885. The appellant admits this in his factum when he says: "If the opposition be dismissed there is no need of a judgment on the motion."

I am of opinion that this appeal should be dismissed with costs, *distraits* to Messrs. Robertson, Fleet & Falconer, attorneys for respondent.

GWYNNE J.—I do not feel competent to form a decided opinion in this case, but as the justice and equity of the case seems to me to be in favor of the appellant, Barnard, I concur in the opinion of my brother Fournier, that the appeal should be allowed.

Appeal dismissed with costs.

Solicitor for appellant: *F. L. Beïque.*

Solicitors for respondent: *Robertson, Fleet & Falconer.*

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