REPORTS

— OF THE —

SUPREME COURT

— OF —

CANADA.

REPORTER

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1891.

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.

" " 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.

ERRATA.

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

Page 282.—Transpose notes (7) and (9).

Page 338.—line 7 of head-note. For "9 & 10 W. 4" read "9 & 10 W. 3."

Page 372.—Line 4. For "ch. 31" read "ch. 13."

Page 417.—Line 11 from bottom. For "Lamb" read "Oulaghan."

Page 581.—Line 4 from bottom. For "Sept." read "Nov."

Page 620.—Line 13 from bottom. For "won" read "once."

Page 652.—Lines 13 and 17. For "Company" read "County."

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

ALEXANDER S. WALLBRIDGE (PLAINTIFF) ..... } APPELLANT; 1889 *Nov. 13, 14.

AND

WILLIAM FARWELL *et al. ès-qual.* (DEFENDANTS) ..... } RESPONDENTS. 1890 *June 12.

THE ONTARIO CAR AND FOUNDRY COMPANY (limited) (PLAINTIFF)... } APPELLANT;

AND

WILLIAM FARWELL *et al. ès-qual.* (DEFENDANTS) ..... } RESPONDENTS.

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

Railway bonds—Trust conveyance—Construction of—Trustees—43 and 44 Vic. (P.Q.) c. 49—44 and 45 Vic. (P.Q.) c. 43—Privileged claim—Unpaid vendor—Immoveables by destination—Arts. 1973, 1996, 1998, 2009, 2017 *C. C.*

In virtue of the provision of a trust conveyance, granting a first lien, privilege and mortgage upon the railway property, franchise and all addition thereto of the South Eastern Railway Company, and executed under the authority of 43 and 44 Vic. (P.Q.) ch. 49,

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

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and 44 and 45 Vic. (P. Q.) ch. 43, the trustees of the bondholders took possession of the railway. In actions brought against the trustees after they took possession, by the appellants, for the purchase price of certain cars and other rolling stock used for operating the road, and for work done for, and materials delivered to, the company after the execution of the deed of trust, but before the trustees took possession of the railway,—

Held,—1st, affirming the judgments of the court below, that the trustees were not liable.

2. That the appellants lost their privilege of unpaid vendors of the cars and rolling stock as against the trustees, because such privilege cannot be exercised when moveables become immoveable by destination (as was the result with regard to the cars and rolling stock in this case,) and the immoveable to which the moveables are attached is in the possession of a third party or is hypothecated. Art. 2017 C. C.

3. But even considered as moveables such cars and rolling stock became affected and charged by virtue of the statute and mortgage made thereunder, as security to the bondholders, with right of priority over all other creditors, including the privileged unpaid vendors.

Per Gwynne J.—That the appellants might be entitled to an equitable decree, framed with due regard to the other necessary appropriations of the income in accordance with the provision of the trust indenture, authorizing the payment by the trustees "of all legal claims arising from the operation of the railway including damages caused by accidents and all other charges," but such a decree could not be made in the present action.

Per Strong J.—*Quære:* Whether the principle as to the applicability of current earnings to current expenses, incurred either whilst or before a railway comes under the control of the court by being placed at the instance of mortgagees in the hands of a receiver, in preference to mortgage creditors whose security has priority of date over the obligation thus incurred for working expenses, should be adopted by courts in this country.

APPEALS from the judgments of the Court of Queen's Bench for Lower Canada (appeal side), reversing the judgments of the Superior Court in favour of the appellants.

The action brought by the appellant, A. W. Wallbridge, against the respondents in their quality of trustees of the South Eastern Railway Company, was for work done for, and supplies delivered to, the Railway Company, and the action brought by the appellants,

The Ontario Car Company, was for cars and other rolling stock furnished to the said railway company, after the execution of a trust conveyance to respondents of the railway company's property and franchise as authorized by statute to secure the payment of its bonds, but prior to the trustees taking possession under said trust conveyance.

The material provisions of the statutes 43 and 44 Vic. ch. 49, and 44 and 45 Vic. ch. 43 (P.Q.), in pursuance whereof the trust conveyance was executed, and of the trust conveyance itself, are referred to at length in the judgments hereinafter given.

Both appeals were argued together.

Laflamme, Q.C., for appellants, cited and relied on arts. 1973, 2047, 2009, 2082, 2083, 1922, 1802, 1977, 1046, 1966, 1996 and 1987 C. C. ; Sirey, Rep. Gen. (1) ; Sirey (2) ; Aubry & Rau (3) ; Troplong, Antichrèse (4) ; Laurent (5) ; Pothier, Pandectes (6) ; Proudhon (7) ; Beach on Receivers (8) ; *Burnham* v. *Bowen* (9) ; *Fosdich* v. *Schall* (10) ; *Union Trust* v. *Souther* (11) ; *Ralston* v. *Stansfield* (12) ; *Greenshields* v. *Dubeau* (13).

O'Halloran, Q.C., and *Ferguson*, Q.C., for respondents, cited and relied on *Redfield* v. *Wickham* (14) ; *Rhode Island* v. *South Eastern Railway Company* (15) ; *St. Louis* v. *Cleveland* (16) ; *Goodherham* v. *Toronto & Nipissing Railway* (17) ; Coote on Mortgages (18) ; Jones on Railroad Securities (19).

(1) Vo. Constructeur No. 3.
(2) 31, 2, 286.
(3) 4 Vol., p. 719.
(4) No. 425.
(5) 20 Vol., p. 361-363.
(6) 1 Vol., p. 20.
(7) 3 Vol., p. 285, No. 1436.
(8) §§ 367-370.
(9) 111 U. S R. 777.
(10) 99 U. S. R. 235.
(11) 107 U. S. R. 591.
(12) 31 L. C. Jur., p. 1.
(13) 9 Q. L. R. 353.
(14) 31 L. C. Jur. 170.
(15) 31 L. C. Jur. 86.
(16) 125 U. S. R. 659.
(17) 8 Ont. App. R. 685.
(18) P. 400.
(19) Cap. 11, § 357.

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SIR W. J. RITCHIE C.J.—I agree in the judgments prepared by Mr. Justice Taschereau in these cases.

STRONG J.—I concur in the judgment which has been prepared by my brother Taschereau, and I only desire to add a few words to guard against any misconstruction of my acquiescence in that judgment, as it may be invoked as a precedent in future cases, especially in cases arising in the Provinces subject to the English system of law.

The actions in the present case seek to make the trustees personally liable for the debts of the railway company, incurred in the purchase of rolling stock. This, I am clear, cannot be done and, therefore, I agree in dismissing the appeal. I also entirely concur in the view of my brother Taschereau as regards the loss of the vendor's privilege by reason of the cars and rolling stock having become, under the express provision of the law, immoveables by destination.

What I desire to explain, however, is this. In assenting to the judgment of the court dismissing these appeals I do not by any means intend to preclude myself in future, should the question be raised in proper form and in an appropriate case, from considering whether the principle which is now universally recognised in the United States as to the applicability of current earnings to current expenses, incurred either whilst or before railway property comes under the control of the court by being placed at the instance of mortgagees in the hands of a receiver, in preference to mortgage creditors whose security has priority of date over the obligation thus incurred for working expenses, should be adopted by our courts. This doctrine is now firmly settled in the United States, where railway mortgages exactly resemble those in use with us, and which do not at all resemble

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the securities of debenture holders under the English system of securities for borrowed capital; and the practice referred to is so pregnant with justice, good faith and equity that there may be found strong reasons for applying it here when the question arises. It certainly does not arise in the present case where the defendants are not receivers but trustees, and where it is sought to recover a personal judgment against them, which is entirely inadmissible.

TASCHEREAU J.—By the Quebec Act 43-44., Vic., ch. 49, (1880) the South Eastern Railway Company, being in financial difficulties, was authorized to issue mortgage bonds to a certain amount, and for the purpose of securing the payment of the same and interest thereon, to convey its railway, franchise and all its property, tolls and income to trustees to be named, when required, by the shareholders of the company.

By section 4 of the said act, it was enacted that in any such deed of conveyance, the company and the trustees might stipulate as to who should have the possession, management and control of the said railway, receive the tolls and income thereof, and dispose of them, as well before as after default in the payment of said mortgage bonds or of the interest thereof, with power also to stipulate how, in case of such default, the company might be divested of all interest, equity of redemption, claim or title to the said railway franchise, and other property so conveyed, and how the same might become vested absolutely in the said trustees in satisfaction of the said bonds.

By section 5, the said trustees were empowered, upon default in the payment of the bonds, or of any interest coupons, to take possession of and run operate, manage and control the said railway as fully and effectually as the company might do the same.

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Section 7 enacts that the said conveyance shall be to all intents, valid, and create a first lien, privilege and mortgage upon the said railway.

Section 10 enacts that neither the present proprietors of the said road, nor those contemplated under the said act, shall have the power to close or cease running the said road.

On the 12th August, 1881, mortgage bonds having been issued by the company, a deed of trust was executed by which the said railway was conveyed by the company to the present respondents as trustees, for the purpose of securing the payment of the said bonds, as contemplated by the said act. It was stipulated in the said deed that the company should remain in full possession of the said railway, as if the deed had not been passed, until ninety days after default of payment of said bonds or interest thereon, after which ninety days the said trustees were empowered to enter into possession. The deed then provides that in case of default of payment, during six months, the trustees may become full owners of the road, after certain notices and lapse of time therein specified.

This deed was registered in March, 1884.

Under the terms of this deed the company continued in possession of the railway, until the 5th October, 1883. when, interest on the said mortgage bonds being overdue for more than 90 days, upon the request of the said trustees, the company gave them up the possession and control of the railway, voluntarily and in good faith, as alleged in the appellant's declaration.

These trustees, are the respondents in this court, defendants in the Superior Court. They are sued by the appellant for work done for and materials delivered to the company, from the 9th of May, 1882, to September 20th, 1883, that is to say after the execution of the deed of trust aforesaid, but

before they, the trustees, came in possession on the 5th October, 1883.

They pleaded to this action, that they are not liable for the appellant's claim, and that there is no privity of contract between them and the appellant. They also pleaded *res judicata*, but abandoned their contentions on that point at the hearing before us.

The Superior Court gave judgment for the appellant on the ground, "that the deed of trust to the respondents constituted a pledge of this railway, with the statutory power, against the common law rules concerning pledges, to leave the pledge in the hands of the pledger, as long as the interest on the bonds was paid as accrued, that as in law the pledger is bound to the preservation of the thing pledged, under Article 1973, Civil Code, the respondents, as such pledgees, were bound to satisfy the appellant's claim, which is for work and materials necessary for the working of the said railway."

The Court of Appeal reversed that judgment and dismissed the appellant's action upon the ground that the work done and the materials sold which he claims in his action were not furnished or done to or for the respondents, but to and for the company, to whom alone he had given credit.

The appellant now appeals from this last judgment.

Since the judgment of the Superior Court was given in this case, the Privy Council has, in a case of *Redfield* v. *Wickham* (1) given an authoritative opinion on the construction of the Quebec Statute of 1880, under which the respondents are now in possession of this railway. The only observation of their lordships, however, which can have any bearing on this present case is the following:

Their lordships do not doubt that the effect of the trust conveyance

(1) 13 App. Cas. 467.

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of 12th of August, 1881, followed by possession in terms of the deed' was to vest the property of the railway and its appurtenances in the appellants and to reduce the interest of the South Eastern Company to a bare right of redemption.

The appellants there were the trustees, respondents in the present case.

These remarks of their lordships, however, have perhaps, no direct application here, because, clearly, their lordships thereby refer solely to the conveyance to the trustees when followed by their possession, whilst the appellant's claim is for goods sold to the company when the company was still in possession, before the trustees exercised their right to take possession.

This raises the question, not determined by the Privy Council, as to the nature and legal character of the possession by the company after the deed of trust of 1881 till the 5th October, 1883? A question which, of course, I need consider here only as its solution may affect the present case.

Now, conceding with the Superior court for the sake of argument, that the deed of 1881, as long as the company retained possession, constituted a pledge, (which, of course, implies that the company also remained proprietor,) it is evident that this pledge was not for the benefit and in the interest of the company's creditors generally, but only and exclusively for the benefit and in the interest of the mortgage bondholders. The appellant contends however, and the Superior Court gave countenance to that contention, that, as under article 1973, the debtor is obliged to repay to the creditor the necessary expenses incurred by him, the creditor, in the preservation of the thing pledged, the respondents are here liable towards him, the appellant, because such was the nature of the materials sold and the work done by him for the company. I cannot adopt

this view of the case. It is true, in fact, and admitted in the record, that the work done and materials sold by the appellant were necessary for the working of the railway; but, assuming there was a contract of pledge, the company being allowed, exceptionally by the statute, to remain in possession of the thing pledged, though, at common law, the pledgee must have the possession, it follows that article 1973, can have no application whatever to the appellant's claim. In the first place, it is not the creditor here who has incurred expenses for the preservation of the thing pledged by his debtor and still belonging to his debtor, but it is the debtor who, according to this theory, allowed to remain in possession of the thing pledged, has incurred the expenses for the preservation of his own property. In the second place, if these expenses were recoverable at all against the trustees, it is the company, and the company alone, who could recover them. I cannot see on what principle the appellant, a third party, can have an action against the trustees on that contract of pledge, if such contract there ever existed before the trustees' possession. The appellant contracted with the company and the company alone. To the company alone he gave credit. He sued the company and obtained judgment for these very same advances he now claims from the trustees. This fact, it is true, is not by itself a bar to his present action, but is as full and complete evidence as can be had that his dealings were with the company. There is no *lien de droit*: there was no privity of contract between the appellant and the trustees, and I cannot see that any legal liability ever was created in his favour against the trustees by this contract of pledge, if it ever existed, for the sum now claimed.

Then this article 1973, C. C., upon which this argument is based, seems to me the very enactment that proves its unsoundness. This article says that

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the pledger is always responsible for the expenses incurred for the preservation of the thing pledged, even when the thing pledged is in the pledgee's possession. By what reasoning can it be contended that when, as here, by exception, the pledger retains possession, these expenses will then fall, not on the pledger, but on the pledgee? I cannot see it. I take this article to lead to the very opposite conclusion, and, when applied to this case, to clearly throw on the company alone all the expenses now claimed from the trustees.

I have so far considered the deed of 1881, as creating till the 5th of October, 1883, a contract of pledge with the possession and title in the pledger.

I have done so, however, only argumentatively. I cannot see in the deed, as long as the company remained in possession, a contract of pledge. Possession by the pledgee is such an essential feature of that contract that there cannot, in my opinion, exist, any such thing as a contract of pledge with the pledge in the pledger's hands.

Now, if the deed of trust of 1881, as argued in the alternative by the appellant, is to be considered as an actual sale, one by which the title to this railway became vested immediately in the trustees with equity of redemption, even before default of payment of the interest on the mortgage bonds, and before they exercised their right to take possession of it, is the appellant's action maintainable? In that case, the respondents are the vendees, allowing their vendor to remain in possession. The vendor in possession incurs expenses for the preservation of the thing sold, say, expenses absolutely necessary, and of which the vendees must eventually benefit. He incurs these expenses, and contracts for them in his own name with third parties. He himself may, perhaps, then, under certain

circumstances, have an action against his vendee for the re-imbursement of the monies so expended for his benefit, though, as a general rule, till delivery, the property is at the vendor's risks and charges as a depositary, but would this give to those who have contracted with him, the vendor, in his name, for these expenses, a right of action against the vendee personally, for the payment thereof? I should say, clearly not; and, to apply this to the present case, supposing that the company might maintain an action against the trustees for the expenses necessarily incurred on the road after the deed of 1881, and before the 5th October, 1883, yet I cannot see that this would give to the appellant, a third party, the right to claim from the trustees the advances he made to the company, or in other words, the right to be paid by any one else than by the party he dealt with. Whether in such a case the appellant would have under art. 1031, C. C., the right to exercise the company's action against the trustees is a question which does not arise. He claims to act here in his own name and to exercise his own personal right of action. And for the same reason, I may as well immediately remark, the appellant's attempt to have his action considered as one *de in rem verso* (1), cannot help him. The action *de in rem verso* would, under the facts disclosed in the present case, be an action by and in the name of the company against the trustees. The doctrine upon which such an action rests cannot be invoked by the appellant to create a *lien de droit* between him and the trustees.

To follow Mr. Laflamme's able argument for the appellant, I have so far considered the deed of trust of 1881, before the respondents came into possession, either as creating a pledge or as an actual and complete sale of this railway, and I have said why, in my opinion, admitting it to be either one or the other, the ap-

(1) *Vide* 20 Laurent, No. 334.

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pellant has no action against the trustees. I need hardly remark the contradiction between these two grounds of reasoning. If a pledge, the railway company remained the owners. If, a sale, the trustees became owners. Was that deed, however, anything else than a mortgage or hypothec of this railway, as long as the company remained in possession, within of course the sense and meaning that these words have in the Province of Quebec, where the hypothec is a kind of pledge in which the pledger retains both ownership and possession of the thing pledged, in contradistinction to the contract of pledge, *pignus*, where the pledgee is put in possession, the title remaining in the pledger. It seems to me impossible to see in that deed, as interpreted in the light of the statute of 1880, anything else than a hypothecation of this railway in favour of the bondholders, not precisely the hypothecation of article 2016, C. C., but with the exceptional right, given by the statute, of the mortgagee to enter into possession, in default of payment, after the exercise of which right the contract between the parties became one of *nantissement*, with, of course, *droit de rétention*, till paid, joined to the hypothec. The term "sold" is used in the deed, it is true. But the statute of 1880 authorizes only to *convey* as security. *Transporter*, says the French version. Then a deed called a sale may be nothing else but a contract of pledge: *Ross* v. *Thompson* (1); *Farmer* v. *Bell* (2); *Canada Paper Company* v. *Cary* (3).

Now what is a hypothec, or rather its origin at common law?

Troplong (4) answers:

L'on en vint donc par la suite à établir qu'une simple convention

(1) 10 Q. L. R., 308.
(2) 6 Q. L. R. 1.
(3) 4 Q. L. R. 323.
(4) Hypothèque No. 7.

suffirait pour que le débiteur engageât son fonds, sans en abandonner la possession, à condition toutefois de devoir en être dessaisi, en cas de non paiement au temps fixé par le contrat. Ce fut un établissement que le droit prétorien emprunta à la civilisation grecque. Aussi le terme dont on se sert pour exprimer cette convention est-il purement grec.

This is, in my opinion, precisely the nature of the contract that has taken place between the parties here. The company were to remain in possession as long as they satisfied, as accrued, their liabilities to the bondholders. They might never have lost the possession, and have continued to work the railway themselves, the railway, however, by the authority of this statute, all the time remaining vested in the bondholders, or in the trustees for them, till the complete satisfaction of their bonds, in 1901, as security therefor. I must confess that I can see nothing else in this deed, before the trustees took possession, than a hypothecation of the railway, which hypothecation took the character of an antichresis, when the trustees took possession, or, to use the English law terms of their Lordships of the Privy Council, in the *Redfield case* (1)—a conveyance by a debtor to his creditor, coupled with possession, with right of redemption, in security of a debt (2).

New, as before remarked, it is for a debt contracted by the company, before default, and during the possession of the company, for the company, that the appellant now sues the trustees. That the mortgagee is personally liable for the debts created by the mortgagor in possession upon the property mortgaged could not be contended for. Yet the appellant goes that far, when he argues that the company, during the interval between the deed of trust of 1881 and the 5th October, 1883, were the agents or mandataries or *negotiorum gestor* of the trustees.

(1) 13 App. Cas. 467.

(2) See also Laurent, 28 Vol. Nos. 480, 543.

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A word now, as to the question of privilege, upon which the appellant at the hearing strenuously relied. Admitting, for the sake of argument, that he had a privilege on the railway for his claim, under arts. 1996 and 2009, C. C., as being for work done in the common interest of the creditors, I cannot see how this can support his action. 1st There is no question here of preference or priority amongst creditors. 2nd. The privileged creditor has no personal action against the *tiers détenteur* of an immoveable affected by a privilege, but only a real action. 3rd. The privilege given for the expenses incurred in the common interest of the creditors cannot be exercised against a subsequent purchaser, or pledgee in possession, if it has not been registered.

It is true that art. 2084, as does art. 2107 of the French Code, exempts such a privilege from the necessity of registration, but this must be read as applying merely to the respective rights of the creditors amongst themselves, when a distribution of the price of sale of the property takes place. It has no application to subsequent purchasers or pledgees of the property, whose titles are registered. Art. 2056 (1)

4thly. The trustees for the bondholders have, by the act of 1880, confirmed in this respect by the act of 1881, 44-45 Vic. c. 43, the first lien and privilege on this railway, with the *droit de rétention*, till all arrears due on these bonds are paid. Consequently, the plaintiff, if he has this privilege attached to expenses made in the interest of the mass of the creditors, which, undoubtedly, under art 1996, would include those incurred for the preservation of this railway, cannot have the bene-

(1) See also arts. 2015 & 3030 C. C.; Pont 2 Vol. 1123; Aubry & Rau 3 Vol. § 269; Massé 5 Vol. 806; Rolland de Villargues, Privilège No. 334; Persil, Régime hypoth. 2107; Dalloz, Priv. & ch. 1, sec. 4; Boileux, 7 Vol. pp. 557, 558; Troplong Priv. & Hyp. 265, 273, 922; and Zachariæ Par. 269.

fit of his privilege, before disinteresting the bondholders. Being vested by the statute and the deed with the *droit de rétention*, as a first lien and privilege, the bondholders, and the trustees for them, cannot be deprived of it till they are entirely paid (1). This question does not directly arise in this case, however, as the appellant's action is merely a personal action against the trustees. I have noticed it solely in answer to the appellant's contention as to the rank of his privilege under the code. It is clear, to my mind, that the statute of 1880, has given to the bondholders a privilege which carries priority to the appellant's claim, whatever rank his privilege would have had under the code, and, consequently, if the appellant was at all entitled to invoke his right of privilege in support of his action, he could not do so without having, as a condition precedent, paid all the bondholders (2). It has been argued for the appellant that the statute merely says that the conveyance shall be "a first charge," and that this does not mean *the* first charge. But to my mind there is no ground whatever for that distinction. A first charge must mean second to none.

Some of my remarks in the next case may apply to this one.

I would dismiss the appeal.

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TASCHEREAU J.—In this case, the same trustees are sued by the Ontario Car Company, for cars sold, on credit, to the South Eastern Railway Company, to the amount of over $45,000, after the deed of trust of 1881, and before the 5th October, 1883, that is to say, as in the preceeding case, before the trustees were put into

(1) Compare arts. 1967, 1969, 2001 C.C. (2) See 28 Laurent Nos. 500, 540

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possession of the railway. Here also, as in the previous case, the Superior Court gave judgment for the plaintiffs, now appellants, and the Court of Appeal reversed that judgment. I need not repeat here my reasoning in the previous case, which applies almost entirely to this one. The two however are not precisely identical. Here, the Car Company's action prays as follows :—

That the transfer and delivery of the said cars by the said company to the defendants and their predecessors be declared fraudulent, null and void, and be set aside. That the indenture of mortgage of the 12th of August, 1881, the resolution of the shareholders authorizing the same, and the foreclosure and taking possession thereunder upon the 5th of October, 1883, be also declared fraudulent, null and without effect, and be set aside so far as respect the said cars. That the said South Eastern Railway Company be impleaded to hear said transfer, indenture, resolution and foreclosure set aside and hear the final judgment thereon. That the trustees, defendants, be adjudged and condemned to pay and satisfy the plaintiffs the sum of $45,556.97, damages for the use and detention of said cars, from the 5th October, 1883, to this date, with interest.

That the defendants be ordered not to use, and be enjoined and prevented from holding or using, said cars or any of them, as long as said plaintiffs shall not be paid therefor the sum of $45,556.97 with interest, and be condemned to surrender and deliver the said cars within fifteen days from the final judgment to be pronounced in the case in as good order and condition as when taken by the said trustees, to a guardian to be named by said court, and that the same be sold in satisfaction of the plaintiffs' claim, and in default of so doing and failing to deliver the same that they be adjudged and condemned to pay jointly and severally the said sum of $45,556.97.

By these conclusions, the car company do not ask for a direct personal condemnation against the trustees. Neither do they claim the cars themselves, they merely claim a *jus ad rem* on them, and that they be sold, *en justice*, in satisfaction of their claim. It is only on the failure by the trustees to deliver up these cars so that they be so sold, that the car company ask, that they, the trustees, be condemned to pay the plaintiffs' claim.

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And I cannot see that it would have been possible, in any case, upon these conclusions, to condemn the trustees to pay the amount claimed, without option, as the Superior Court has done.

This action, I notice, was instituted in December, 1886, over 3 years after the trustees entered into possession of the railway. The argument of counsel at bar had led me to understand that the car company based their action on a claim to a right of privilege, as unpaid vendors. There is not a word of it, however in their declaration. The only grounds of their conclusions are that the deed of trust of 1881, and the delivery of possession in 1883, were fraudulent, null and void, and strange to say, though the general issue was pleaded, only one witness was examined by the plaintiffs, and that one, merely as to the necessity of these cars for the working of the railway. An admission covering certain facts is to be found in the record, but there is nothing in it that can be connected in any way whatever, that I can see, with the plaintiffs' allegations of fraud. The insolvency of the railway company, in 1883, when they bought these cars, is admitted, but I fail to see that the trustees, authorized by Act of Parliament to take possession of the railway, and everything connected with it, including these very cars, as security towards the bondholders, can be said to have participated in a fraud, when they did the very thing the statute was passed to authorize. If a fraud at all, all I can say is, that it was a fraud authorized by statute, and a statute enacted precisely because the railway company was insolvent. It is not even proved that when they entered into possession on the 5th October, 1883, the trustees were at all aware of the car company's claim against the railway company.

Upon the general issue alone the plaintiffs' action

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it seems to me, fails. But were it otherwise on that first plea, and taking it for granted that it may be gathered from the general allegations of their declaration that their claim is based on their privilege as unpaid vendors, on the defendants' exception, by which they plead the privilege and mortgage given by the statute on this railway and all its rolling stock in favor of the mortgage bondholders, the result must be the same.

It is clear that by the deed of trust of 1881, as I said in the previous case, the railway and everything connected with it became a security towards the bondholders with a first lien, privilege or mortgage on everything thereby conveyed, either moveable or immoveable, comprising all cars, locomotives, tenders, etc., etc., then owned by the company, or that might from time to time thereafter be acquired by the company. Now the very cars upon which the plaintiffs claim a right became, by operation of the statute, at the very moment they came into the railway company's possession, and whether they are to be considered as moveable or immoveable property, affected and charged as security to the bondholders, with right of priority over all other creditors, including the privileged unpaid vendor. And even if it might be contended that this privilege and lien did not so attach immediately at the moment the railway company bought these cars and added them to their rolling stock, it seems to me unquestionable that, when on the 5th of October, 1883, the trustees got possession of them with the railway, as pledgees by antichresis, as additional security to their statutory mortgage, their *droit de rétention* became a first charge and lien, with priority over every other creditor, even the unpaid vendor, and that consequently the trustees cannot be dispossessed,

except upon payment of all accrued interests on these bonds. Article 2001 C. C.

To give the plaintiffs a right of preference over the trustees, or to deny to the trustees the *droit de rétention* on these cars, would clearly be setting the statute at naught. Under article 1543 civil code, (article 5811 Revised statutes) the right of an unpaid vendor to demand the *rescission* of the sale of moveable things can only be exercised while the things sold remain in the possession of the buyer. The railway company here were the buyers, not the trustees. The contention that they, the company, acted merely as agent or *negotiorum gestor* for the trustees is untenable. I have referred to this point in the previous case. The railway company was then the owner in possession with a statutory mortgage on the property in favor of the bondholders. When the statute gives to the trustees a lien or mortgage on the railway, it clearly implies that the trustees were not, at first, to be owners. One does not require a lien or mortgage on his own property for the payment of his claims. Then the statute and the deed provide when and under what circumstances the trustees might become later absolutely owners of the railway. This also implies that they were not yet owners, and still further, there was no price of sale, so there was no sale ; *pretium* is a requisite of this contract, as much as *res et consensus*. The fact that trustees for the bondholders, benefited by the sale of these cars to the railway company does not help the plaintiffs. A hypothecary creditor always benefits from the improvements made and expenses incurred by his debtor on the property hypothecated.

As to the unpaid vendor's right of revendication, under article 1998, civil code, it clearly cannot be claimed by the plaintiffs. 1st, because they had given delay to the railway company for the payment

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of these cars. 2nd, because those cars are now in the hands of a third party. 3rd, because they are too late. Articles 1998, 1999, civil code, and cases cited in de Bellefeuille's code under these articles; *Rhode Island* v. *South Eastern* (1). I need not dwell on this any longer however, as the action here is not one of revendication.

But further are these cars now moveable property? It is a well established jurisprudence that the rolling stock of a railway is immoveable property and part of the freehold. The appellants argue, however, that the *immobilisation* of a moveable does not operate against its unpaid vendor. Admitting this to be so, and the weight of authorities now seems to incline that way, the rule applies only between the vendor and the vendee as long as the vendee is in possession of the thing sold, but does not operate against a third party who comes into possession of an immoveable to which are attached moveable things, which by law are immoveable *par destination*, nor against a mortgaged creditor. I think that the point is now not open to discussion. I refer to the cases of Chrétien (2), and Camus (3), in that sense. So that, putting aside the general rule that "*les meubles n'ont pas de suite* (4)," on this other consideration, I do not see how the action can be supported. The immobilisation takes effect against an unpaid vendor in favor of the mortgaged creditor, even if the buyer is still in possession. Marcadé (5), says :—

La seconde question est de savoir si la résolution de la vente mobiliére, qui est impossible quand le meuble vendu est passé dans les mains d'un tiers de bonne foi qui l'a acheté ou reçu en gage, est également impossible quand ce meuble est devenu immeuble par destination et qu'il se trouve soumis au droit d'un créancier hypothécaire de l'acheteur.

(1) 31 L. C. J. 86.
(2) S. V., 36-2-347.
(3) S. V. 40-1-412.
(4) Laurent 29 Vol., No. 478; Bourjon, 1 Vol. No. 145.
(5) Vol. 6, p. 301.

Mr. Troplong (addit. au No. 465) et plusieurs arrêts décident que la résolution peut encore avoir lieu. L'acheteur disent-ils en substance, n'a pas pu transférer plus de droits qu'il n'en avait lui-même ; or la transformation du meuble en immeuble par destination ne met pas cet acheteur à l'abri de l'action du vendeur, la preuve en est dans l'article 593, puisque la loi, après avoir prohibé en principe, dans l'article 592, la saisie exécution des meubles immobilisés par destination, la permet dans cet article 593, au vendeur non payé. Cette doctrine nous parait inexacte, et nous pensons, avec Mr. Duvergier (1439) et des arrêts postérieurs à ceux indiqués ci-dessus, que l'action résolutoire n'est pas admissible ici.

Il est très vrai que du vendeur à l'acheteur l'immobilisation dont il s'agit ne nuit en rien au droit de ce vendeur, mais il en est autrement entre le vendeur et le tiers qui acquiert un droit sur le meuble vendu, et il est faux de dire que le tiers ne puisse pas avoir plus de droits que n'en aurait l'acheteur. Mr. Troplong reconnait que, vu l'effet de la possession de bonne foi sur les choses mobilières, celui à qui le meuble aurait été revendu par mon acheteur serait à l'abri de mon action en résolution, tandis que mon acheteur, lui, s'il avait encore le meuble, ne pourrait pas s'en garantir.

Le tiers peut donc avoir plus de droits que l'acheteur, et c'est tout simple, puisque c'est un effet de la bonne foi de ce tiers, bonne foi dont l'acheteur qui ne paye pas ne saurait argumenter. Si celui à qui le meuble a été revendu est à l'abri de l'action résolutoire, s'il en est de même du créancier dont ce meuble est devenu le gage mobilier, pourquoi en serait-il autrement de celui dont il est devenu, par son immobilisation, le gage hypothécaire ?

Le droit de ce dernier n'est pas moins favorable, et c'est avec raison que la jurisprudence se fixe dans ce sens !

See in the same sense, Pont (1) ; Aubry & Rau (2) also say :

Il importe peu, quant aux immeubles par destination, que les objets réputés tels aient déjà existé en cet état au moment de l'établissement de l'hypothèque, ou que le propriétaire de l'immeuble hypothéqué ne les y ait attachés que plus tard. On doit en conclure que le vendeur d'objets mobiliers, par exemple de machines incorporées par l'acheteur à l'immeuble hypothéqué, ne peut exercer ni l'action résolutoire ni le privilége établi, par le No. 4 de l'art. 2102 au détriment des créanciers hypothécaires de ce dernier, qu'ils soient antérieurs ou postérieurs à la vente.

See also Zachariæ (3) and Dalloz (4).

(1) 1 Vol. No. 154.
(2) Vol, 3, p. 409.
(3) 5 Vol. P. 143, note 27.
(4) 87-1-394.

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According to these authors, these cars are now immoveable property, as forming part of the railway, and the trustees' mortgage and privilege on the railway extends to them, even if they, the trustees, were not vested with the possession.

A case of *Detouche* c. *Neustadt* (1), in the Cour de Cassation is in point.

See also *Philion* v. *Bisson* (2), and article 2017, civil code.

But if they are moveables, the plaintiffs are not in a better position.

Le droit de résolution et le privilége supposent que l'acheteur est encore en possession de la chose (3).

The Colebrook Rolling Mills v. *Oliver* (4), *Thibaudeau* v. *Mills* (5).

See also Laurent (6); Bédarride, Achats et Ventes (7).

Article 1996, civil code, relating to disbursements incurred for the preservation of the property has been cited by the appellants, but it hardly applies to the facts of this case. But should it apply, the statute here again intervenes, and sets at rest all possible controversy as to the relative rank of the claim for these expenses, or that of the unpaid vendor's and that of the trustees, by enacting that the trustees shall be first.

Another point upon which there can be no doubt, is that when the vendor has given credit, the pledgee's claim has priority over the vendor's (8).

And again :—

La résolution de la vente mobilière à la poursuite du vendeur non payé ne peut avoir lieu contre un tiers à qui le meuble a passé de bonne foi en gage (9).

Article 417 civil code, which enacts that the pro-

(1) S. V. 68, 1. 9.
(2) 23 L. C. J. 32.
(3) 29 Laurent, No. 471.
(4) 5 Q. L. R. 72.
(5) M. L. R. 1, Q. B. 326.
(6) 29 Vol. No. 526, Nos.470,487.
(7) Nos. 327, 328.
(8) See 1 Pont, No. 152, art. 2000, C.C.
(9) S. V. 38, 2, 97, *Moss* v. *St. Jean*, 15 R. L. 353.

prietor must re-imburse to the possessor the necessary expenses incurred on the property, was also invoked by the plaintiffs and is referred to by the Superior Court, but it has no application. The expenses here were made by the railway company as owners in full possession and for themselves. The plaintiffs sold these cars to the railway company, and, on that sale, they have no personal action against the trustees. This article, if it applied at all, would give an action to the railway company against the trustees, but cannot give one to the car company.

Articles 1043 and 1046 civil code, were also relied upon by the Superior Court. This last article enacts that he whose business has been well managed by a *negotiorum gestor* is bound, 1st, to fulfil the obligations that the *negotiorum gestor* has contracted in his (the person whose business has been well managed) name, 2dy., to indemnify him for all the personal liabilities which he has assumed, and 3dly., to reimburse him all necessary or useful expenses. In the Wallbridge case, the Superior Court treated the railway company pending their possession after the deed of trust, as the *negotiorum gestor* of and acting for the trustees. This, in that case, under article 1046, would have given an action to the railway company against the trustees, but not to the plaintiff. The railway company did not contract with the plaintiff Wallbridge in the trustees' name, and it is not pretended that they did. Then the railway company were not *negotiorum gestor* at all for Wallbridge, as I said in that case. In the present case, the Superior Court, another judge presiding, held that it is the Ontario Car Company that was the *negotiorum gestor* for the trustees. I cannot adopt that view of the facts. I cannot see how the Ontario Car Company, by the simple fact of selling cars to the railway company acting for itself became the *negotiorum gestor* of

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the trustees. By this line of reasoning the bondholders, instead of a security on this railway, would have been liable to all the expenses even before getting the control and revenue.

As to the plea of *res judicata*. It appears on this record that, in previous actions, the present plaintiffs attempted seizure *en revendication* of these very same cars, and that by judgments, which are now *chose jugée*, these seizures were quashed on the ground that these cars were now immoveable property, as forming part of the rolling stock of this railway.

Le vendeur qui a succombé sur la demande en revendication d'objets mobiliers, est-il ensuite recevable à former une demande en résolution de la vente des mêmes objets ? Non, suivant la Cour de Cassation, (1).

The annotator however brings strong arguments against that decision, and I do not determine this question of *res judicata*. I would hesitate, however, to say that it is not *res judicata* between the parties that these cars now form part of the freehold. The seizures were quashed on that only ground.

L'autorité de la chose jugée s'attache aux motifs d'un jugement quand ils ont été sanctionnés par le dispositif (2).

It might perhaps have been contended that the plaintiffs' action was nothing else but the action *Pauliana*, to set aside the deed of August, 1881, as made in fraud of creditors. Articles 1039 and 1040, however, would have been in their way, apart from the statute of 1880, passed for the very purpose of authorizing that deed. That is probably why they have not attempted to support their action, as one of that character.

I would dismiss the appeal.

Since I wrote down these reasons for my conclusion it has been suggested by my colleagues that, as the

(1) S. V. 37-1-42.
(2) S. V. 76-1-448 — 81-2-145 ; Bonnier, 2 Vol. 459 ; Demolombe, 7 Vol. des oblig. par. 291 ; S. V. 39, 1, 119 ; Dalloz, 88-2-210.

deed puts upon the trustees the obligation to pay the running expenses of the road, they are liable for the appellants' claim. But I cannot adopt this conclusion.

I. I read the deed as stipulating that the trustees, after they come into possession, shall be bound to pay the expenses of the road incurred during their possession, but cannot see that they covenanted to pay the expenses incurred or expended by the company itself during the possession by the company.

2. Such a construction of the deed would put on the trustees all the debts incurred by the company, even those incurred prior to the deed of trust.

3. If this was the true construction, the statute of 1881 would have been altogether unnecessary, and I take that statute as a legislative interpretation that the bondholders' lien has priority over all other creditors whatever.

4. By this construction, the enactment which gives to the mortgage bond holders a first lien on the road and all its appurtenances is set at nought.

5. This construction has not been thought of, even by the appellants and is inconsistent with their declaration and particularly with their conclusions, as, were it to prevail, it would necessarily entail a direct condemnation against the trustees for the amount claimed, with execution, of course, against the railway itself and all its appurtenances, a condemnation which in this case would clearly be *ultra petita*.

6. Even if that was the true construction of the deed, the appellants' action should fail for want of privity of contract: as it is clear that a covenant between the company and the trustees that the trustees should pay the expenses incurred by the company would not give to the appellants a right of action against the trustees.

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GWYNNE J.—The decision in these cases must depend upon the construction to be put upon the terms and provisions of the trust indenture by way of mortgage, executed by the South Eastern Railway Company, under the authority of the Quebec Statutes, 43 and 44 Vic., ch. 49, and 44 and 45, Vic., ch. 43. By the former of these acts the company was authorized to issue certain bonds and, for the purpose of securing the payment of the same and interest thereon, to convey the railway, franchise and all property, rights and interests owned, possessed or enjoyed by it, and the tolls, income, profits, improvements and renewals thereof, and additions thereto, to trustees in trust for that purpose, and it was enacted that the trustees to whom such conveyance should be made should be designated by the shareholders at a meeting of the shareholders authorizing the issue of said bonds, and that the said conveyance should be made in such form as the shareholders at such meeting should direct, and that the company and the said trustees might therein, among other things, stipulate as to who should have possession, management and control of the said franchise and other property therein conveyed, and receive the tolls and income thereof, and how the same should be applied and disposed of, while such bonds should be outstanding, as well before as after default should be made in the payment thereof, or of any of the coupons thereto attached, and might make such other provisions therein, not contrary to law, as might be considered necessary or convenient for the purposes of such trust: and the trustees were by the act authorized, upon default being made in payment of the said bonds or coupons, to take possession of and run, operate, maintain, manage and control the said railway and other property conveyed to them as fully and effectually as the company might do the same;

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and it was further enacted that the said conveyance should be to all intents valid and should create a first lien privilege and mortgage upon the said railway and other property thereby conveyed: and it was expressly declared that neither the said company, who were the proprietors of the road at the time of the passing of the said act, nor those contemplated to become proprietors under the act, namely the trustees, and, eventually, the bondholders, should have power to close or cease running any part of the said road. Under the authority of these acts the trust indenture therein referred to was executed by the company to certain trustees therein named, whereby, after recital of the issue of the bonds, authorised by the act, the company granted, bargained and sold to the trustees, the railway of the company as the same was then located and constructed, and as the same might thereafter be located and constructed, and all branches thereafter to be built, and all the lands, &c,, &c., then owned or that thereafter might be acquired by the company for the uses of the railway, together with the franchises of the company, and all rights secured to the company by its charter, and also all cars, locomotives, tenders, wood, ties, steel and iron rails, tools, machinery, supplies, and personal property of every description then owned by the company, or that might from time to time thereafter be acquired by the company for the purpose of operating and maintaining the said railway and transacting the business thereof, and also all the right, title and interest of the company in two certain railways, called the Newport and Richford railways and the Lake Champlain and St. Lawrence Junction railway, to have and to hold to the trustees upon the trusts thereinafter specified and, among such trusts, upon trust, that until default should be made in the payment of the said bonds, or

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of some portion of the interest thereon, and such default should continue for the space of 90 days, the company should be entitled to retain possession of all of the railway property, rights and interests thereby conveyed and to run, operate and manage the same, and to take and receive all and singular the tolls, receipts, income and profits of the same and the business thereof for their own use, benefit and advantage, in all respects as fully and absolutely as if the indenture had not been made; but that upon such default happening then the trustees should be entitled, and have the right, to take and receive immediate possession of the said railway, and all the property, rights, and interests by the said indenture conveyed, and to run, operate, and manage the same, and to take and receive all and singular the tolls, receipts, income and profits of the same and the business thereof, as fully and absolutely as the company might otherwise do, and use, pay out, and disburse said tolls, receipts, income and profits in the payment and settlement of all expenses of running, operating, managing, and maintaining the said railway and other property, rights and interests thereby conveyed, including all rents due for the use of any and all railways and property leased to the company, as specified in the leases thereof, or agreements in respect thereto, and all expenses and liabilities incurred by the trustees their successors and assigns in that behalf, and a reasonable compensation to them for their services: and also all expenses of renewing, repairing, and increasing the said railway and other property for the purpose of keeping the same in good condition for the transaction of the business thereof; and all taxes and assessments on said property thereby conveyed, and all legal claims thereon arising from the operating of said railway, including damages caused by accidents, and all other

charges, and the balance of said tolls, receipts, income and profits, after paying or providing for the payment of all and singular the expenses and payments aforesaid, to use, pay out and disburse semi-annually to the owners and holders of the bonds aforesaid, and the residue, after paying all such bonds to the company.

Now in the month of November, 1883, the plaintiff, Wallbridge recovered a judgment in the Superior Court of the Province of Quebec, against the South Eastern Railway Company for the sum of $7970.00 and interest for lumber and ties supplied to the company, for the necessary use and working of the railway, between the months of August, 1881, and September, 1883, and the plaintiffs, the Ontario Car and Foundry Company, in the month of July, 1884, recovered three several judgments against the railway company for the sum in the whole of $45,556.97, exclusive of interest for,—1. 200 railway platform cars delivered to the railway company in the month of February, 1883, for the necessary use and working of the railway. 2. for 50 coal cars delivered to the company in the month of May, 1883, for the like necessary use and working of the railway, and,—3. for 20 cattle cars delivered to the company in the month of July, 1883, for the like necessary use and working of the railway. On the 5th October, 1883, the trustees under the said trust indenture took possession of the railway and of all the above material and plant so as aforesaid supplied for the necessary use of the railway; and made use thereof under the provisions of the said act 43 and 44 Vict. ch. 49, and of the said trust indenture, in operating and working the said railway which, by the act, they were under the obligation to continue to run and operate, and the question is whether, for the purpose of obtaining satisfaction of the said judgments which still remain wholly unsatisfied, the parties who

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supplied the materials and plant above described, and which was all necessary for the working of the railway, have any remedy against the trustees personally, or against the receipts, income, and profits coming to their hands from the working of the railway and the use of the said material and plant.

That the bondholders, in whose interest and for whose benefit the trustees are operating, as they are by the act obliged to keep the railway in operation, have obtained the benefit of the plant and material in question there can be no doubt; and as deriving the benefit, it is not unreasonable that some provision for such a case should have been made in the trust indenture; it would certainly, I think, be but just and equitable that there should be, and the only question appears to me to be whether there has been. If the material and plant had not been provided by the company, the trustees, I apprehend there can be no doubt, would have taken possession much sooner than they did, and, upon taking possession, in order to operate the railway as they were obliged by the statute to do, in the interest of the bondholders, must needs have supplied themselves with the material and plant; and, in that case they must have been personally responsible, to whomsoever should supply it, for the price thereof: but the material and plant in question having been delivered to the railway company before the trustees took possession, although the latter, as trustees of the bondholders, derive all the benefit and could not continue to operate the railway without such material and plant they, cannot, I agree in thinking, be made personally responsible. It was argued, that the true construction of the trust indenture is that the company's possession of the railway, after the execution of the indenture prior to the railway being taken possession of by the trustees, was as agents merely of the

trustees, in whom the property was vested by the trust indenture, and that, therefore, the trustees should be held to be liable for material and plant, necessary to keep the railway in operation, provided for the benefit of the trustees by their duly authorised agents; but this contention cannot be entertained in face of the express provision in the trust indenture that until default the company should be at liberty to retain their possession of the railway, &c., &c., &c., for their own use, benefit, and advantage, as fully and absolutely as if the indenture had never been made. The statute, however, enacts that it is whatever the "conveyance," that is, the trust indenture, provides for, that shall become a first lien privilege and mortgage upon the railway and other property thereby conveyed. Now, the trust indenture in express terms provides for many things as being payable out of the income and receipts from the railway before anything shall be paid to the bondholders.

The trustees, on behalf of the bondholders, are by the statute bound to keep the railway in operation, consequently all claims and expenses incurred by the trustees in their operating the railway became a first charge upon the income and receipts coming to their hands, as a necessary incident upon the obligation imposed upon them to keep the railway in operation, without any express declaration in relation to such claims and expenses. However, the trust indenture apparently, *ex majori cautelâ*, does declare the trust purposes towards which the trustees shall apply the income and receipts coming to their hands, namely:—

1st. in payment of all expenses of running, operating, managing and maintaining the railway and other property vested in them by the trust indenture, including all rents due for the use of any railway leased to the company.

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2nd. In paying reasonable compensation to themselves for their services.

3rd. In payment of all expenses of renewing, repairing and increasing the railway and other property for the purpose of keeping the same in good condition for the transaction of business.

Now, these trust purposes so declared, seem to cover and include everything having relation to expenses and claims arising from the operating of the railway by the trustees. But the trust indenture provides further, that the trustees, out of the income coming to their hands from the railway, shall pay:

4th. "All taxes and assessments, and all legal claims on the property thereby conveyed, arising from the operating of the railway, including damages caused by accidents and all other charges."

All charges and claims of the nature comprised under this last head, which should arise or accrue during the period that the trustees should be operating the railway, had already been provided for in express terms; the question, therefore, appears to me to be resolved simply into this; is this provision to be construed also as wholly and solely relating to claims and charges arising while the railway is being operated by the trustees? To my mind, there appears to be a difficulty in so construing it, for, as already observed, the previous provisions in express terms provided for the application of the income by the trustees towards the payment of every one of the items enumerated under this 4th head, if they occurred while the railway was in the possession of and operated by the trustees; the implication, therefore, would seem to be that what is here provided for cannot be limited, at least, to matters occurring wholly during the period that the railway is so operated. Sufficient provision had already been made for the payment of all taxes accrued during the.

possession of the railway by the trustees, as expenses necessarily incident to their running, operating, managing and maintaining the railway and other property in good working order and condition. Now, assuming taxes to have accrued due and payable before the trustees took possession, which still remained unpaid after they had taken possession, they surely would be justified under this provision of the trust indenture in paying out of the income coming to their hands all taxes which were over due before they took possession. Taxes, it may be said, stand on a peculiar footing—granted—but in this sentence in which this provision as to taxes is made, the other charges mentioned are connected by the copulative "and all legal claims," &c., &c., &c. Is there, then any reason why the trustees should not in like manner, under the language of this provision, be justified in paying and, if justified, liable to be compelled to pay, out of the income coming to their hands "all legal claims arising from the operating of the railway, including damages caused by accidents and all other charges," which had occurred in connection with the operating of the railway prior to their taking possession and which then still remained unpaid? As, for example, supposing that while the railway was worked by the company the wages and stipend of those engaged in working it had not been paid in full but that a portion had been suffered to fall into arrear, would not the trustees upon their taking possession and finding such wages and stipend to be in arrear, be justified under this provision in the deed, in paying such arrears by degrees out of the income and receipts coming to their hands? Again, supposing that an accident had occurred on the railway a day, a week or a month or more before the trustees took possession, which accident had caused damages to individuals the amount

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of which had not yet been ascertained, or that it had been ascertained but not yet paid, when the trustees took possession, would not the trustees be justified, under this provision in the trust indenture, in applying, and if justified, could they not be compelled to apply, some portion of the monies coming to their hands towards payment of such damages? And if they would be so justified and could be compelled so to do why should they not be equally justified in paying, and be equally liable to be compelled to pay, all other charges which, like those in the present case, are for the direct improvement and beneficial increase in the value of the property vested in the trustees, and absolutely necessary for the operating of the railway by them on their taking possession, although such charges accrued due and payable three months or more or it might be only a week or a day before the trustees should take possession?

The peculiar language of the trust indenture in defining the trust purposes to which the trustees are authorized, and directed to apply the income and receipts coming to their hands, present a great difficulty, as it appears to me, in limiting the authority and direction to matters accruing wholly while the railway is in the possession of the trustees, and being worked by them, but if the plaintiffs be entitled to relief in virtue of the provision of the trust indenture, under consideration, it would be by an equitable decree framed with due regard to the other necessary appropriations of the income, in accordance with the provisions of the trust indenture, a decree which could not be made in the present actions, which are not framed for that purpose, but are framed solely for the purpose of obtaining judgment against the trustees personally, which, as I have already said, I concur in thinking that the facts

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and law do not warrant. I must concur, therefore, in dismissing the appeals.

PATTERSON J.—I concur in dismissing these appeals on the grounds stated by my brother Taschereau. I also agree with the views expressed by my brother Gwynne whose opinion I have read, so far as they affect the present actions in which the trustees personally are charged.

I am not prepared to express an opinion as to the trustees being justified, and being compellable in any other form of action to provide for claims such as those of these plaintiffs. By the terms of the mortgage deed, they are to hand over from time to time to the company all surplus income not required for the payment of the overdue bonds and coupons. Such surplus moneys, if any such should be forthcoming, would form a fund to which these plaintiffs could have recourse. But to construe the trusts as including among the specified charges debts incurred before the trustees took possession of the road, thus giving those debts priority over the bonds and coupons, would seem to be in effect abandoning the limit of $12,000 a mile or $2,000,000 in all, affixed by the statute to the borrowing powers accorded to the company, and so far impairing the security offered to purchasers of the bonds.

I should, therefore, require to consider maturely the suggestion that the income in the hands of the trustees was chargeable with debts of this class in any form of action, before venturing an opinion upon it.

Appeals dismissed with costs.

Solicitors for appellants: *Laflamme, Madore & Cross.*

Solicitor for respondent: *Jas. O'Halloran.*

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*Jan. 27, 28.

*Nov. 10.

ARTHUR W. GODSON (PLAINTIFF).....APPELLANT;

AND

THE CORPORATION ON THE CITY OF TORONTO AND JOSEPH E. McDOUGALL (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Prohibition—Restraining inquiry ordered by city council—R.S.O. (1887) *c.* 184 *s.* 477—*Functions of county court judge.*

The council of the City of Toronto, under the provisions of R. S. O. (1887) c. 184 s. 477, passed a resolution directing a county court judge to inquire into dealings between the city and persons who were or had been contractors for civic works and ascertain if the city had been defrauded out of public monies in connection with such contracts; to inquire into the whole system of tendering, awarding, carrying out, fulfilling and inspecting contracts with the city; and to ascertain in what respect, if any, the system of the business of the city in that respect was defective. G. who had been a contractor with the city and whose name was mentioned in the resolution, attended before the judge and claimed that the inquiry as to his contracts should proceed only on specific charges of malfeasance or misconduct, and the judge refusing to order such charges to be formulated he applied for a writ of prohibition.

Held, affirming the judgment of the Court of Appeal for Ontario, Gwynne J. dissenting, that the county court judge was not acting judicially in holding this inquiry; that he was in no sense a court and had no power to pronounce judgment imposing any legal duty or obligation on any person; and he was not, therefore, subject to control by writ of prohibition from a superior court.

Held, per Gwynne J. that the writ of prohibition would lie and in the circumstances shown it ought to issue.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of Mr. Justice Robertson (2), who ordered a writ of prohibition to is-

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

(1) 16 Ont. App. R. 452 (2) 16 O.R. 275.

sue to restrain the judge of the county court of the county of York from proceeding with an inquiry against the plaintiff.

The Municipal Corporations Act (1), provides by sec. 477, as follows:

"In case the council of any municipality at any time passes a resolution requesting the judge of the county court of the county in which the municipality is situate, to investigate any matter to be mentioned in the resolution and relating to a supposed malfeasance, breach of trust, or other misconduct on the part of any member of the council or officer of the corporation, or of any person having a contract therewith in relation to the duties or obligations of the member, officer, or other person to the municipality, or in case the council of any municipality sees fit to cause inquiry to made into or concerning any matter connected with the good government of the municipality or the conduct of any part of the public business thereof; and if the council at any time passes a resolution requesting the judge to make the inquiry, the judge shall inquire into the same, and shall for that purpose have all the powers which may be conferred upon commissioners under the act respecting inquiries concerning public matters; and the judge shall, with all convenient speed, report to the council the result of the inquiry, and the evidence taken thereon."

Under this provision, the council of the city of Toronto passed resolutions reciting that one Lackie, an officer of the corporation, had been guilty of malfeasance and breach of trust in his position of inspector of materials furnished for work done for the city by contractors, and specifying instances of such malfeasance, one of them being that the plaintiff had been allowed to furnish material inferior to that called for by his

(1) R. S. O. (1887), ch. 184.

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contract, and the county court judge was directed to make an inquiry with a view of ascertaining the truth of the allegations against Lackie, and also:

"2. To investigate and inquire into every matter and thing connected in any manner with the past or present relations which may have existed or do exist between the city of Toronto, contractors and officials, and other persons who are or who have been connected with this corporation, and which relations might or may tend to unduly influence the action of the said officials and persons in favor of said contractors when dealing with them on behalf of the city."

"3. To investigate and inquire into and ascertain whether contractors or other persons wrongfully obtained from the city of Toronto payment of moneys by deception, fraud or other unlawful means, and if so, who are the parties, and to what amount were such moneys obtained unlawfully."

"4. To investigate and inquire into the whole system of tendering, awarding, carrying out, fulfilling and inspecting contracts made with the city of Toronto, and to ascertain whether the present system and conduct of that part of the public business has been or is defective, and that the said county judge do report to this council on as early a day as possible the result of the inquiry into the matters and things referred, and the evidence taken therein."

The judge proceeded to hold an inquiry as directed by these resolutions, and notice was given to plaintiff that certain contracts in which he had been interested would be taken up and investigated on a day named. The plaintiff and his counsel attended the inquiry in pursuance of this notice and claimed that specific charges of misconduct should be formulated which the judge refused to direct.

Eventually the plaintiff, on being informed that the

judge intended to proceed to Chicago and take evidence of a witness there who had formerly been in plaintiff's employ, applied to Mr. Justice Robertson for a writ of prohibition to restrain from further prosecuting the inquiry otherwise than as to the acts and conduct of Lackie, the officer of the corporation named in the resolution. Mr. Justice Robertson granted the writ (1), but his decision granting it was afterwards reversed by the Court of Appeal (2). From the judgment of the latter court the plaintiff appealed to the Supreme Court of Canada.

McCarthy Q.C. and *T. P. Galt* for appellant. As to prohibition generally see *Rex* v. *Justices of Dorset* (3); *Bishop of Chichester* v. *Harward* (4); Bacon's Abr. (5); Comyn's Dig. (6).

As to the powers exercised by the county court judge, see *The State* v. *Young* (7); *Chabot* v. *Lord Morpeth* (8); *Reg.* v. *Hastings Local Board* (9).

Prohibition will lie against other than courts. *Reg.* v. *Herford* (10); *South Eastern Railway Company* v. *Railway Commissioners* (11); *Reg.* v. *Local Government Board* (12); *Gould* v. *Capper* (13); *Mackonochie* v. *Lord Penzance* (14).

Biggar Q. C. for the respondent the City of Tronto and *Aylesworth* Q. C. for the respondent McDogall referred to *Coté* v. *Morgan* (15); *Rex.* v. *Justices of Dorset* (16); *Poulin* v. *Corporation of Quebec* (17); *Molson* v. *Lamb* (18).

Sir W. J. RITCHIE C.J.—I am clearly of opinion that

(1) 16 O.R. 275.
(2) 16 Ont. App. R. 452.
(3) 15 East 598.
(4) 1 T. R. 650.
(5) Title Prohibition.
(6) Prohibition A 1.
(7) 29 Minn. 474.
(8) 15 Q.B. 446.
(9) 6 B. & S. 401.
(10) 3 E. &. E. 115.
(11) 6 Q.B.D. 586.
(12) 10 Q. B. D. 320.
(13) 5 East 366.
(14) 6 App. Cas. 459.
(15) 7 Can. S.C.R. 1.
(16) 15 East 589.
(17) 9 Can. S.C.R. 185.
(18) 15 Can. S.C.R. 253.

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the judgment of the Court of Appeal, in reversing the judgment of Mr. Justice Robertson who had granted a writ of prohibition in this case, was right and should not be disturbed The proceeding before the county court judge was, in my opinion, in no sense a judicial proceeding. The city was empowered by law to issue the commission to the county judge to make the inquiries directed in this case. The object of such inquiry was simply to obtain information for the council as to their members, officers and contractors, and to report the result of the inquiry to the council with the evidence taken, and upon which the council might in their discretion, if they should deem it necessary, take action. The county judge was in no way acting judicially ; he was in no sense a court ; he had no powers conferred on him of pronouncing any judgment, decree or order imposing any legal duty or obligation whatever on the applicant for this writ, nor upon any other individual. The proceeding for prohibition in this case was, therefore, wholly unwarranted, and the appeal should be dismissed with costs.

FOURNIER and TASCHEREAU JJ. concurred.

GWYNNE J.—By sec. 477 of the Municipal Act, ch. 184, of the Revised Statutes of Ontario, it is enacted that (1)

Now, the powers thus imported into the above act from the act respecting inquiries concerning public matters, ch. 17 R. S. O., are :

The power of summoning before the judge any party or witnesses, and of requiring them to give evidence on oath, orally or in writing, or on solemn affirmation if they be parties entitled to affirm in civil matters, and to produce such documents and things as the judge shall deem requisite to the full investigation of the matters referred to him to inquire into ; and the same power to enforce the attendance of witnesses, and to compel them to give evidence and produce documents

(1) See p. 37.

and things as is vested in any court in civil cases; but no party or witness shall be compelled to answer any question by his answer to which he might render himself liable to a criminal prosecution.

Now, it is to be observed that the person authorized to make whatever inquiry is authorized is designated in his official character only as "the judge of the county court of the county in which the municipality is situate," and the subjects which he is, by the statute, authorized in this very exceptionable manner to inquire into, and the powers which are vested in him in relation to such matters, are, as it seems to me, twofold; the first affecting the persons whose conduct is to be inquired into, and the second affecting the system, practice, or procedure in use in the conduct of the affairs of the municipality, with a view to the improvement of such system, practice or procedure, if necessary, for the good government of the municipality. It is with the first of these alone, namely, the powers vested in the corporation and the judge as affecting persons, that we are concerned in the present case. With reference to the persons affected by the act the resolution which the council is authorized to pass in order to put in motion against them the functions by the act vested in the judge is a resolution requesting him to investigate some matter to be mentioned in the resolution of the nature of malfeasance, breach of trust, or other misconduct supposed to have been committed either by a member of the council, or by some officer of the corporation, or by some person having a contract with the corporation. Legislation of this nature, so open to abuse as, in view of the matters in contestation here, and of the construction put upon it on behalf of the respondents, it appears to me to be, should, in my judgment, be so construed as as to confine the powers proposed to be conferred by the act within the strictest construction of its letter.

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Now, in order to give to the judge any jurisdiction to exercise any of the powers vested in him by the act the resolution of the council must, as it appears to me, specify some act, matter or thing, either in the nature of malfeasance, breach of trust, or other named misconduct, which is charged as supposed to have been committed by some named member of council, or officer of the corporation, or person having a contract with the corporation. A resolution, for example, requesting the judge to inquire whether any malfeasance, breach of trust or other misconduct had been committed by any member of council or officer of the corporation, or any person having a contract with the corporation, would be absolutely void, and under such a resolution the judge would not become vested with any jurisdiction over any person under the act. To call into action the functions vested in the judge by the act some specific matter, act or thing of the nature of malfeasance, breach of trust, or other misconduct must, in my judgment, be mentioned in the resolution as being alleged as supposed to have been committed by some named member of council, officer of the corporation, or person having a contract with the corporation, and no other person is affected by the resolution, nor is any of the above persons, except as to such matters as are specifically stated in the resolution as being supposed to have been committed by some or one of the persons named in the resolution as and being either a member of the council, an officer of the corporation, or person having a contract with the corporation. The act does not, in my opinion, authorize any inquiry in this extraordinarily exceptionable manner into the conduct of a person who had been, but no longer was at the time of the resolution being passed, a member of the council or officer of the corporation, or into the conduct of any person who may have had, but no longer had

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when the resolution invoking the judge's jurisdiction was passed, any contract with the corporation, nor into the conduct of any person, although having then a contract with the corporation, in relation to a contract which such person previously had had, but which was then finally determined. It was not the object of the act, in my opinion, that this exceptionable jurisdiction should be invoked for the purpose of inquiry into the conduct of persons having had contracts with the corporation which were completed and finally settled, it may be for years ; for if the jurisdiction extends to affect a contract which had been closed and determined six months previously, it might equally be invoked in relation to the conduct of a person who had had a contract with the corporation which had been closed five or ten years previously to the passing of the resolution of council, to put in action the jurisdiction of the judge.

Then, again, in order to exercise such jurisdiction as is vested in the judge by the act he is empowered to summon before him any party and witnesses, and to require them to give evidence on oath or affirmation, and to produce such documents as the judge shall deem necessary for the full investigation of the matters referred to him ; and for that purpose, all the powers vested in any court in civil cases are vested in him, including committal for contempt, for disobedience of the summons or subpœna issued by the judge,

but no party or witness shall be compelled to answer any question by his answer to which he might render himself liable to a criminal prosecution.

The word "party," as twice used in the above sentence as applied to sec. 477 of ch. 184 R.S.O , plainly means, in my opinion, the member of council, officer of the corporation, or person having a contract with the corporation, who is charged with having committed some

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malfeasance, breach of trust or misconduct "in relation to some duty or obligation," due by such party to the municipality, and whose conduct in breach of such duty or obligation is to be inquired into. The power thus vested in the judge of summoning any party before him is one which, in my opinion, it is imperative upon him to exercise before he can acquire any jurisdiction to inquire into the charge or complaint against such person referred to the judge to be inquired into, because it is contrary to the principles of natural justice, and to the course pursued "by any court in civil cases," that any person should be subjected against his will to any jurisdiction in any person to inquire into his conduct in respect of any matter, and to have evidence taken against him, unless he should be given notice of the particular nature of the charge or complaint made against him, and which he has to meet, and of the time and place of the taking of the evidence against him in relation thereto. As the statute vests in the judge the same powers as are vested "in any court in civil cases," it must be intended that these powers shall be exercised in the same manner as those powers are exercised by all courts of justice in civil cases.

Then upon the evidence given upon oath after due inquiry made the "judge" is required to report to the council the result of the inquiry, and the evidence taken thereon. Now, what possible meaning can be attached to these words, "the result of the inquiry," unless it be the opinion or judgment formed by the "judge" as to the just and legal conclusion from the evidence, which the "judge," as a person qualified by his judicial mind to give, is to report to the council, namely, whether the malfeasance, breach of trust, or other misconduct charged against the person whose conduct in relation to some duty or obligation owed by

him to the municipality has been inquired into by the "judge," has or has not been established by the evidence; in other words, whether the party accused was or was not in the opinion and judgment of the "judge," proved to have been guilty of the malfeasance, breach of trust or other misconduct whereof he was accused? If he was, although true it is that the judge was not empowered to inflict any punishment as consequential upon the opinion or judgment which he had formed as to the guilt of the accused, still the corporation, upon whose behalf the inquiry was made, had such power, as for example, by removal from office of an officer of the corporation, if the accused was an officer of the corporation, or by disqualifying a person having a contract with the corporation, if such a person was the accused, from having any other contract with the corporation. So that although the judge was not himself empowered to inflict any punishment upon the accused as a consequence of his being, in his opinion and judgment, guilty of the malfeasance, breach of trust or misconduct charged, still, as the result of the conclusion so arrived at by the judge, the accused would be subjected to serious consequences affecting his reputation and his business, and to injuries of a pecuniary nature which the corporation might inflict as the result of the opinion and judgment formed by the judge upon the evidence. Now, as regards the observations of Lord Justice Brett in *The Queen* v. *The Local Government Board* (1), that learned Lord Justice did not say that the jurisdiction of the superior courts over persons vested with limited authority by parliament is confined to cases in which the limited authority is in the nature of a power to impose some obligation upon individuals, and if that was a principle that he was laying down there cannot, I think, be

(1) 10 Q. B. D. 321.

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any doubt that the power to subject individuals to pecuniary loss or obligations at the hands of others as the result of the actions of the persons invested with the limited authority would be equally within the principle. But the learned Lord Justice laid down no such principle. He was dealing simply with the case then before the court, and applying his observations to it. The Penarth Local Board had power in certain circumstances to impose pecuniary obligations upon individuals and in the particular case had done so. The person affected had appealed to the Local Government Board, insisting that this Board had a right to review the action of the Penarth Board, and to bind or loose the obligation imposed by the Penarth Board, and invoked the interposition of the Local Government Board to relieve the appellant from the action of the Penarth Board. The latter Board moved for a prohibition. The Court of Queen's Bench refused the writ. The Penarth Board appealed, insisting that the Local Government Board had no jurisdiction to entertain the appeal. The Solicitor-General, on behalf of the Local Government Board, contended that the latter was not a judicial tribunal, that its functions were not of a judicial nature, and that, therefore, prohibition would not lie. It is to this contention that the Lord Justice adresses himself. After saying that it was asserted by the Solicitor-General upon behalf of the Local Government Board, among other things,

> that the Board was not a body against which a prohibition can lie, that is, if they exceed their jurisdiction they are not a tribunal or set of persons against whom prohibition will lie at all,

he says that, in the view he took of the case, it was not necessary to decide that point, such view being that the statute did give an appeal to the Local Government Board in the case, and that in entertaining

the appeal, they would be acting within their jurisdiction, and he adds:

I think I am entitled to say this, that my view of the power of prohibition at the present day is that the court should not be chary of exercising it, and that wherever the legislature entrusts to any body of persons, other than to the superior courts, the p wer of imposing an obligation upon individuals [that being the case then before him], the courts ought to exercise,as widely as they can, the power of controlling those b dies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by act of parliament.

The learned Lord Justice, in this manner, intimated his opinion to be that whether the persons exercising limited statutory authority be a judicial tribunal or be invested with judicial functions, in which case there could be no doubt that prohibition should lie if they exceeded their jurisdiction, or be a body of persons not exercising judicial functions but having statutory power to impose an obligation upon individuals, as in the case before him, prohibition would lie against such persons if they should exceed their jurisdiction equally as it would against persons, or a tribunal, exercising judicial functions with limited authority. Now, it is impossible, in my opinion, to entertain the contention that "the judge," in exercising the functions vested in him by the act under consideration, was not acting judicially. The matter is referred to him in his official name only—"the judge of the county court." The matter authorized to be referred to him is in the nature of a complaint against a member of council, or officer of the corporation, or a person having a contract with the corporation, for some malfeasance, breach of trust or misconduct supposed to have been committed by such person in relation to some duty or obligation due from him to the municipality; the matter so referred requires a due inquiry, under oath; the judge is empowered to summon before him the party and witnesses, and to exercise all the powers vested in any court

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in civil cases for enforcing the attendance of witnesses and the production of documents, and being so empowered he is, in my judgment, bound to exercise the powers so vested in him in the same manner as they are exercised by a court of justice in civil cases. Upon the close of the inquiry, "the judge" is bound to report to the corporation the judgment or opinion formed by him as to the charge or charges referred to him upon the evidence taken before him, and the result of that judgment or opinion, if unfavorable to the accused, may injuriously affect his character, reputation and business prospects, and subject him to pecuniary losses at the hands of the corporation; under all these circumstances, I cannot for a moment entertain a doubt that the judge was, by the act, invested with judicial functions in respect of the matter to be inquired into and reported on by him, and was required to proceed in a judicial manner, and that, therefore, he is subject to prohibition if he exceeded his jurisdiction, or did not exercise his jurisdiction in accordance with the due and ordinary course of procedure in courts of justice. The language of Lord Justice Fry, in *Leeson* v. *The General Council of Medical Education* (1) is, in my judgment, precisely applicable in the present case.

What the statute under consideration authorizes, in substance, is that upon a resolution of council being passed requesting the judge of the county court to investigate some complaint of malfeasance, breach of trust or other misconduct mentioned in the resolution as having been committed by either a member of the council, an officer of the corporation, or a person having a contract with the corporation, in relation to the duties and obligations owed by such person to the municipality, the judge shall institute a due inquiry

(1) 43 Ch. D. 386.

into such charges, upon oath, and for conducting such inquiry he is invested with the same powers as are vested in any court in civil cases to enforce the attendance of witnesses, the production of documents, &c., &c., and, upon the close of the inquiry, he is required to report to the council the result of the inquiry. That is to say, he is to report his judgment upon the evidence of the guilt or innocence of such accused person of the charges or charge alleged against him in the resolution of council. Such report, if unfavorable to the accused, cannot fail to be attended with consequences injurious to his character and to his business prospects and pecuniary interests. Moreover, the corporation would have it in their power to give effect to the judge's report by removal of the officer, if the officer of the corporation was the accused person, or by disqualifying the person from ever having another contract with the corporation, if the accused person's business was that of a contractor and if he was a person having a contract with the corporation. A person who may be so injuriously affected in his pecuniary interests, his reputation and business prospects by the judgment formed by a "judge" upon such an inquiry had before him must be entitled to have the inquiry conducted in a judicial manner, and "the judge" presiding and making the inquiry and required to report his conclusions or opinion or judgment, or whatever else the result may be called, to the council who have power to act upon it must, beyond all doubt, in my opinion, be considered to be acting in a judicial capacity.

In the particular resolution before us it was an officer of the corporation who was accused of having been guilty of malfeasance, breach of trust, gross negligence and other misconduct, specially named in relation to his duties as such officer, namely, as inspector

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of works, and the judge was required to inquire and report to the council whether these charges were true or false. The resolution of council which prescribed the jurisdiction of the judge is as follows: (1) The resolution refers to the judge.

1st. Certain specific matters charged upon, and affecting the conduct of, a named officer of the corporation; and

2nd. Requests an inquiry into the general system pursued by the corporation in relation to the letting of contracts. The personal charges which the resolution of council purports to authorize the judge to inquire into and to report upon seem to me, I confess, very plainly to involve an inquiry into matters of a criminal nature amounting to charges of larceny, or obtaining money upon false pretences, and a conspiracy between Lackie, the officer named, and Godson, and others not named but whom the judge was to identify and report their names, to defraud the corporation. If the judge should report that the charges were established before him, and such report should be well founded upon the evidence, it cannot, I think, be doubted that persons guilty of the matters charged would be liable to prosecution by indictment. Now, the Provincial Legislatures have, by their constitutions, no power whatever to legislate in any manner in relation to criminal matters otherwise than by establishing courts of criminal jurisdiction. How, then, can it be contended for a moment that when an act of a Provincial Legislature authorises the judge of a county court *eo nomine* to inquire into and to report upon matters involving charges of a criminal nature the judge can act otherwise than in his judicial capacity, and as a court of criminal jurisdiction—a court of limited jurisdiction, it is true, but as a court of criminal jurisdiction specially constituted as such for the express purpose named?

(1) See p. 38.

The only person named in the resolution, as being subjected as a party to the inquiry required to be instituted by "the judge" is an officer of the corporation, William Lackie, into whose conduct, as inspector in relation to the particular matters specified in the resolution, the inquiry is directed. Whether all the charges made against him are made with that precision which would, under the terms of the statute, give the judge jurisdiction over him, personally, as an accused party guilty of some malfeasance, breach of trust, or misconduct in relation to the duties and obligations owed by him to the municipality, we are not concerned at present to inquire, for all that we have to deal with is the jurisdiction assumed to be exercised over Godson, the appellant in the present case, and with respect to him it is to be observed that not one of the personal charges referred to the judge to investigate and report upon is made against him as a party personally brought under the jurisdiction of the judge, and into whose conduct the statute has authorized any inquiry to be made, otherwise than in connection with the charges specified against Lackie. He is, it is true, named, and liable to be called and examined as a witness in relation to the charges secondly, fifthly, sixthly and eighthly made against Lackie, the officer of the corporation, subject to the qualification contained in the statute that he shall not be compelled to criminate himself. Lackie is the only person named in the resolution as having been guilty of any malfeasance, breach of trust, or other misconduct in relation to the duties and obligations which, as an officer of the corporation, he owed to the municipality, and the only person, therefore, into whose conduct in respect of the charges made, the "judge" is, by the express provisions of the statute, authorized to make any inquiry. Godson is neither a member of council or officer of the corpora-

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tion, nor, so far as appears, a person having a contract with the corporation. The reference with respect to Lackie, under the paragraph of the resolution numbered "1," however objectionably vague it may be in some respects, as to him is confined expressly into the truth or falsity of the charges previously recited in the resolution as made against him; it in no way affects Godson as a person whose conduct is submitted to the jurisdiction of the judge under the terms of the statute. The reference under the paragraph No. "2" is, in my judgment, altogether too vague to give the judge jurisdiction over any person. That reference does not appear to be authorized by the statute at all, for there is no allegation therein of any malfeasance, breach of trust, or other misconduct supposed to have been committed by any member of council, officer of the corporation, or a person having a contract with the corporation, such persons being the only persons whose conduct is, by the statute, submitted to and brought under the jurisdiction of "the judge." Paragraph No. 3 appears to be objectionable for the same reason, and because it professes to submit an inquiry whether frauds have been committed upon the corporation by some person or persons not named. Paragraph No. 4 relates to the system of awarding contracts, with which we are not concerned in the present case; and the result is that, in my judgment, Godson is not, by the resolution of reference, brought at all under the jurisdiction of "the judge," as a party having a contract with the corporation, or otherwise, and liable to have any conduct of his inquired into, either as being misconduct in relation to any duty or obligation owed by him to the municipality, or otherwise than as incidental to the charges against Lackie.

I am of opinion, therefore, that the learned judge of the county court erred in the conclusion arrived at by

him in the very inception of the inquiry instituted by him under the above resolution of the council of the city of Toronto, that he was not acting in a judicial capacity in the exercise of the authority vested in him by the statute.

It appears by the affidavit of the appellant filed upon his motion for a writ of prohibition, and it is not denied, that at the opening of the investigation instituted by the judge he intimated that it was intended in the course of the investigation to inquire into different contracts and dealings which the appellant had had with the city of Toronto, and that he refused to direct any particulars of any charges of misconduct to be delivered to him. I am of opinion that the learned judge erred here also. 1st. Because no charges against Godson were within the terms of the statute as for malfeasance, breach of trust or other misconduct committed by him either as a member of council, an officer of the corporation or a person having a contract with the corporation, referred to the judge to be inquired into, and therefore the learned judge had no jurisdiction to institute the threatened investigation against Godson, and 2nd,—if he had jurisdiction it was contrary to natural justice that any charge against him should be made the subject of inquiry which was not duly notified to him to enable him to meet it. The learned counsel for the corporation appears to have taken what appears to me to be a singular view of the object and intent of the statute, for instead of regarding it as authorizing only an inquiry into some named charge against named persons of having been guilty of some malfeasance, breach of trust or other misconduct in violation of certain duties and obligations owed by such persons to the municipality, he seems to think that what the Legislature contemplated was a sort of secret fishing inquiry to be made by a judge for the

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purpose of ascertaining whether, at any time, any malfeasance, breach of trust, or other misconduct had been ever committed by any person formerly, but no longer, a member of council, or by any person formerly, but no longer, an officer of the corporation, or some person who formerly had, but no longer had, a contract with the corporation, for he says, in an affidavit filed by him, that he was informed by the judge that his duties would be to assist the judge, and under his direction, so far as might be necessary, to make inquiries and ascertain what evidence could be obtained bearing upon the matters under investigation and to cause the same to be brought before the judge, and he adds :—

> It has been and will be necessary in the progress of the said investigation to call witnesses whose evidence I cannot beforehand ascertain, and to inquire into matters where the facts are only partially known or even only suspected, and if I were compelled to take counsel for the parties interested in the results of this investigation into my confidence beforehand, and to disclose to them the object I had in view in making the said inquiries, and calling the said evidence, I have strong belief the result would be to defeat the object the investigation has in view.

The object of the investigation, and of the legislature in authorising the investigation authorized by it, would thus seem to be assumed to be that the judge of the county court should be empowered, with the assistance of a counsel employed by the corporation, to make inquiries whether any charge of malfeasance or misconduct can be discovered against a person who formerly had had a contract with the corporation, in relation to such contract, although such person is not charged, in the resolution of council which puts the judge in motion, with any malfeasance or misconduct in relation to such contract, instead of being simply to investigate such charges of malfeasance or misconduct as are mentioned in the resolution of council and with being guilty of which the person therein also

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mentioned is accused. I can only say that I am surprised that any person should construe the terms used in the statute as justifying such a species of investigation.

Then, we find that the first inquiry made by the learned judge was not at all into any one of the charges mentioned in the resolution as made against Lackie, and which were referred to the judge to inquire into, but for the purpose of discovering whether any complaint could be made against Godson in respect of a certain contract which he had had with the corporation in relation to what is called the Eastern Avenue Bridge. The learned judge, Mr. Justice Robertson, before whom the motion for prohibition was made, and who had before him all the evidence taken before the judge of the county court, says that in 71 pages of large foolscap type writing taken upon this inquiry there was not a tittle of evidence that Lackie had anything whatever to do with the subject then under inquiry. I entirely concur with Mr. Justice Robertson that this inquiry into the Eastern Avenue Bridge contract and work was altogether in excess of the jurisdiction vested in the judge, and that Godson was not bound to have submitted to it. He did, however, submit to it, and does not therefore now complain of it, but he does object to being exposed to any similar investigation into his conduct in respect of contracts he has had with the corporation which are not referred to the judge by the resolution of council under which he is proceeding. He appears to have been willing to have had his conduct in respect of such contracts investigated by the learned judge, although not brought within his statutory cognizance under the resolution of council, if only he should be given notice beforehand of the nature of any charge against him which is proposed to be investigated, but this having been refused,

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and because of some other extraordinary assumption of authority upon the part of the learned judge, he applied for the writ of prohibition.

After the close of the investigation, which as I have said was, in my opinion, unauthorized, into the conduct of Godson in connection with what is called the "Eastern Avenue Bridge," Godson again applied for particulars of all charges against him, if the judge should assume to investigate any, and was again refused, and, thereupon, he declined to submit to or attend upon the investigation any longer. Thereafter, in his absence, a person whom Mr. Justice Robertson, not inappropriately it would seem, judging from a letter of his to Godson dated the 10th January, 1888, terms the "Informer Cooper," is examined. With reference to this person it may be observed that this letter of his of the 10th January, 1888, seems to justify Godson's declaration on oath, that he believes it to have been written with the view of extorting blackmail from him, and further, that although from the letter itself the council of the municipality, by several of its members, appear to have been placed in possession of the information possessed, or alleged to be possessed, by this man Cooper before they passed the resolution of council of the 12th March, 1888, yet they did not make, in that resolution, any charge of malfeasance or misconduct against Godson, nor authorize any investigation into any such as having been committed by him in relation to any contract he had with the corporation. Again, after Godson had so withdrawn from attending the investigation which was instituted by the judge, and at the close of the month of May, 1888, a letter is written by the counsel acting for the corporation, under the direction of the judge, to the gentlemen who had acted as counsel for Godson

on the inquiry to which he had submitted into the "Eastern Avenue Bridge" matter as follows:

DEAR SIRS,—I hereby notify you that on Monday, at 2 p.m., I will make a special application to His Honor Judge McDougall to go on Wednesday to some place in the States to take the evidence of James Hardy in the investigation now pending in *re* the Board of Works. A large portion of the evidence taken is now ready and can be obtained from the reporter, Mr. Clarke, and the balance will be ready on Monday, and will, I think, sufficiently inform you of the points upon which I propose to examine Mr. Hardy. I also notify you that it is impossible to bring Mr. Hardy here, and if you desire to cross-examine him, I will ask the judge to rule that you will have to do so immediately after the examination-in-chief is concluded. Yours, ———.

And on the 1st of June, 1888, the following:

I propose to make an application to His Honor Judge McDougall to-morrow, to allow Mr. Cross to examine certain accounts in Mr. Godson's books, other than those that have been referred to in Cooper's evidence to date. By direction of His Honor, I give you notice that such application will be made. Yours, ———.

This assertion of a right to examine the books of a man in business, not for any evidence upon any specific matter as to which a contestation was pending in a court of justice, but to enable the corporation of the city of Toronto to discover whether they could find there any foundation whereon to raise a suspicion, or to rest a complaint, of some misconduct having been committed by Godson in relation to some contract he may have had with the corporation in years past, or to enable them to discover whether the information obtained from Cooper was reliable, seems to me, I must confess, to involve a most singular misapprehension of the statute in virtue of which the right was claimed. The statute invested the judge with only the same powers to compel production of documents as were possessed by courts of justice in civil cases; but it never has been heard that a court of justice exercised the right which has been here claimed over Godson's books unless in respect of some matter in contestation,

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or some litigation to which the person whose books are sought to be inspected is a party litigant, or without giving him an opportunity of stating whether he had any books in his possession containing any entries therein in relation to the matters in issue.

The Mr. Hardy referred to in the former of the above letters written by the counsel acting for the corporation, and whose evidence was proposed to be taken in Chicago against Godson, against whom no charge had been made, and in relation to some matters not specified, is another person who, as Godson swears, was in his employment formerly, and having been discharged by him, had attempted by threats to levy blackmail from him, and had written to him a threatening letter an extract from which he annexed to his affidavit.

It appears from the judgment of Mr. Justice Robertson that the evidence taken in this manner from Cooper and others extends over 143 pages of type-writing, and from the above letters from the counsel acting for the corporation, to the gentlemen who had been acting as counsel for Godson in the Eastern Avenue Bridge matter, it appears that a portion of this evidence, at least, how much we are not informed, related to charges made, not by the corporation, but by the witness Cooper and others against Godson personally. It is under these circumstances that he moved for the writ of prohibition, and I must say that I entirely concur with the able judgment of Mr. Justice Robertson, that a clear case for the interference of a court of justice by prohibition has been made out, and this, in my opinion, quite apart from the judgment in the case of *The Queen* v. *Squier* (1).

Otherwise than as a witness against Lackie the learned judge did not, in my opinion, become invested with any jurisdiction over Godson, or acquire any authority to compel an inspection of his books in the

(1) 46 U. C. Q. B. 474.

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manner asserted, which could have been for no other purpose than to fish for some ground of complaint against Godson, not to investigate one made against him for in the resolution of council none was made.

It is no answer now to the motion for the writ of prohibition to say as to the examination of Mr. Hardy in Chicago that the learned judge, after Mr. Justice Robertson had rendered his judgment, gave up the idea of taking Hardy's evidence in Chicago, and that his evidence has been otherwise obtained; this is but a portion of the grounds upon which the motion for prohibition rested, for if the investigation against Godson personally, against whom no charge has been made, is unauthorized, he surely must have a right to prevent his character from being assailed, and it may be defamed in this manner by malevolent persons with a corrupt intent. He must surely have a right also to claim relief from having his whole time occupied in watching, and that, too, it may be at very great expense, proceedings instituted, apparently, not to carry out the object expressed in the resolution of council but for the purposes of opening up all the transactions which Godson may have had with the corporation over a course of years, with the view to ascertain whether he may have been guilty of some misconduct in relation to some or one of those transactions; with the view, in short, of fishing for evidence, if any could be found, whereon to rest a charge against him. This is not, in my judgment, what the statute contemplated and has authorized, and as the learned judge has, in my judgment, clearly exceeded his jurisdiction in so instituting an inquiry into Godson's conduct, and as the counsel acting on behalf of the corporation still insist upon the right of carrying on the investigation in the manner it has been carried on, save only as to the taking of evidence outside of the Province of On-

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tario, I am of opinion that the appeal should be allowed with costs, and that the writ of prohibition should be issued in accordance with the judgment of Mr. Justice Robertson, prohibiting the judge to proceed in investigating any charges against, and from reporting upon the conduct of, Godson personally otherwise than in so far as his conduct in relation to the particular matters charged against Lackie, mentioned in the resolution of council of March 12th, 1888, warrants and requires.

PATTERSON J.—I concur in the views expressed by the judges of the Court of Appeal, and am of opinion that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellant: *Beatty, Chadwick, Blackstock & Galt.*

Solicitor for respondent, City of Toronto: *C. R. W. Biggar.*

Solicitor for respondent, McDougall: *J. S. Fullerton.*

THE PHŒNIX INSURANCE COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

LEONARD J. McGHEE (PLAINTIFF) . ..RESPONDENT.

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*Oct. 29.

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*June 12.
*Nov. 10.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Marine insurance—Total loss—Evidence—Right to recover for partial loss.

A vessel insured for a voyage from Newfoundland to Cape Breton went ashore on October 30th at a place where there were no habitations, and the master had to travel several miles to communicate with the owners. On Nov. 2nd a tug came to the place where the vessel was, the master of which, after examining the situation, refused to try and get her off the rocks. On Nov. 16th one of the owners and the captain went to the vessel and caused a survey to be had and the following day the vessel was sold for a small amount, the purchaser eventually stripping her and taking out the sails and rigging. No notice of abandonment was given to the underwriters and the owners brought an action on the policy claiming a total loss. The only evidence of loss given at the trial was that of the captain who related what the tug had done and swore that, in his opinion, the vessel was too high on the rocks to be got off. The jury found, in answer to questions submitted, that the vessel was a total wreck in the position she was in and that a notice of abandonment would not have benefitted the underwriters. On appeal from a judgment refusing to set aside a verdict for the plaintiff and order a nonsuit or new trial.

Held, per Ritchie C. J. and Strong J., that there was evidence to justify the trial judge in leaving to the jury the question whether or not the vessel was a total loss, and the finding of the jury that she was a total loss, being one which reasonable men might have arrived at it should not be disturbed.

Per Taschereau, Gwynne and Patterson JJ., that the vessel having been stranded only, and there being no satisfactory proof that she could not have been rescued and repaired, the owners could not claim a total loss.

PRESENT.—Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

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Held, Gwynne J. dissenting, that there being evidence of some loss under the policy, and the owner being entitled, in his action for a total loss, to recover damages for a partial loss, a non-suit could not be entered, but there should be a new trial unless the parties agreed on a reference to ascertain the amount of such damages.

Per Gwynne J.—That the plaintiff could not recover damages for a partial loss of which he offered no evidence at the trial but rested his claim wholly upon a total loss.

Held, per Strong J.—An appeal court exercises different functions in dealing with a case tried by a judge without a jury from those exercised in jury cases. In the former case, the court has the same jurisdiction over the facts as the trial judge, and can deal with them as it chooses. In the latter, the court cannot be substituted for the jury to whom the parties have agreed to assign the facts for decision.

APPEAL from a decision of the Supreme Court of New Brunswick refusing to set aside a verdict for the plaintiff and order a non-suit or new trial.

The facts of the case are fully set out hereafter in the judgment of Mr. Justice Strong.

C. A. Palmer for the appellants.

Barker Q.C. for the respondents.

In June, 1890, the court proceeded to deliver judgment but no decision was pronounced as Mr. Justice Patterson wished to satisfy himself that the plaintiff could recover for a partial loss under the pleadings and the case stood over until October.

(June 12th, 1890.)

SIR W. J. RITCHIE C.J.—Two questions were discussed in this case. First, was there evidence of a total loss? Secondly, as to the preliminary proofs?

I think there was evidence to justify the learned judge in leaving the question to the jury whether the vessel was an actual total loss or not in these words:

Was this vessel when she was thrown upon the beach as described in the evidence, in your opinion, a complete wreck, that is, had she ceased to be a ship for any useful purpose or not?

In answer to this question the jury stated:

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We find that the vessel was a total loss from the position in which we consider she was in.

I read these words to mean that the vessel was a complete wreck—a total loss—as she lay upon the shore, and therefore, no notice of abandonment was, in my opinion, necessary. The evidence of the captain fully justifies this conclusion (1).

It is clear from this evidence that if the tug could have taken her off she would have done so, and, therefore, I think the jury were quite justified in finding that in the position she then was she was a total loss.

This finding of the jury shows that the ship, in the position in which she was, was physically irreparable and, therefore, she was an actual loss to the owner. In this case the jury must be taken to have found that there was no chance of the recovery of the vessel; that there was a total loss of the subject matter insured; that the vessel had become a wreck, and from the position she was in she was a mere congeries of planks, and, in the language of the Court of Exchequer in *Roux* v *Salvador* (2).

She was placed by reason of the perils of the seas, against which the underwriter insured the vessel, in such a position that it was wholly out of the power of the insured or of the underwriter to procure its arrival, and he is bound by the letter of his contract to pay the sum insured.

This case is cited in *Cossman* v. *West* (3).

There having been sufficient evidence to justify the learned judge in so leaving that question to the jury I think their verdict should not be disturbed, more especially as the loss appears to have been, unquestionably, a *bonâ fide* loss. I am, therefore, less disposed to interfere with this finding.

As to the preliminary proof, the learned Chief Justice in the court below says:

(1) See p. 66 (2) 3 Bing. N. C. 267.

(3) 13 App. Cas. 174.

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The defendants could not possibly be prejudiced by the variance between the preliminary proof of interest and the proof on the trial, and I should be very sorry to defeat a just and honest claim by an objection so purely technical, and which in no way whatever touches the merits of the case. I think the appeal should be dismissed.

(Nov. 10th 1890.)

When the matter was formerly before the court my brother Strong was of my opinion that the appeal should be dismissed, but my brother Gwynne thought that a non-suit should be entered, and it has now become necessary to determine what form our judgment should take. I think a non-suit would be against the law laid down in New Brunswick decisions. I have looked into this point, and find that the courts of New Brunswick, on several occasions, have determined that where an action was brought for a constructive total loss, which has not been established for want of notice of abandonment, that it is not proper to non-suit, but that there should be a verdict at all events for nominal damages, or, as it was determined in one case, that there should be a new trial or a verdict for nominal damages.

In *Millidge* v. *Stymest* (1), the plaintiff claimed for a constructive total loss but the evidence showed a partial loss only the vessel having been repaired, but no evidence having been given of the cost of the repairs the plaintiff was non-suited. It was distinctly held that the non-suit was wrong, and that plaintiff was entitled to nominal damages at all events. So in the case of *Wood* v *Stymest* (2), the plaintiff sought to recover for a total loss without giving notice of abandonment, which the court thought necessary; no evidence of damages on a partial loss was given, and it was very obvious could not be given as it would go against the party seeking to recover for a total loss. On motion

(1) 6 All. (N. B.) 164. (2) 5 Allen (N.B.) 309

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to enter a non-suit the court refused to make the rule absolute, but ordered a new trial unless the plaintiff should consent to have the damages reduced to one shilling, or unless both parties should agree to refer the estimate of liability on a partial loss to some competent person for adjudication. The case before us is in precisely the same condition.

I therefore think that in this case there should be a new trial ordered unless the parties agree to refer the matter to a competent accountant to take evidence of the amount of damages as on a partial loss, and then a verdict should be entered for that amount.

STRONG J.—This was an action on a policy of insurance, dated 2nd November, 1883, and underwritten by the appellants, effected sometime previously to the date in the name of the respondent for the sum of $600 on the schooner " Betsey " lost or not lost at and on a voyage from St. John's, Newfoundland, to coal ports in Cape Breton and return. The vessel was valued on the policy at $4,000. The policy contained a clause in these words, " and in case of loss such loss to be paid within thirty days after proof of loss and proof of interest in said schooner," and also a clause " that no partial loss or particular average should be paid unless amounting to 5 per cent."

The vessel sailed from St. John's on the 27th October, 1883, and went ashore on Wing and Point Beach inside of Guion Island, about five miles from Gabarus, Cape Breton, on the morning of the 30th October. The crew having got ashore the captain went in search of a settlement, the spot at which the vessel was beached being on a wild shore with no houses nearer than Gabarus. The captain not being able to find houses or settlement had to return to the vessel, but found her

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pounding so badly that he could not get aboard and had to remain in the woods all night.

The next morning, the 31st, a man came down to them from a place called Firchete and told the crew where they were, and this man guided the master to Gabarus from whence, finding no telegraph there, he went on to Louisbourg, twenty miles further, and from thence telegraphed the owners, Messrs. S. March & Sons of St. John's, Newfoundland, informing them of the loss and received an answer telling him that the vessel was only half insured and directing him to use his best endeavors to get her off, and referring him to Messrs. Archibald & Co. of Sydney, Cape Breton, for assistance. Thereupon the master telegraphed Messrs. Archibald & Co. who the next day sent their tug "The Merrimac" to the wreck. The master also returned there. The master of the tug having arrived at the wreck and examined the situation of the vessel declined to attempt to pull her off, considering it useless to do so as from her position he considered that the tug could not have hauled her off. Nickerson the master of the schooner in his evidence gives the following account of what occurred on this occasion and of the situation of the vessel. He says :—

The tug came around and would not take hold of the schooner. The captain of the tug said he could do nothing to the vessel as she was too high up. She was at that time so high up that at high water it would only come half way up half her length. It was Archibald's tug "Merrimac," a large tug. Don't know her tonnage or power. Refused to take hold.

Then in answer to the question :

From nautical knowledge and experience could the tug in your opinion have pulled the vessel off ? Answer—I don't think she could. She was too far up, was not water enough to float her. The ground she was on was no objection to pulling her off, but she was too high and dry. Went to Sydney and telegraphed the owners that the tug could not get the vessel off and that they had better come on themselves. No more correspondence until Levi March came on himself.

The very last time I saw her was last fall (September) I saw her ribs sticking up out of the sand. The last time before that about a fortnight after I went to Sydney, say about middle of November, 1883, she was pretty well used up then by pounding on the shoals. Her keel was twisted badly ; her treenails were sticking out of her ; the oakum sticking out of her seams and a hole was through her bottom ; her rudder traces were broken and the wheel was broken.* * * No chance of getting the vessel off. Heavy waves, barren country, no roads, swamps, etc. No heavy woods within 15 or 20 miles, the vessel never was off the beach.

Then in cross examination the witness says :

If on the 1st or 2nd November I had had ways etc., she could not have been launched. The time of year and weather could not be depended upon. I took the carpenter down I think to try and launch the vessel. The tug did not take hold of her. If there was any chance of getting the vessel off, the tug could have taken hold of her. * * * *

Question.—How much more in your opinion were the hull and materials of the schooner "Betsey" worth on the 2nd of November than they were at the time of sale ?

Answer.—I don't consider she was worth a great deal to any one after she struck.* * * The only effort I made to get the vessel off was having tug come round.* * When I left hull in tug boat she was pretty badly strained.

The master returned to Sydney taking with him the crew with the exception of the mate whom he left in charge of the vessel.

About a fortnight after this Mr. Levi March came over from Newfoundland and he, together with Nickerson, Mr. Ross, who described himself as Surveyor for Lloyd's agent, and Gordon the master of the tug "Merrimac," went to Gabarus and from thence to the wreck which was found to have suffered much additional damage since the captain had been last there. Nickerson in his deposition says that at this time the vessel was in the state detailed by him in the extract before given from the evidence. A survey was then held by Mr. Ross and Gordon the captain of the tug who made the following report :—

We the undersigned Alexander C. Ross, of North Sydney C.B. agent and Surveyor Lloyd's agent at North Sydney aforesaid, and James W.

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Gordon, master of the steam tug "Merrimac," having been called upon by George Nickerson, master of the schooner "Betsey" 79 tons register of St. John's Newfoundland, to hold a survey upon the said vessel do hereby certify that on the day of the date hereof we proceeded together to the said vessel and after careful examination and survey report as follows:—We found the said vessel up on Wing and Point Beach inside of Guion Island near Gabarus, Cape Breton, but within reach of the sea at high water, and considering the dangerous and exposed condition of the said vessel on a barren coast several miles from any habitation, the lateness of the season, and the impracticability of procuring the necessary material and assistance for launching and floating the said vessel, we therefore condemn the said vessel and order her to be sold as she lies for the benefit of all whom it may concern.

Given under our hand at North Sydney, Cape Breton, this 2nd day of November 1883.

(Signed) ALEX. C. ROSS,
Surveyor for Lloyd's agent.
J. W. GORDON, Master Steamer
"Merrimac,"

The date of this document is clearly erroneous; instead of the 2nd of November, the date should have been the 14th or 15th of that month.

This document was proved by Nickerson on his examination and its admissibility in evidence does not appear to have been objected to, either then or subsequently when it was read at the trial.

Upon this the vessel was sold at auction on the 17th November, at Gabarus, for the sum of $400, the net proceeds of sale, after deduction of expenses, being $376, as appears from the account sales put in as an exhibit, and this amount being further diminished by the deduction of $150, the amount of the Messrs. March expenditure for the survey, protest, tug service and telegrams, left $226 to be distributed between the two sets of underwriters and the owners as self-assurers for the amount not covered by the policies, the proportion attributable to the appellants being some $33.90.

The purchaser did not attempt to get the vessel off, but stripped her, taking out rigging and sails, and in

this condition left her on the beach, where Nickerson says he saw her remains in September, 1884, when "her ribs were sticking out of the sand."

Mr. Justice Fraser, who tried the case, refused to grant a motion for a non-suit but reserved leave to move in term, holding that there was evidence of an actual total loss and that the proofs of loss and interest furnished to the appellants were sufficient, and he left the case to the jury who, upon the question of actual loss, found for the respondent for $625.53, and in answer to a question put by the learned judge the jury said:

> We find the vessel was a total loss from the position in which we considered she was in.

The declaration, as amended under an order of a judge in chambers, averred interest in the owners S. March & Sons, a firm composed of Nathaniel March, Stephen R. March, and Levi March, as broker for whom the policy sued on had been effected by the plaintiff, and the interest so alleged was proved at the trial. It was, however, objected that the proofs of loss furnished to the defendants preliminary to the action, and as required by the policy, did not show the interest as thus alleged and proved.

A motion to enter a non-suit or for a new trial having subsequently been made in term a rule *nisi* was granted which was, after argument, discharged, Mr. Justice King and Mr. Justice Tuck being dissentients from the judgment of the court, and from that decision the present appeal has been brought.

The only substantial questions which we are called upon to decide in order to determine this appeal are whether there was evidence to leave to the jury of an actual, as distinguished from a constructive, total loss; and if so, whether the verdict ought to be set aside as being against the weight of evidence.

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No notice of abandonment was given and, therefore, the respondent is entirely precluded from recovering as for a constructive total loss.

A majority of the learned judges in the court below were of opinion that there was evidence proper for the consideration of the jury, and that Mr. Justice Fraser was right in leaving the question of an actual total loss to them. The learned Chief Justice, however, thought that although there was some evidence fit for the consideration of the jury yet it was weak and hardly satisfactory; but Mr. Justice Wetmore and Mr. Justice Fraser considered it amply sufficient to warrant the verdict.

It is a fact not without legitimate influence in the case, and therefore one not to be disregarded, that the claim in the present case is beyond all doubt or question a perfectly honest and legitimate one. The vessel was valued in the policy at $4000, and besides the $600 covered by the policy sued upon in the present action there was no insurance on the interest of Messrs. S. March & Sons except a policy for £275 ($1100) underwritten by private insurers in Newfoundland.

The case must depend then altogether on the evidence of Nickerson, the captain of the schooner. This witness was unfortunately not examined before the court and jury, but his deposition taken by consent before an examiner was read at the trial.

Cases of high and unimpeachable authority have established that to constitute a total loss in the case of a ship the subject of insurance must be either such an entire wreck as to be reduced, as it is said, to a mere "congeries of planks," or if it still subsists in specie it must, as a result of perils insured against, be placed in such a situation that it is totally out of the power of the owner or the underwriter at any labor, and by means of any expenditure, to get it afloat and cause it

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to be repaired and used again as a ship. The latter branch of the foregoing proposition is deducible from the following cases, viz. *Cambridge* v. *Anderton* (1); *Roux* v. *Salvador* (2); *Rankin* v. *Potter* (3); *Barker* v. *Janson* (5) and *Cossman* v *West* (5). In *Roux* v. *Salvadore* (2) Lord Abinger says:—

> If in the progress of the voyage the thing insured becomes totally destroyed or annihilated, or if it be placed by the perils insured against in such a position that it is totally out of the power of the assured or the underwriter to procure its arrival, the latter is bound by the very terms of his contract to pay the whole sum assured.

And in *Rankin* v. *Potter* (3) Mr. Justice Blackburn in advising the house says:—

> The decision of the Exchequer Chamber in *Roux* v. *Salvador* (2) was, as far as I can learn, received with general approbation. There was, however, one exception; Lord Campbell never could be brought to think it right. In the case of *Fleming* v. *Smith* (6), the counsel for the appellants, the Attorney General Jarvis and Sir F. Thesiger, argued, as I think logically from the decision in *Roux* v. *Salvador* (2), that notice of abandonment could not be in any case required except where there was something which could be done by the underwriters in consequence, and then the failure to give notice of abandonment might be material as determining the election which the assured had, whether to treat the loss as total or not. This, as I have already stated, is what I consider to be the law.

In the same case of *Rankin* v. *Potter* (3), the rule thus propounded by Mr. Justice Blackburn was accepted as a correct statement of the law and, so far as it was applicable to the circumstances of that case, acted upon by the House of Lords. In the case of *Anchor Marine Insurance Company* v. *Keith* (7), this court recognised and acted upon this view of the law and, adhering to what I said in the last named case, I am of opinion that it must now be considered a governing principle of the

(1) 2 B. & C. 691.
(2) 3 Bing. N.C. 386.
(3) L.R. 6 H. L. 83.
(4) L.R. 3 C.P. 303.
(5) 13 App. Cas. 160.
(6) 1 H. L. Cas. 513.
(7) 9 Can. S.C.R. 483.

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law of marine insurance and that the case of *Knight* v. *Faith* (1), Lord Campbell's opinion in *Fleming* v. *Smith* (2), and the case of *Kaltenbach* v. *Mackenzie* (3) (unless, indeed, the latter case is to be distinguished upon its particular facts) are so inconsistent with the case of *Rankin* v. *Potter* (4) as to be of no authority.

That this rule is well founded appears very plain when we consider the object and purpose for which notice of abandonment is required as a preliminary condition to the right to claim for a constructive total loss. The reason for requiring such notice is not, as explained by the authorities already quoted, that the underwriters may thereby be subrogated to the rights of the assured in so much of the subject as still remains in specie ; the law alone, without any notice, effects such a subrogation upon payment of the loss.

The notice is required in order that the underwriters may have an option of doing that which the assured by the act of abandonment has announced his intention not to do, viz., an opportunity of reclaiming and rescuing the insured property and (in the case of a ship) repairing it, and reinstating it in its original condition. Then it is manifest that if such restoration is a physical impossibility the reason for requiring notice is inapplicable, and the assured who fails to give it does not, in legal contemplation, by his omission, cause prejudice to the underwriters.

The cardinal point for determination in the present case is therefore this : Was there any evidence which the judge could properly have submitted to the jury to show that the schooner could not, by means of the tug, or by the use of other appliances within reach, have been got off the shore on which she had been beached ?

(1) 15 Q.B. 649.
(2) 1 H.L. Cas. 513.
(3) 3 C.P. D. 467.
(4) L. R. 6 H. L. 83.

It is important to emphasize that the question we have to consider, in so much of the appeal as relates to entering a nonsuit, is not whether the proposition of fact just stated is established to our own satisfaction, but solely whether there was evidence of it proper for the consideration of the jury.

And as regards that part of the rule which asks for a new trial on the weight of evidence it is to be remarked that although issues of facts are now in some jurisdictions tried by a judge without a jury yet the functions of a court *in banc*, or an appellate court, in reviewing the findings in such cases on a motion for a new trial or on appeal, differ widely from those which are properly exercised in the case of a trial by jury. In the case of *Jones* v. *Hough* (1), Lord Bramwell said :—

> A great difference exists between a finding by a judge and a finding by the jury. Where the jury find the facts the court cannot be substituted for them because the parties have agreed that the facts shall be decided by a jury ; but where the judge finds the facts there the court of appeal has the same jurisdiction that he has, and can find the facts whichever way they like.

It being the province of the court to determine if there is any evidence proper for submission to the jury, then if it is determined that there is such evidence a verdict based upon it is not, according to a late decision of the House of Lords, to be disturbed unless the court should think it such that reasonable men could not have found as the jury did. In the case referred to, *Metropolitan Railway Company* v. *Wright* (2), Lord Halsbury said :

> If reasonable men might find (not "ought to," as was said in *Solomon* v. *Bitton*), (3) the verdict which has been found, I think no court has jurisdiction to disturb a decision of fact which the law has confided to jurors, not to judges.

This decision of the House of Lords, though of so

(1) 5 Ex. D. 122.
(2) 11 App. Cas. 156.
(3) 8 Q. B. D. 176.

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recent a date as 1886, has been so frequently referred to as to have become very familiar to the profession, so much so that it may seem superfluous to quote it. It appears to me, however, that in the present day, when courts and judges have so frequently to deal with facts in cases in which juries are dispensed with, that this important distinction between the widely different functions of the court in such cases, and in those in which upon a motion for a new trial its duty is limited to reviewing the verdict which the jury may have found in the exercise of its exclusive jurisdiction of finding the facts, and to annulling it if it should appear not to be such as reasonable men could, on the evidence, have found, cannot be too much dwelt upon. In the present case it may well be that if we had on this appeal to decide the question of fact we might find the evidence not satisfactory to show that it was impossible to have got the vessel off on the 2nd of November when the tug went to the scene of the wreck, but we have not here to pronounce upon any question of fact except so far as we are called upon to say: 1st. If there was any evidence of the loss of the schooner in the sense before mentioned, which the judge could submit to the jury; and 2nd. If there was, whether on that evidence reasonable men might find as the jury actually did find. Whatever opinion I might have come to if I had had to deal with the evidence absolutely as a judge of fact, I am of opinion that upon these two questions, which alone are properly before us, the conclusion of the court below was in all respects correct.

Upon the question of non-suit I think it clear that there are to be found in the evidence of Nickerson, the master, facts stated which were properly left to the jury. We have the fact sworn to that the captain of the tug, after having been brought at considerable ex-

pense to the spot where the vessel lay, and having every inducement, so far as self-interest was concerned, to endeavor to get her off, considered it so hopeless as not to be worth while making the attempt; and that in the judgment of the witness himself, who, as a nautical expert, gives his opinion that the vessel could not have been pulled off, this conclusion of the master of the tug was entirely correct. Then there is in addition the report of the surveyors, which appears to have been before the jury having been admitted in evidence without objection so far as appears from the record before us. Further, there is the evidence of Nickerson to show that except the tug other means and appliances for the rescue of the vessel were not within reach. On the whole, it seems impossible to say that these were not proper matters for the consideration of the jury, and that in the face of such evidence the judge would have been justified in granting the motion for a non-suit.

Then, as regards the alternative of the rule asking for a new trial, that, in my opinion, was also properly refused. It was, no doubt, open to remark that the captain of the tug was neither called nor his absence accounted for, but any presumption resulting from this is not, in my opinion, sufficient to neutralize the evidence of the facts stated by the master, and to warrant us in saying that in finding as they did the jury did not act as reasonable men. Upon this head it is also to be remembered that in the present case the value of the vessel was not covered by the insurance, and that the master, who seems to have been zealous for the interests of his owners, and to have done his best to protect them, knew this to be the fact. I am of opinion, therefore, that the verdict could not properly have been set aside as being against the weight of evidence.

Had I thought, however, that there was no evidence

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of actual loss proper for the consideration of the jury I should have considered a new trial and not a non-suit to have been the proper disposition of the case. It is quite clear that though the declaration goes for a total loss yet upon such pleading a partial loss may be recovered for. Then there was, beyond all doubt or question, evidence of some loss from perils covered by the policy having been sustained by the assured, and although the exact amount of it had not been ascertained yet it seems to me it would have been reasonable to have permitted a new trial in order to ascertain the amount, unless the defendants had, to save expense, submitted to some less costly and more simple mode of arriving at the amount as by a reference to an officer of the court or other referee. It would have seemed to me a harsh decision to have precluded the assured from recovering any indemnity whatever in respect of the policy sued on, as must be the effect of a judgment entered upon this action for the defendants.

There was ample evidence of proofs of loss and of the interest of the assured having been forwarded to the appellants before action brought. The fact of loss was shown by the protest. As regards the interest no technical proof of that was required and the account furnished by the assured to the appellants, of the expenses incurred in which (as is pointed out by Mr. Justice King) the underwriters were charged as debtors to "S. March & Sons," would at once have been an intimation to any reasonable man that the latter firm claimed as owners, and that the insurance had been effected for their benefit.

The appeal must be dismissed with costs.

TASCHEREAU J.—The only question left for our determination is as to the necessity of the notice of abandonment. I am of opinion, for the reasons given by Tuck

and King JJ. in the court below, that such notice was necessary, and that none having been given in this case the appeal should, on this ground, be allowed.

I cannot see in the evidence that this ship was an actual total loss. As Arnould on Insurance (1) puts it:

> An absolute total loss takes place when the subject insured wholly perishes, or there is a privation of it and its recovery is hopeless. A constructive total loss takes place when the subject insured is not wholly destroyed but its destruction is highly probable, or the privation of it, although not quite irretrievable, is such that its recovery is either exceedingly doubtful or too expensive to be worth the attempt.

And to quote Tuck J. in the court below:

> An absolute total loss entitles the assured to claim from the underwriter the whole amount of his subscription. A constructive total loss entitles him to make such claim, on condition of giving notice of the abandonment of all right and title to any part of the property that may still exist or may be recovered.

It is the duty of the assured if he means to abandon, in cases where abandonment is necessary, to give notice to the underwriters of his intention within a reasonable time after he gets intelligence of the loss.

If the first information is not sufficient to enable the owner to tell whether he ought to abandon or not, he may wait a reasonable time for further information as to the extent of the damage. He cannot wait an undue length of time to see which will be the more profitable for him to abandon or to claim for a partial loss. If the assured makes little or no effort to recover the property whilst it exists in specie, but lies by for weeks with knowledge of the disaster, and gives no notice of abandonment, he cannot recover for an actual total loss. The rule is that where there is anything to abandon, it must be abandoned; in case of an actual total loss, where nothing is left

(1) 6 ed. vol. 2 p. 951.

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to abandon, there need be no abandonment, but when there is a constructive total loss it is necessary.

In *Kaltenbach* v. *Mackenzie* (1), Lord Justice Brett states the law thus :

> If he (the assured) hears that the ship is stranded and her back is broken, although she retains her character as a ship, if he gets the information upon which any reasonable man must conclude that there is very imminent danger of her being lost, the moment he gets that information he must immediately give notice of abandonment.

If the information that he first receives is not sufficient to enable him to say whether there is immediate danger, then he has reasonable time to acquire full information as to the state and nature of the damage done to the ship. I also refer to Hilliard on Marine Insurance (2), Marshall (3) and 2 Phillips (4).

GWYNNE J.—Upon the 30th October, 1883, the insured vessel named the " Betsey " was cast ashore on the coast of Cape Breton, about twenty miles from the town of Louisburg, and on the 1st November her captain telegraphed from Louisburg to the owners at St. John's, Newfoundland, as follows :—

LOUISBURG, 1st November, 1883.

S. MARCH & SONS.—" Betsey " stranded Tuesday's gale, twenty miles west of Louisburg—wild shore—any insurance ? Telegraph instructions immediately.

GEORGE NICKERSON.

Upon the same day March & Sons telegraphed to Nickerson in reply :

" Betsey " not half insured—use all possible means to get her off, and dock her if necessary. Have telegraphed Archibald, our agents, North Sydney to assist you. Consult them by wire. Employ tugs if necessary.

Upon the same day March & Sons telegraphed to Archibald as follows :—

Schooner " Betsey " ashore near Louisburg. Have telegraphed

(1) 3 C. P. D. 473.
(2) Secs. 364 et seq.
(3) 5 ed. p. 446.
(4) 5 ed. p. 225.

Captain Nickerson to wire you for advice and assistance. Vessel not half covered. Serious loss if abandoned. Make best possible arrangements. Keep us posted. Has " Mayflower " sailed ?

Nickerson also telegraphed to Archibald as he was directed in the telegram he had received from March & Sons. Archibald sent a tug down to the vessel upon the 2nd or 3rd November. The tug did not take hold of her or make any effort to take her off the shore where she was. Nickerson said that the captain of the tug had told him why nothing was done by him to take the vessel off ; this evidence was objected to, and as it was inadmissible as evidence it is unnecessary to repeat what Nickerson said that the captain of the tug said to him. Nickerson himself, however, said that he thought the vessel was too far up ashore to have been hauled down ; that the ground where she was offered no impediment to pulling her off, but that he thought she was too high and dry. On the same day that the tug came down to the vessel she returned to North Sidney with captain Nickerson and all his crew except the mate of the " Betsey " who was left in charge of her. Nickerson said that immediately after his arrival at Sydney he telegraphed again to March & Sons, the owners of the " Betsey," that the tug could not get the vessel off and that they had better come down themselves.

Whether Archibald, the agent of March & Sons, who had been directed by the telegram of the 1st November to keep March & Sons posted in the matter, sent any communication to them by telegram or letter did not appear ; however, from Nickerson's telegram from Sydney to March & Sons on the 3rd or 4th November they must, I think, be held to have had sufficient reliable information to make reasonable men conclude that the vessel was then in imminent danger of becoming lost. That she then existed in specie as a ship there can be

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no doubt, however perilous may have been the position in which she was. Then, therefore, was the time when, upon the authority of *Kaltenbach* v. *McKenzie* (1), it became imperative upon the owners, if ever they should claim as for a total loss, to have given immediate notice of abandonment to the underwriters. There is no suggestion that the vessel was in such a position and condition that she must have absolutely perished and disappeared before notice could be given to the underwriters, if that would have been a sufficient excuse for not having given notice of abandonment. From the information which the owners then had they had no right to keep secret in their own minds what they intended to do, namely, whether they would treat the loss as total, in which case notice of abandonment was necessary, or wait to see whether a change of circumstances might not make it more to their advantage to treat the loss as partial, thus keeping the underwriters in ignorance of the state of things and depriving them of the opportunity of doing what they might think best to be done in their interest, while the vessel was all the time left exposed to the violence of winds and waves and to increased damages and greater probability of eventual total loss. From the 3rd to the 18th November the vessel was left exposed to the violence of the winds and waves without any effort whatever being made to get her off. During this time she suffered additional damage. On the 18th, one of the owners went down to where she was and got the captain of the tug, who had gone down to her on the 2nd or 3rd of November and done nothing, and another man, to make a survey of the vessel as she then lay, and upon their report, which is not produced, sold the vessel. Nickerson says that between the time that he had left her on the 2nd or 3rd of November and his coming back with Mr.

(1) 3 C. P. D. 467.

March, the owner, who went down to her on the 18th November she had sustained additional damage—that he could see that she had strained and had some water in her—that he did not know whose idea it was bringing Mr. Ross and the master of the tug from Sydney to hold survey—that Mr. March got them to hold survey, and that the vessel was sold the same day or the next day after the survey. He said:—

The men that held the survey, I suppose, went about to sell the vessel and she was sold the same day or next after survey.

The language of the Lords Justices in *Kaltenbach* v. *McKenzie* (1) is, to my mind, conclusive in the present case. Lord Justice Brett (2) says, speaking of the assured owner of a ship:—

If he hears that the ship is stranded, and her back is broken, although she retains her character as a ship, if he gets information upon which any reasonable man must conclude that there is very imminent danger of her being lost, the moment he gets that information he must immediately give notice of abandonment. The law that has been laid down is that immediately the assured has reliable information of such damages to the subject matter of insurance as that there is imminent danger of its becoming a total loss, then he must at once, unless there is some reason to the contrary, give notice of abandonment.

And again (3), he says:—

I am not prepared to say that if it could be shown that the subject matter of insurance, at the time when the assured has information upon which otherwise he would be bound to act, is in such a condition that it would absolutely perish and disappear before notice could be received or any answer returned, that that might not excuse the assured from giving notice of abandonment, but I am prepared to say that nothing short of that would excuse him; and although I do not say that what I have stated would excuse him, I am not prepared to say it would not; that is the limit to which, I think, the doctrine could be carried, and it seems to me that to go further than that would let in the danger to provide against which the doctrine of notice of abandonment was introduced into the contract and made a part of the contract.

Lord Justice Cotton (4) says:

(1) 3 C.P.D. 476.
(2) At p. 473.
(3) At p. 475.
(4) At p. 480.

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The object of notice, which is entirely different from abandonment, is, that he (the assured) may tell the underwriters at once what he has done, and not keep it secret in his mind to see if there will be a change of circumstances. There is another reason : the thing in various ways may be profitably dealt with ; therefore the second reason for requiring notice of abandonment to be given to the underwriters is that they may do, if they think fit, what in their opinion is best and make the most they can out of that which is abandoned to them as the consequence of the election which the assured has come to. How then can the plaintiff say that it was not necessary in the present case to give notice of abandonment ?

And referring to *Rankin* v. *Potter* (1), he says :

It was suggested that it followed from *Rankin* v. *Potter* (1) that if the notice of abandonment was of no use to the underwriters the assured was excused from giving it, but in my opinion nothing that was said by the learned lord who moved the judgment of the House of Lords, or by any of the judges, supports that contention.

And again :

There is nothing in the observations of Blackburn J. which can possibly be construed to mean, that where the assured has in his possession the thing insured at the time when he received notice of the facts, he then is excused from giving notice of abandonment to the underwriters. On principle, ought we to carry what was laid down in *Rankin* v. *Potter* (1), further than that case has carried it ? In my opinion, no. All the grounds upon which the rule requiring notice of abandonment to be given is based apply equally in this case, even although the jury might find that in the ultimate result notice of abandonment would have produced no good result to the underwriters. The object is, as I have pointed out before, to communicate to the underwriters that decision at which the assured has arrived at the earliest possible moment, so as to render it impossible for him having formed that decision to retract it, and in order that he must not be allowed to run the chance of events, and to abstain from giving notice and afterwards excuse himself by saying ; " if I had given notice the underwriters would have got no benefit from it," and from the other ground on which notice is required it equally follows that it must not be left to the jury to say whether or no notice would be useful.

Then Lord Justice Thesiger, after quoting largely from the judgments of the learned law lords in *Rankin*

(1) L. R. 6 H. L. 83.

v. *Potter* (1), and referring to the opinion of Blackburn J. in that case given to the House of Lords, says (2):

> In the first place it is to be observed that the opinion of Blackburn J. delivered to the House of Lords is not a binding authority upon us, and although the opinion is very valuable for the purpose of guiding us, we have to look at the opinions of the lords and not the opinion of the judges given to the lords ; but, at the same time, I think I may also say that when the whole opinion of Blackburn J. is looked at it does not justify the contention on behalf of the plaintiff, and without taking up time by reading passages from that opinion I would say that it goes no further than the opinions of the lords themselves, that where at the time that the assured receives notice of the loss, and has to exercise his election to abandon, there is no part of the subject matter of the insurance to abandon, and therefore no possibility of advantage to the underwriters if they did receive the notice, in that case the assured may be discharged from the *onus* which otherwise would be upon him of giving a notice of abandonment.

Now how can it be held that the judgment in that case is not conclusive upon the present? Here, upon 3rd or 4th November, at latest, the owners of the insured vessel had reliable information that she lay ashore where she had stranded, in imminent peril of becoming a total loss, which made it their imperative duty then to elect whether they would treat the vessel as a total loss, or should regard their loss as partial only. In the former case it was absolutely necessary for them to give notice of abandonment to the underwriters in order to enable them to recover as for a total loss. The vessel was, beyond all question, then in existence as a vessel, and capable of being abandoned to the underwriters as the subject insured by them, and *Kaltenbach* v. *MacKenzie* (3) is a conclusive authority, therefore, that in the absence of notice of abandonment the assured cannot recover as for a total loss.

In my opinion the conduct of the assured in doing nothing whatever with the vessel for the purpose of extricating her after receiving Nickerson's telegram of

(1) L. R. 6 H. L. 83. (2) At p. 486.
(3) 3 C.P.D. 467.

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the 3rd November, and in suffering her to be exposed to further damage from the violence of the winds and waves without giving notice of abandonment to the underwriters, affords abundant evidence that they did elect to regard their loss as partial, and to run all risks themselves of extricating the vessel; the conduct of the owners is not, I think, otherwise susceptible of a reasonable construction.

It has been contended that this case comes within the principle of the *Anchor Marine Insurance Company* v. *Keith* (1), which proceeded upon the opinion expressed by Willes J. in *Barker* v. *Janson* (2), namely, that

> when a ship is so injured that it cannot sail without repairs, and cannot be taken to a port at which the necessary repairs can be executed, there is an actual total loss, for that has ceased to be a ship which never can be used for the purposes of a ship.

In that case it was held that a valid sale for the benefit of all concerned might be made, and no notice of abandonment would be necessary. The principle involved in such a case is, that as there was a physical impossibility under the circumstances that the vessel ever could be used again as a ship she had ceased to be a ship, and could not be transferred to the underwriters as the thing which was the subject of insurance by them. It is unnecessary to inquire whether a ship stranded, but not otherwise damaged, and which retains her character of a ship in specie and is capable of being abandoned to the underwriters as the very thing insured by them, presents a case at all analogous to the case suggested by Willes J. in *Barker* v. *Janson* (2), which was the very case of *The Anchor Marine Insurance Company* v. *Keith* (1), for there was in the present case no evidence whatever that there was any physical impossibility in the insured vessel being put

(1) 9 Can. S. C. R. 484. (2) L. R. 3 C. P. 305.

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to sea again. It was suggested that from the fact of the tug having gone down on the 2nd or 3rd November, and nothing having been done, it might be inferred that it was physically impossible that anything could be done—but from such a premise no such inference could be drawn. It might be that the tug had not the necessary appliances, or that the expense of getting the vessel down to sea again was thought to be greater than she was worth, or that the tug master could give no rational account of his inaction and, therefore, was not called by the plaintiff. But, in truth, the case of the plaintiff was not one to be established by any such inferences as were suggested. He had undertaken to excuse his not giving a notice of abandonment to the underwriters upon the ground that it was physically impossible to get the vessel down to sea again. If that could afford an excuse, while the thing insured remained in existence in specie the fact had to be proved by the assured by clear and conclusive testimony, and in point of fact none such was, in my opinion, offered. The plaintiff should, therefore, have been non-suited.

Finally, it has been suggested that as there was undoubtedly a partial loss the plaintiff could not be non-suited. This suggestion has proceeded from one of the learned judges in the court below, not from the plaintiff either in the court below or here, and it appears that at the trial the plaintiff, repudiating all idea of claiming as for a partial loss, abstained from offering any evidence in support of such a claim, and insisted wholly upon an actual total loss which he failed to prove. The appeal, therefore, in my opinion, should be allowed with costs, and judgment of non-suit be ordered to be entered in the court below.

PATTERSON J.—I have had an opportunity of read-

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ing the opinion prepared by my brother Gwynne, and agreeing as I do with the views he has expressed I shall not repeat what he has said.

The result of that opinion is to overrule the judgment pronounced by a majority of three against two in the court below, but when I read the opinions of the learned judges who formed the majority I cannot avoid the impression that if the second discussion, which is one advantage of an appeal, had taken place in the court below there would have been at least a majority of that court in favor of a judgment of non-suit.

The learned Chief Justice formed his opinion with hesitation, being pressed by the slight evidence of inability to get the vessel off the rocks, there being really no evidence of any attempt to do so and no evidence of the reason why the tug did not make the attempt, and Mr. Justice Wetmore seems to have been influenced by what I conceive to be a misapprehension of remarks of my brother Strong in *Providence Washington Insurance Company* v. *Corbett* (1). He applies to this case, in which the vessel when surveyed and sold was in far worse condition than when the tug was there, the rule stated and illustrated in Corbett's case that the right to abandon the vessel must, under English law, be tested by the condition of the vessel at the time of action brought. But the discussion in Corbett's case was on a very different matter. It related to the case of notice of abandonment being given under circumstances that justified it—as *e. g.* when the vessel had been captured by an enemy's cruiser but afterwards came back to the possession of the assured, as in the event of a rescue by an English frigate—and the point discussed was whether under such circumstances the notice of abandonment could

(1) 9 Can. S. C. R. 246.

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be insisted on. Nothing was said in that case at all inconsistent with the doctrines quoted by my brother Gwynne from the observations of the lords justices in *Kaltenback* v. *Mackenzie* (1) as to the necessity for prompt notice of abandonment.

I agree that the plaintiff ought to have been nonsuited and that the appeal should therefore be allowed.

(Nov. 10th, 1890.)

Our judgment in this case upon the merits when the court formerly proceeded to deliver judgment was to enter a nonsuit, taking the view of two judges of the court below, but it was suggested in this court that a new trial would be more proper under the circumstances. I was not prepared at the time to pronounce an opinion upon that, as I wished to be quite satisfied that upon the pleadings it was competent for the plaintiff to recover for the partial loss. I am now satisfied that he has a right to do so. It was competent after evidence of partial loss, which I think there is in this case, for the plaintiff to recover for a partial loss on his claim on the record for a total loss. I therefore agree that our judgment should be for a new trial instead of entering judgment of nonsuit. I do not think it should affect the question of costs of the appeal as the judgment of the majority of the court is against the decision appealed from. If a new trial is had it should be on terms of paying the costs of the former trial.

Appeal allowed and case remitted to court below to make rule absolute for new trial on payment of costs.

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

Solicitors for respondent : *G. C. & C. J. Cosler.*

(1) 3 C.P.D. 467.

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THE MOLSON BANK (PLAINTIFFS).....APPELLANTS ;

*Mar. 14, 17.

AND

*Dec. 10.

EDWARD HALTER AND MOSES E. WISMER (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of statute—R.S.O. (1887) *c.* 124 *s.* 2—*Assignment for benefit of creditors—Preference—Intent—Pressure—Criminal liability.*

R. S. O. (1887) c. 124 s. 2 makes void any conveyance of property by a person in insolvent circumstances made " with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect."

Held, affirming the judgment of the Court of Appeal, Fournier and Patterson JJ. dissenting, that the words " or which has such effect " in this section apply only to the case of " giving any one or more of (his creditors) a preference over his other creditors or over any one or more of them."

Held further, that the preference provided against in the statute is a voluntary preference and a conveyance obtained by pressure from the grantee would not be within its terms.

W. having become insolvent, and wishing to secure to an estate of which he was an executor monies which he had used for his own purposes, gave his co-executors a mortgage on his property for the purpose, and proceedings were taken by a creditor to set aside this mortgage under the above section.

Held, Fournier and Patterson JJ. dissenting, that the mortgage was not void under the statute.

Held per Strong, Taschereau and Gwynne JJ. that there was no preference under the statute as the persons for whose benefit the security was given were not creditors of the grantor, but they stood in the relation of trustee and *cestui que trust.*

Held also, per Strong and Taschereau JJ., that the grantor being criminally responsible for misappropriating the money of the estate of which he was executor the fear of penal consequences was sufficient pressure on him to take from the mortgage the character of a voluntary preference.

PRESENT.—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of MacMahon J. at the trial in favor of the defendants.

The defendants were co-executors and trustees under a will of what was known as the Jantz estate. The defendant Wismer was the active trustee and he received certain monies of the estate which he applied to his own purposes. He had been a farmer but bought the interest of a partner in a milling business and gave a statement of his means to the plaintiff bank in order that his firm might obtain a line of credit to carry on the business. In a little more than a year the firm became insolvent and Wismer gave to his co-trustee a second mortgage on certain property to secure the estate money which he had appropriated. No assignment for the general benefit of creditors was made by the firm or by Wismer and the bank having obtained a judgment against Wismer took proceedings to have the said mortgage set aside as being a fraudulent preference under the statute R.S.O. (1877) ch. 124 sec. 2. The trial judge refused to set it aside and gave judgment for the defendants which the Court of Appeal affirmed. The decision of the latter court was based on the ground that the parties did not stand in the relation of the debtor and creditor and there could, therefore, be no preference and that an intent to defeat or delay creditors must still be shown to avoid a preference under the statute which was not done. The plaintiffs appealed to the Supreme Court of Canada.

Bowlby Q. C. for the appellants. R. S. O. ch. 124, sec. 2, makes void every transfer of property which has the effect of defeating or delaying creditors.

The relation of debtor and creditor undoubtedly existed between the Jantz estate and Wismer. *Ex parte*

(1) 16 Ont. App. R. 323.

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Taylor. In re Goldsmid (1), followed in *Ex parte Ball. In re Hutchinson* (2); *In re Mills. Ex parte The Official Receiver* (3).

The mortgage is clearly void under the statute. *McDonald* v. *McCall* (4); *Davis* v. *Wickson* (5); *Warnock* v. *Kloepfer* (6) affirmed by the Supreme Court on appeal; *Rider* v. *Kidder* (7).

Aytoun-Finlay and *Duvernet* for the respondents. The judgment of the plaintiffs is against Wismer personally, and cannot be enforced against him as executor. *Allen* v. *McTavish* (8); *Lucas* v. *Crookshank* (9).

The statute only applies to voluntary assignments, *McLean* v. *Garland* (10); *Long* v. *Hancock* (11); and there was clearly pressure on Wismer to give this mortgage.

STRONG J.—The question presented for decision by this appeal is whether a mortgage of lands made by one of several executors to his co-executors as security for money belonging to his testator's estate, wrongfully appropriated by him, is void by reason of the mortgagor's insolvency when he executed the mortgage.

The solution of this question depends, in the first place, upon the construction to be placed upon section 2 of the Revised Statutes of Ontario, 1887, ch. 124, which is as follows:—

Every * * * conveyance * * * of * * * any * * * property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect, shall as against them be utterly null and void.

(1) 18 Q.B.D. 295.
(2) Weekly Notes, 1887, p. 21.
(3) 58 L.T.N.S. 235.
(4) 12 Ont. App. R. 593.
(5) 1 O.R. 369.
(6) 15 Ont. App. R. 324.
(7) 10 Ves. 360.
(8) 8 Ont. App. R. 440.
(9) 25 Can. L. J. 124.
(10) 13 Can. S.C.R. 366.
(11) 12 Can. S.C.R. 539.

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The appellants have contended before this court, as they also contended before the Court of Appeal, that in construing this enactment the words "or which has such effect," are not to be confined to the immediately antecedent case, that avoiding preferences, but are also to be applied to the first case comprised in the section, that of conveyances made to defeat, delay or prejudice creditors, and that, consequently, as the effect of the mortgage here has been, in fact, to defeat and prejudice the appellants as judgment creditors of Wismer, the mortgagor, it is, irrespective altogether of the intent with which it was given, void as against the appellants. The Court of Appeal, by a majority of three to one, Mr. Justice Osler being the dissentient judge, decided against this contention. The Chief Justice of Ontario and Mr. Justice Burton both held, in the learned judgments delivered by them, that the words " or which has such effect," are to be confined to the case of preferences, and Mr. Justice MacLennan concurred in the judgment of the Chief Justice; Mr. Justice Osler, on the other hand, based his dissenting judgment on the construction which attributes the words in question to both the cases dealt with by the section and therefore held that, without regard to the intent with which it was made, the mortgage by Wismer to his co-executors to secure the moneys of the testator's estate which he had appropriated to his own use was void. If intent to defeat creditors is required to be proved to bring a case within the first part of the section it is manifest that the appellants must fail so far as regards the contention now under consideration.

In the first place I entirely agree with the majority of the Court of Appeal in attributing the words " or which has such effect " to the case of preferences exclusively. Many unimpeachable authorities have established that in interpreting statutes th rule

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of grammatical construction is to govern unless the context, indicating that a different intent actuated the legislature, requires a departure from that rule, or unless some absurdity, injustice or great inconvenience would be the result of adherence to it. So well established is this rule that it has been called by very great judges the "golden rule," and we find it approved and applied to numerous cases, some of them decided in the House of Lords. One of the instances of the application of this principle is that which occurs in the construction of relative words and a subordinate rule, formulated in a well known legal maxim, has been adopted as a canon of construction in such cases. This maxim, *ad proximum antecedens fiat relatio nisi impediatur sententia*, is, therefore, that which is primarily to be applied in the present case, and we are not entitled to disregard it or to depart from it unless its effect will be to bring the clause of the statute we are dealing with within some of the exceptions to the general principle of literal, grammatical construction. Then can it be said that the interpretation of this section adopted by the Court of Appeal in accordance with the maxim just referred to, by confining the words "or has such effect," or rather the relative word "such" in that sentence, to that part of the section concerning preferences which immediately precedes, introduces any of those consequences which are said to indicate that the rule is inapplicable? I am of opinion that it cannot be so said. It is impossible to say that such a meaning is at variance with any context, or that it involves either absurdity or injustice, or that it is repugnant to anything to be found either in this specific clause or in other parts of the statute. I have heard and can conceive nothing which would lead to these results and, therefore, I am of opinion that we must refer the words "such effect" to the next antecedent,

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"a preference over his other creditors," a construction which is in accord, not only with the literal and grammatical meaning, but which is also consistent with reason, good sense and legal convenience, and which does not conflict with any contrary intent of the legislature disclosed by the context. If, on the other hand, we were to apply these referential words to the first part of the section, and hold that a conveyance tending to prejudice creditors, though made with the most honest and praiseworthy intentions, was void, and that, too, even as regards *bonâ fide* purchasers, such as a creditor innocently taking a conveyance in satisfaction of his debt, or parties claiming under an ante-nuptial settlement made and accepted in good faith and without notice of any fraudulent intent, we should, I think, be attributing to the statute an operation which would not merely be novel and startling but which would be positively unjust.

Therefore, I am of opinion that the validity of the impeached mortgage must depend exclusively on the answer to be made to the inquiry whether or not the mortgage is proved to have been made with intent to give a preference to particular creditors over the appellants or over the general body of creditors, or whether it has had such effect, which is the case secondly provided for by the enactment in question. No question of statutory construction arises here; the section construed in the manner already indicated is, in my opinion, perfectly plain and unambiguous. The question we have to determine is, in the abstract, whether a conveyance or mortgage by a defaulting trustee to his co-trustees, made when the defaulter is in a state of insolvency with the object and intent of making good to the trust estate monies which he has abstracted from the trust fund and appropriated to his own use, is to be considered a preference of one creditor to

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another or as having the effect of such a preference within this second section. Again concurring with the learned judges who formed the majority in the Court of Appeal I am of opinion that the answer to this must be in the negative for the reason that the persons for whose benefit the security was given were not creditors within the meaning of this section of the statute but have rights higher than those of creditors. The English cases are conclusive on the point. *Ex parte Stubbins re Wilkinson* (1) and *ex parte Taylor re Goldsmid* (2), and *ex parte Kelly* (3), all decide that the doctrine of fraudulent preference has no application to such a state of facts as we find disclosed by the evidence in the present case. As the Master of the Rolls observed in the case of *ex parte Taylor* (2), the relationship between the defaulting party and those who get the benefit of the conveyance or mortgage in such cases is not that of debtor and creditor at all but that of trustee and *cestui qui trust*, and consequently the enactments in the bankruptcy statutes against preferences do not include the case in question. The reasoning of these cases is so satisfactory, and the disastrous consequences of a contrary construction so obvious, that I need not say more on this head. The English authorities already quoted are precisely in point, and no reason has been, or can be, suggested why they should not be acted upon here.

There is, however, still another reason why, even in the absence of these English cases, I should, on a different ground, have come to the same conclusion. As Lord Cairns, in the case of *Butcher* v. *Stead* (4), has laid it down the word "preference" imports a voluntary preference, that is to say, a spontaneous act of the debtor. There was nothing new in this explanation

(1) 17 Ch. D. 88.
(2) 18 Q.B.D. 295.
(3) 11 Ch. D. 311.
(4) L.R. 7 H.L. 839.

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of the term; it was a very old principle of the law of bankruptcy, though it was stated by Lord Cairns more clearly and decisively, and in a more absolute form, than it had ever before been formulated in. Then could it be said that the giving a security by Wismer for this money which he had abstracted from the assets of his testator and fraudulently applied to his own use was a mere voluntary act on his part? Surely not in view of the state of our criminal law, which renders such a defaulting trustee liable to prosecution, and on conviction to personal punishment. It is held that a mere demand is sufficient pressure by a creditor to take away from a conveyance, transfer or mortgage the character of an unjust preference, and if the pressure of the creditor is thus sufficient to show that such a transaction is not a voluntary preference, how much more effectual for that purpose should be the pressure caused by the consciousness of the trustee, that if he fails to make good his abstractions from the fund he will subject himself to penal consequences. In such a case it could never be said that the act of restoration, if impeached as a preference, was voluntary or spontaneous, or made otherwise than under the weight of the heaviest pressure to which the defaulter could be subjected. As I have said, pressure by the creditor in the case of a common debt divests a transfer of any fraudulent color, and in the case of the trustee, such as we have here, the law itself, by recognizing the restitution of a trust fund as a higher duty enforced by a higher statutory sanction than the payment of an ordinary debt, exerts the pressure which takes away from the transaction the character of a voluntary preference.

Upon this last ground alone I should be prepared to hold that the mortgage impugned by this section

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was neither an illegal preference nor a security having the effect of such a preference.

Although in the view which I take it is not material that I should be able to assign any particular meaning to the words "or has such effect," I may add that I should find no difficulty in doing so. It appears to me that they have a perfectly plain and obvious meaning. They are, in my opinion, redundant words inserted by the draftsman, *ex abundanti cautelâ*, to show that not merely direct preferences, such as would result where an impeached mortgage or conveyance was made directly by the debtor to the creditors, they being the only and immediate parties to the transaction, were intended to be prohibited, but that preferences which might be the consequences of indirect and circuitous forms which might be given to transfers of property made through persons interposed between the debtor and creditor were also intended to be included.

So used they were probably unnecessary and superfluous, but their use for such a purpose was quite in conformity with the style generally adopted in drafting legislative acts.

The appeal must be dismissed with costs.

FOURNIER J. was of opinion that the appeal should be allowed.

TASCHEREAU J. concurred with STRONG J.

GWYNNE J.—The determination of this case turns upon the true construction to be put upon sec. 2 of the Ontario Statute, 48 Vic. ch. 26—which is now consolidated with other acts in ch. 124 of the Revised Statutes of Ontario. The frequent revision of the statutes and the mode adopted for effecting these revisions are, in my opinion, calculated to conceal, and to

distract the attention from the consideration of the object which the legislature had in view in originally enacting the provision of the law for the time being under consideration. This 2nd section of 48 Vic. ch. 26 was passed by way of substitution for the 2nd section of ch. 118 R.S.O., 1877, and the effect was to make this section, so substituted, to be thenceforth read as the 2nd section of said ch. 118, the title of which act is: "An act respecting the fraudulent preference of creditors by persons in insolvent circumstances." We have thus, as it appears to me, a clear enunciation by the legislature of their intention in enacting this 2nd section of 48 Vic. ch. 26 to be to provide against persons in insolvent circumstances transferring any property for the purpose of defrauding their creditors, or giving to any of their creditors a fraudulent preference over any other creditor. The section enacts that—

> Every gift, conveyance, assignment, or transfer, delivery over, or payment of any goods, chattels or effects, or of any shares, dividends, premiums or bonus in any bank company or corporation, or of any other property, real or personal, made by any person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect, shall as against them be utterly void.

What the draftsman of this section intended by the words at its close, "or which has such effect," I do not think was very clear to his own mind. To my mind, I must say that they do not appear to have the effect of changing the nature of the inquiry which would have been necessary, or of extending the operation of the section beyond what it would have effected if these words had been omitted. Prior to the passing of 48 Vic. ch. 26, if a deed had been assailed under ch. 118 of the Revised Statutes of Ontario upon the ground of its being fraudulent as against the creditors of the grantor

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as having been executed by him with intent to defeat, delay or prejudice them in obtaining satisfaction of their debts out of the property conveyed by the deed to the extent of the value of such property, the inquiry into that subject necessarily opened the question of the consideration upon and for which the deed had been executed; and if it appeared that the deed was purely voluntary upon the part of the grantor, without any good and valuable consideration having been given by or on behalf of the grantee or other person on whose behalf and for whose benefit the deed was executed, the natural and necessary effect of such a deed was to defeat, delay and prejudice the creditors of the grantor, and so the fraud charged was established, namely, that the deed was executed by the grantor with the intent that it should have that effect which was the natural and necessary effect of its being executed; but if it should, on the contrary, appear that the deed was executed for a good, valuable, legal consideration, proceeding from the grantee or person in whose favor or for whose benefit the deed was executed, such good consideration operating to support the deed and to pass the title in the property conveyed to such person, the necessary result was that no fraud against the grantor's creditors had been committed, and the deed could not be held to have had the effect of depriving the creditors of any property which they had any right to reach to obtain thereout satisfaction of their debts in whole or in part. Thus we see that the question as to the intent with which the deed was executed was subsidiary to, and involved in, the question as to what was the consideration upon and for which the deed was executed. If the consideration given was good and valuable, and given *bonâ fide*, the deed could not be said to have the effect of defeating or delaying the grantor's creditors nor could the grantor be said to have executed the deed with the

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intent that it should have an effect which, in point of law, it could not, under the circumstances, be said to have; in short the question as to the sufficiency or insufficiency of the deed to pass the title thereby purported to be conveyed, and the question as to what was the effect of the deed, and what the intent with which it had been executed, were all involved in the one question, namely: Was the consideration upon and for which the deed was executed a good valid and *bonâ fide* consideration for the purpose of vesting the title of the property according to the terms of the deed, or, on the contrary, was the deed a purely voluntary deed executed without any consideration *bonâ fide* given and proceeding from the person in whose behalf or for whose benefit it was executed? Now, if a deed should be assailed since the passing of 48 Vic. ch. 26 as fraudulent against the creditors of the grantor upon the allegation that it defeated or delayed or prejudiced them in the recovery of their debts, the evidence, I apprehend, must be of precisely the same nature as had been necessary before the passing of the act, and the consideration upon and for which the deed was executed is still, equally as before, the crucial test to determine whether the deed was sufficient to pass the title *bonâ fide* to the grantee of the deed, or whether, on the contrary, it was a purely voluntary deed, and so having the effect as charged of defeating, delaying and prejudicing the grantor's creditors in the recovery of their debts. Assuming, then, the words, "or which has such effect" to be coupled with the words, "with intent to defeat, delay or prejudice his creditors" as well as with the words with which they are immediately connected, namely, "or to give to any one or more of them a preference over his other creditors, or over any one or more of them," it does not appear to me that thereby any material difference is made in the

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law, either as to the nature of the deed, which is open to the imputation of being one which, operating so as to defeat, delay, or prejudice the grantor's creditors, is fraudulent as against them, or as to the nature of the evidence as to the consideration which is sufficient to sustain the deed, and to relieve it from such imputation of fraud. The whole question is still as before involved in an inquiry into the precise character and sufficiency of the consideration upon and for which the deed was in truth executed. The suggestion that the effect of the words, "or which has such effect," coupled with the words, "with intent to defeat, delay, or prejudice his creditors," is to make them operate in two distinct events, namely: First, to avoid a deed executed with intent to defeat, delay or prejudice the grantor's creditors, whether the deed should or should not have, or in other words, although it should not have, such effect; and second, to avoid the deed which had the effect of defeating, delaying or prejudicing the grantor's creditors, although he executed the deed *bonâ fide* for good and valuable consideration without any such intent, cannot, in my opinion, be entertained for a moment. It is impossible to attribute to the legislature so motiveless and senseless an intention as that a deed should be avoided as prejudicial and fraudulent as against creditors, as defeating or delaying or prejudicing them in the recovery of their debts, which had not any such effect, upon the ground that the grantor is assumed to have vainly intended that the deed should have an effect which *ex premissis* it had not. Every deed executed by an insolvent purely voluntarily and without consideration is regarded in law as well as in fact as having the effect of defeating, delaying and prejudicing the creditors of the insolvent grantor; the only deed, therefore, executed by an insolvent not having

such effect must be a deed executed *bonâ fide* for good and valuable consideration; and neither justice nor common sense, in my opinion, justifies the contention that the legislature, by the language used, contemplated declaring void as fraudulent, as against the grantor's creditors, a deed executed by him, *bonâ fide*, for good and valuable consideration proceeding from the person to whom, or in whose favor, and for whose benefit the deed was executed. Such a great change in the law which such a construction of the language used, so pregnant itself with fraud, would effect cannot, in my opinion, be attributed to the language used by the legislature.

While I am of opinion that the words under consideration have no such effect I concur with the learned Chief Justice of the Court of Appeal for Ontario, in the opinion that the words "or which has such effect," are to be construed only in connection with the sentence immediately preceding —thus: "or to give to any one or more of them a preference over his other creditors, or over any one or more of them, or which has such effect." If the intention had been to apply these words in connection also with the words, "with intent to defeat, delay or prejudice his creditors," the natural expression would have been, "or which has any of such effects," for there had been several effects involved in the two sentences, namely, the effect of defeating, the effect of delaying, the effect of prejudicing the grantor's creditors generally, and the very different effect, namely, the effect of preferring one or more of his creditors over others; but construing the words in connection with the immediately preceding words—"or to give to any one or more of his creditors a preference over his other creditors, or over one or more of them," there is not the slightest indication that the legislature

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intended, in 48 Vic. ch. 26, to use the terms, "preference," and "to give a preference," in any other sense than the well understood legal sense of those terms as the same had been in use before the passing of the act. Indeed, on the contrary, the enacting of the 2nd sec. of 48 Vic. ch. 26, in substitution for the 2nd sec. of ch. 118 R. S. O., 1877, the title of which act is as above stated, indicates very plainly, I think, that the legislature used the terms in their well understood legal sense, namely, the fraudulent preference given by an insolvent to one or more of his creditors over others. It is, therefore, as material since the passing of 48 Vic. ch. 26 as it was before to inquire what species of conveyance was assailable as giving a preference to one of the creditors of an insolvent over others. A preference of one creditor over others consisted, and, in my opinion, still consists, in the voluntary disposition by an insolvent of some portion of his property so as to confer greater benefit upon one or more of his creditors than upon others, when unable to pay all in full. To constitute a preference it must have been given by the insolvent of his own mere motion, and as a favor or bounty proceeding voluntarily from himself.

If, for example, a person in insolvent circumstances should execute a deed conveying a portion of his property to one of his creditors in order to get the remainder of his property released from the operation of an execution in the sheriff's hands as against his property generally, or if in a suit in chancery by one of his creditors to compel specific performance of a contract relating to a portion of his property the insolvent should be decreed specifically to perform such contract by conveying to such creditor the particular property in question, in neither of those cases could a creditor of the insolvent assail successfully the convey-

ance as constituting a preference of one creditor over his other creditors, either before or since the passing of 48 Vic. ch. 26, for the reason that such deeds must be regarded as having been executed by compulsion of law and for good consideration, and not for the purpose of effecting a voluntary disposition of any part of the grantor's property as a benefit conferred upon one of his creditors over the others.

So likewise, as it appears to me, if an insolvent should transfer property to one of his creditors for the purpose of specifically performing a contract which the creditor could enforce by process of law, although no suit had been instituted for that purpose, such transfer would not constitute a giving a preference by the insolvent to such creditor within the meaning of the statute; an act, specific performance of which could have been enforced by law, could not, I apprehend, have been considered to be, before the passing of 48 Vic. ch. 26, what the law regarded as a preference given to one of an insolvent's creditors over the others; and as the 48 Vic. ch. 26, makes no difference as to the character of the act which constitutes a preference, but uses that term in its well known legal sense, a disposition of property by an insolvent which did not, before the act, constitute a preference of one creditor over others cannot be adjudged to be a preference within the meaning of 48 Vic. ch. 26.

Upon the whole, therefore, I can see no reason why the English decisions upon a similar question to that arising here are not as applicable to the determination of the present case as to like cases arising in England; and upon the authority of *Ex parte Kelly. In re Smith* (1), *Ex parte Stubbins. In re Wilkinson*(2), and *Ex parte Taylor. In re Goldsmid* (3), and upon principle, I am of opinion that

(1) 11 Ch. D. 306.
(2) 17 Ch. D. 58.
(3) 18 Q. B. D. 295.

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a conveyance, such as the one in question, executed by one of two trustees to his co-trustee to reinstate a fund of their *cestui que trust* which had been misappropriated by the former trustee in breach of his trust is not a conveyance which can be avoided under the Ontario statutes relating to assignments and preferences by insolvent persons, either upon the contention that it operates as fraudulent to the insolvent's trustees creditors generally, or as a preference to one of his creditors.

To such a transaction the Ontario statute has, in my opinion, no application, and the appeal, therefore, should be dismissed with costs.

PATTERSON J.—The essential facts in this appeal are few and are not now in dispute.

Halter and Wismer were executors of Jantz. Wismer received moneys belonging to the estate and applied them to his own use; then, becoming insolvent, he executed a mortgage to Halter and himself, as executors of Jantz, to secure the amount of the misappropriated moneys.

This action is brought to set aside that mortgage as void against the creditors of Wismer.

The mortgage is not void under the statute 13 Eliz. ch. 5. *Holbird* v. *Anderson* (1); *Alton* v. *Harrison* (2); *Boldero* v. *London and Westminster Discount Co.* (3). I lately discussed these and other cases in *Whitman* v. *Union Bank of Halifax* (4).

Is it void under the Ontario Act, R.S.O. (1887) ch. 124, which is entitled "An Act respecting Assignments and Preferences by Insolvent Persons"?

I shall refer again farther on to the title of the act.

The second section declares that the assignment of any property, real or personal, made by a person at a

(1) 5 T. R. 235.
(2) 4 Ch. App. 622.
(3) 5 Ex. D. 47.
(4) 16 Can. S. C. R. 410.

time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors, or over any one or more of them, or which has such effect, shall, as against them, be utterly void.

This differs in two or three respects from the statute of 13 Eliz. Its scope is more limited because it applies only to insolvent persons, and its effect with regard to those persons is more extensive because it includes preferences of particular creditors among its prohibitions, and makes its operation depend not on intention alone but also on the effect of the transaction.

I do not read the enactment as requiring the concurrence of the two things, the intent and the effect. A transfer made by an insolvent person with intent to defeat or delay creditors, or to give a preference to one or more creditors over the others, is made void as against creditors although no creditor shall be actually defeated or delayed, and no preference actually obtained, by means of it.

In that case the intent must be established in the same way as under the statute of Elizabeth, and the apparent object of the transaction may be explained by proof of pressure or some motive which rebuts the forbidden intent. But if the result is the defeating or delaying or giving a preference, if the transaction has such effect, then the statute dispenses with inquiry as to the intent. It might not be incorrect to say that the effect being produced the intent is conclusively presumed if, as under the statute of Elizabeth, the intent were essential to the avoidance of the transfer. With our minds trained under that statute it may be hard to dissociate the two ideas, but the language of the Ontario act, "or which has such effect," is very

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plain, and to my mind makes the effect of the transaction decisive without respect to the intent. The motive of the legislature was avowed in the preamble of the statute by which the clause was cast in its present form, 48 Vic. ch. 26. Questions were constantly arising respecting the intent of transactions impeached under the law as it stood in R.S.O. (1877) ch. 118. An attempt had been made by 47 Vic. ch. 10, sec 3 to couple with the intent to give a preference among creditors the effect or the tendency of a transfer to create a preference, but the amendment was not happily expressed and failed in its purpose. Then the legislature, in the following session, enacted the clause as we now find it, reciting that " whereas great difficulty is experienced in determining cases arising under the present law relating to transfers of property by persons in insolvent circumstances, or on the eve of insolvency, and it is desirable to remedy the same."

Along with this recital may be noticed the fact that the term " fraudulent " which had been used in the title of ch. 118 of the R.S.O. (1877) and in the previous statute which was there represented and which is replaced by section 2 of the act of 48 Vic., which term, applied as it was in that title to preferences led, in my apprehension, to much of the difficulty referred to in this recital, is dropped in the act of 48 Vic. and in R. S.O. (1887) ch. 124.

The effort to remove the recited difficulty will turn out to be unsuccessful if we refuse to give their plain and direct force to the terms in which the legislative will is expressed. There is no reason or warrant for our so refusing.

These views I understand to be the same as those of Mr. Justice Osler who dissented in the court below, and I do not understand any of the learned judges of that court to find fault with them as a matter of prin-

ciple. But when we come to the practical interpretation of the clause three of the learned judges, one of whom further holds that the intent as well as the effect must appear, read the words " or which has such effect " as applying only to preferential transfers, and not to those that may defeat, delay or prejudice creditors without giving a preference to one creditor over another.

This reading of the clause is, to my apprehension, far away from the plain grammatical reading of the language as well as widely apart from what I take to be the expressed object of the legislature in framing it. The language is " with intent to defeat, delay or prejudice his creditors or to give to any one or more of them a preference over his other creditors or over any one or more of them." That is the description of the intent, an intent to do any one of the things enumerated ; a transfer made with that intent, that is to say an intent to do any one of those things, " or which has such effect," that is the effect of doing any one of those things, shall be void against creditors.

If these qualifying words " or which has such effect" are not to apply equally to all the objects of the intent on equal footing it must be by reason of some overruling policy or principle that will justify a distinct violence to language which is not itself ambiguous or indefinite.

The preamble of the statute does not suggest any idea of discrimination. To defeat or delay creditors or to give a preference stood on precisely the same footing in the law under which difficulties were experienced which it was desired to remedy. A new term was introduced in the act 48 Vic. ch. 26, viz., to prejudice creditors, and the four things, defeat, delay, prejudice, prefer, now stand each in precisely the same grammatical relation to the enacting words as the others.

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The legislature has adopted the policy of resting the validity of a transfer by an insolvent person on the effect without inquiry into the intent. It is argued that that is only when a preference is accorded. Why should that be so? Assuming the policy to be sound policy, and it is not our province to question it, why should a transfer which merely disturbs the equality among the creditors be dealt with more strictly than one that defeats all the creditors? If the fact of giving a preference is to be fatal to one, the other ought not to be treated with greater tenderness.

It was held by all the learned judges of appeal that the mortgage had not the effect of giving a preference to one or more creditors over the others within the meaning of the statute because the mortgagees were not creditors of Wismer, or, in the guarded language of Mr. Justice Osler, were not creditors in the strict sense of the word. I shall show why I differ from that conclusion, but if it was not a transfer to creditors it was one that had the effect of defeating, delaying or prejudicing the creditors and is, therefore, as against the creditors, utterly null and void. I agree in that particular with Mr. Justice Osler.

That ground would be sufficient for the allowance of this appeal, but the other question is an important one on the construction of the statute and must be considered.

It is not and cannot be denied that when Wismer applied the trust money to his own use he became liable in a civil action at the suit of somebody. The form of action is of no consequence. It might be what in former times was an action at law, as money had and received, if the money was appropriated to an individual *cestui que trust*, or it might have been by suit in equity if nothing had been done to alter the relation of trustee and *cestui que trust*. See many cases collect-

ed in Bullen and Leake's treatise on pleading (1). He became a debtor to some one. It would be so even if the money had been feloniously stolen. See *Chowne* v. *Baylis* (2), where one question put and answered in the affirmative by Sir J.Romilly, M.R., was this : If one man takes the property of another does such taking constitute in the eye of the law a debt from the thief to the person robbed ? The liability is not less a debt by reason of its being incurred by a breach of trust, whether an express or an implied trust. See *Emma Silver Mining Co.* v. *Grant* (3), where a specific sum was found due from the defendant, who was financial agent and promoter of the company, to the company for the secret profit made on a transaction. One head-note is

> Held, also, that the debt so due from G. was incurred by "fraud" and also "breach of trust" within section 49 of the Bankruptcy Act, 1869, and that accordingly G. was not released from such debt by his discharge ; and he was thereupon ordered personally to pay such debt to the company, or so much thereof as should not be received by the company under the liquidation.

See also to the same effect *Cooper* v. *Pritchard* (4) where a bankrupt was refused his discharge from a debt incurred by the fraud of his partner who misappropriated money intrusted to the firm for investment. Brett, M. R., there referred to the well known rule, which I venture to think has been somewhat overlooked in the present case, that in construing an act of parliament one has no right to introduce words into the enactment unless it is obvious that it cannot be made sensible without them. See also *Evans* v. *Bear* (5) where an order having been made against two executors jointly to pay into court money misappropriated by one of them an attachment was issued against the innocent executor as well as the other, the point

(1) P. 47 of the 3rd edition.
(2) 8 Jur. N.S. 1028 ; 31 L.J. Ch. 757 ; 31 Beav. 351.
(3) 17 Ch. D. 122.
(4) 18 Q.B.D. 351.
(5) 10 Ch. App. 76.

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decided being that he came within the third exception to the fourth section of the act for abolition of imprisonment for debt, the Debtors' Act, 1869, which excludes from the operation of the section "default by a trustee or a person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control." *Cobham* v. *Dalton* (1) was a case where a trustee, who had been ordered to pay into court trust money which he had mixed with his own, was adjudicated a bankrupt. It was held that although the debt was one from which an order of discharge would not release him still, as it was a debt provable under the bankruptcy, he was, pending the bankruptcy proceedings, protected from attachment for disobedience to the order by section 12 of the Bankruptcy Act, 1869, which enacted that

> Where a debtor shall be adjudicated a bankrupt no creditor to whom the bankrupt is indebted shall have any remedy against the person or property of the bankrupt in respect of such debt, except in manner directed by this act.

In *Ex parte Kelly & Co. In re Smith, Fleming & Co.*,(2) Kelly & Co., at Glasgow, remitted money to Smiths, Fleming & Co., at London, to pay in retiring certain bills. They intended to appropriate the money to that purpose and never applied it to their own use, though a part was paid by mistake into their own bank in place of the Bank of England, and about the time of their bankruptcy endeavored to correct the mistake. That was held not to be a payment made voluntarily and by way of preferring a particular creditor. James, L. J., thus states the law:

> No doubt if a trustee commits a breach of trust by stealing or otherwise misappropriating the trust moneys he becomes a debtor to his *cestui que trust* in respect of the money which he has thus improperly taken, and if he becomes a debtor in that way he remains only a

(1) 10 Ch. App. 655. (2) 11 Ch. D. 306.

debtor, and the *cestui que trust* only a creditor, unless he can ear-mark the money which the trustee has misappropriated,

and so on.

It is indisputable that Wismer was a debtor and that the person or persons to whom he owed the money, whether the executors or beneficiaries, whether known and ascertained individually or called by the comprehensive name of the estate, were his creditors. They could clearly have proved for the debt as creditors under an assignment for the general benefit of creditors under the Ontario act. If the money was appropriated to them, as Wismer proposed to do when he told Halter that he was ruined and would like to save the money of the estate that he had used if he could, and as he tried to do by executing the mortgage, it undoubtedly gave a preference to those creditors over the others, and so the transfer came literally within the terms of the statute.

But it has been held that it is not within the statute because the transfer was not made to a creditor. I am not prepared to concede that the executors were not creditors of Wismer. It was the duty of Halter to protect the interest of the *cestuis que trustent* by active measures against his co-executor, and he would be the proper person to prove the debt under the statute.

A trustee is called upon, if a breach of trust be threatened, to prevent it by obtaining an injunction, and if a breach of trust has been already committed, to bring an action for the restoration of the trust fund to its proper condition, or at least to take such other active measures as, with a due regard to all the circumstances of the case, may be considered most prudential.

Lewin on Trusts (1), citing *Brice* v. *Stokes* (2), *In re Chertsey Market* (3), *Franco* v. *Franco* (4), *Walker* v. *Symonds* (5) and other cases, and see *Styles* v. *Guy* (6),

(1) 8 ed. p. 274.
(2) 11 Ves. 319.
(3) 6 Price 279.
(4) 3 Ves. 75.
(5) 3 Swans. 81.
(6) 1 Mac. & G. 422.

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per Lord Cottenham ; *Williams* v. *Nixon* (1), per Lord Langdale ; *Booth* v. *Booth* (2), *Lincoln* v. *Wright* (3), which related to executors.

But there is not a word in the statute on which to found the doctrine that the transfer must be to a creditor. What is forbidden is a transfer which gives a preference to one creditor over the others, no matter who the transferee may be. It is the effect of the transaction, not the shape it is put in, that is dealt with.

I respectfully submit that the decision is an instance of introducing words into a statute which, without them, is perfectly plain. The words are imported from the English Bankruptcy Acts, either section 92 of the act of 1869, or section 48 of the act of 1883, which are similar in their words and read thus :

> Every conveyance or transfer of property made by any person unable to pay his debts as they become due from his own money in favor of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making the same is adjudged bankrupt within three months after the date of the same, be deemed fraudulent and void as against the trustee in bankruptcy.

Here we have forbidden a transfer made *in favor of any creditor* or person in trust for any creditor, with a view to give *such* creditor a preference. That is to say, it must be made to the creditor himself who is preferred, or to some one in trust for him. We have no such provision. The section of the Bankruptcy Acts has been construed very literally, and perhaps with unnecessary strictness, in the courts as appears from dicta in cases relied on in the court below. The cases really were decisions that the transactions in question were not with a view to prefer creditors because the motive was to restore trust funds or to escape prosecu-

(7) 2 Beav. 475. (8) 1 Beav. 125.
(9) 4 Beav. 427.

tion for misappropriating them, but the other point was alluded to.

Thus in *Ex parte Stubbins. In re Wilkinson* (1) it was held that if a debtor on the eve of bankruptcy voluntarily makes good trust moneys which he has misapplied the payment cannot be set aside under the Bankruptcy Act as a fraudulent preference. James L. J. concluded his judgment by stating the doctrine that if a debtor on the eve of insolvency, and just before he becomes bankrupt, sells goods in order that he may restore money which he has taken from his master, or from anybody else, and does restore the money, it seems impossible to hold that such a payment can be treated as a voluntary preference of a creditor. The defaulting trustee had induced his co-trustee to buy part of his goods in order that he might replace trust moneys which he had misappropriated. That was held not to be a fraudulent transfer to the purchaser. He paid the money to the credit of the two trustees in the banking account of the trust estate, and as to that the Lord Justice said

> I am of opinion that it is impossible to bring such a transaction within the doctrine of voluntary preference of a creditor. In order to do that there must be a payment or a transfer of goods to a creditor or to somebody in trust for a creditor. Here the creditor was the trust estate, if it could be called a creditor.

Then followed the general statement of law already quoted. This dictum is relied on as some authority for the construction of the Ontario Act. It is obviously an example of the strict reading of the words which have no equivalent in the Ontario Act, while the decision of the case is on the question of intent which the latter statute excludes.

Another case relied on is *Ex parte Taylor. In re Goldsmid* (2). It follows *Ex parte Stubbins* (1) on both points,

(1) 17 Ch. D. 58.

(2) 18 Q. B. D. 295.

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as will sufficiently appear from a short passage from the judgment of Lord Esher, M. R.

With regard to the other ground, the execution of the deed of the 23rd of March, the bankrupt had been guilty of a gross, and perhaps a fraudulent, breach of trust, and an application was made to him by Taylor, his co-trustee, to replace the trust money which had been lost. I do not say that threats were made use of, but great pressure was put on him. The relation of debtor and creditor did not exist between the parties. The relation was only that of trustee, honest trustee and defaulting trustee. No action of debt could have been maintained for the sum which was paid, and such a case is not within s. 48 at all. But even if Taylor could be regarded as a creditor of the bankrupt I think the other view comes in ; the bankrupt had committed a gross breach of trust, and it could not be said that he executed the deed with a view of preferring Taylor to whom it could bring no personal benefit. The deed must have been executed with the view of making good the breach of trust. Consequently, there was no fraudulent preference and no act of bankruptcy.

Two other cases were referred to in the court below, *Re Mills. Ex parte the Official Receiver* (1), and *Ex parte Ball. Re Hutchinson* (2), which is found only in the weekly notes. They add nothing to the others.

Ex parte Kelly (3), which I have noticed, was not mentioned in the judgments. It was there held, two years before the case of Stubbins, that the provisions of section 92 of the Bankruptcy Act, 1869, apply only to transactions between a debtor and persons who are, in the strict sense of the words, his creditors.

I may add all these cases to the list I have given as examples of the recognition of a debt created by a breach of trust as being a debt as fully as when created in any other way.

We have to interpret our own statute which differs in the important particulars which I have pointed out from the clause in the English acts, and which, in its present form passed in 1885, long after the Bank-

(1) 58 L. T. 235 and 871. (2) W. N. (1887) 21.
(3) 11 Ch. D. 306.

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ruptcy Act, 1869, and after nearly all the decisions cited under that act and the act of 1883, continues to avoid the form of words on which those decisions turn. It aims at the equal distribution of the assets of insolvent persons among their creditors without preference or priority except in defined cases of privilege which do not come in question under the second section.

I am clearly of opinion that Wismer was a debtor in respect of the money in question ; that the ground on which this appeal should be decided is not that the effect of the mortgage of Halter was to defeat or delay or prejudice creditors, as it would be if not given in respect of a debt, but that it had the effect of providing for this debt in preference to his other debts.

If it were essential to the operation of the statute, as it is held to be under the strict reading of the English Bankruptcy Acts, that the transfer should be to a creditor I am prepared to hold that Halter was a creditor, having as executor a legal right—joint if not several—to the money, being entitled by a civil action to compel its restitution to him or to him and his co-executor, and if necessary to prove as creditor for the debt in any proceedings for the administration of the estate of Wismer, whether under the statute in question or otherwise.

I am of opinion that the appeal should be allowed with costs.

Appeal dismissed with costs.

Solicitors for Appellants: *Bowlby & Clement.*

Solicitors for Respondent: *W. Nesbitt & C. R. Hanning.*

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*Feb. 26, 27.
*Nov. 10. AND

ANDREW HUBLEY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Bill of sale—Registry—Defective affidavit—Assignment for benefit of creditors—Writ of execution—Signature of prothonotary—Seal of court.

An assignment of personal property in trust to sell the same and apply the proceeds to the payment of debts due certain named creditors of the assignor is a bill of sale within sec. 4 of the Nova Scotia Bills of Sale Act (R.S.N.S. 5th ser. c. 92) not being an assignment for the general benefit of creditors and so excepted from the operation of the act by sec. 10.

The omission of the date and the words " before me " from the jurat of an affidavit accompanying a bill of sale under s. 4 of the said act makes such affidavit void and the defect cannot be supplied by parol evidence in proceedings by a creditor of the assignor against the mortgaged goods. Gwynne J. dissenting.

Per Gwynne J. Sec. 4 of the act only applies to bills of sale by way of chattel mortgage and not to an assignment absolute in its terms and upon trust to sell the property assigned.

In the Province of Nova Scotia writs of execution need not be signed by the prothonotary of the court. It is the seal of the court which gives validity to such writs, not the signature of the officer.

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

The defendant is sheriff of the County of Halifax, N. S., and the action is brought for the possession of goods seized under an execution which the plaintiff claims under a deed of assignment to him from one Eaton, against whom the execution was issued, for the benefit of creditors. The points raised and argued in the case were the following :

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

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1. That the execution under which the sheriff justified was improperly issued, not being signed by the prothonotary of the court.

2. That the affidavit attached to the assignment and required by the Bills of Sale Act was defective, the jurat containing no date and the words "before me" being omitted, in consequence of which the deed could not be registered and would not operate as against subsequent creditors.

3. That the assignment itself was void for containing preferences to creditors and a resulting trust in favor of the debtor.

R.S.N.S. 5th ser. ch. 942 contains the following provisions:—

Sec. 1. Every bill of sale of personal chattels, made either absolutely or conditionally, or subject or not subject to any trust * * * shall be filed with the registrar, etc.

Sec. 4. Every bill of sale or chattel mortgage of personal property, other than mortgages to secure future advances, * * * shall hereafter be accompanied by an affidavit of the party giving the same, or his agent or attorney duly authorized in that behalf, that the amount set forth therein as being the consideration thereof is justly and honestly due and owing by the grantor * * * * *; otherwise such bill of sale or chattel mortgage shall be null and void as against the creditors of the grantor or mortgagor.

Sec. 10. In constructing this chapter the following words and expressions shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction, that is to say:

The expression "bills of sale" shall include bills of sale, assignments, transfers, and other assurances of personal chattels, and also powers of attorney, authori-

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ties or licenses to take possession of personal chattels as security for any debt, but shall not include the following documents, that is to say, assignments for the general benefit of the creditors of the person making or giving the same * * *.

The assignment in this case, made by Chas. L. Eaton to the respondent Hubley, contained the following declaration of trust after the usual words of conveyance which included all the household goods and furniture and all other personal estate and effects of the assignor:—

"To have and to hold the said land and premises and the said personal estate upon trust to sell and dispose of the same at such time and manner as to him shall seem best and collect in the money therefor, upon trust to pay the costs and expenses incurred by him on respect of these presents, and ten per centum of the gross proceeds to the said party of the second part in payment for his labor and responsibility herein, and the residue of said trust moneys in the payment of the following amounts to the persons, creditors of said Charles L. Eaton, named herein without any preference of payment, namely: The said Andrew Hubley, $100, Benjamin Hubley $400, Thomas Ritchie (interest $45, city taxes and water rates now $38), Gordon and Keith $12, Doctor Cowie $60, John McLearn $8.35, R. N. McDonald $12.16, Williams and Manual $14.40, Hessian and Devine, $4.10, and the balance, if any, to the said Charles L. Eaton."

The assignor, Eaton, made an affidavit as required by the above section 4 of the act the jurat to which was as follows:

"Sworn to, at Halifax, in the County of , Halifax this day of September, 1887.

J. PARSONS.

A Commissioner of the Supreme Court, County of Halifax."

The assignment with this affidavit attached was filed as a bill of sale under the above act.

One James Jack having recovered judgment for a debt due to him by the said Eaton issued execution and caused the goods covered by the assignment to be seized thereunder. The present action was then brought against the sheriff.

The court below held that the assignment was not one for the general benefit of creditors and therefore came within the act, and that whether or not the affidavit was void for the defect in the jurat the plaintiff was entitled to recover as the execution issued by the defendant was void for want of the signature of the prothonotary.

The defendant appealed to the Supreme Court of Canada.

Ross for the appellant. Under the practice established by the Judicature Act, in 1884 the signature of the prothonotary is not required to writs. See R. S. N. S. 5 Ser. Order 40 and rules p. 903. Rule 14 gives the form of execution which was followed in the present case.

If the writ should have been signed the omission of the signature is an irregularity only and does not make it void.

The jurat to the affidavit annexed to the deed of assignment is defective in two respects. The words "before me" are omitted, which has been held fatal in many cases. *The Queen* v. *Bloxham* (1); *Graham* v. *Ingleby* (2). And the day of the month was left blank, which has also been held bad. *In re Lloyd* (3); *Duke of Brunswick* v. *Harmer* (4).

(1) 6 Q. B. 528.
(2) 1 Ex. 651.
(3) 1 L. M. & P. 545.
(4) 1 L. M. & P. 505.

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The deed is void under the statute of Elizabeth. In the case of *The Union Bank of Halifax* v. *Whitman* (1) an assignment for benefit of creditors was set aside as creating preferences to which unpreferred creditors could not be asked to assent. The present deed is open to the same objections as were made to the deed in that case.

Eaton Q. C. for the respondent. The question as to the form of the execution is one of practice in the court below with which an appellate court will not interfere.

The Judicature Act did not expressly alter the practice which had been followed for many years previously, and will not be held to alter it by implication.

That the writ is void, and not merely irregular, is supported by *Hooper* v. *Lane* (2).

As to the objection to the affidavit it is submitted that a different rule prevails in respect to affidavits required by statute and those used in judicial proceedings. See *Ex parte Johnson* (3); *Cheney* v. *Courtois* (4); *Moyer* v. *Davidson* (5).

Perjury could be assigned before jurats were used. *Cheney* v. *Courtois* (4); *Hollingsworth* v. *White* (6).

No question can arise as to the registration of the deed as plaintiff was in possession.

A deed is not void merely for containing preferences. *Whitman* v. *Union Bank of Halifax* (1) does not so decide, and the deed in that case was of a peculiar character. Nor is a resulting trust fatal. If there had been nothing else in *Whitman* v. *Union Bank* (1) but a a resulting trust the deed would not have been set aside.

Ross, in reply, cited *Ex parte Parsons* (7), and *New-*

(1) 16 Can. S. C. R. 410.
(2) 6 H. L. Cas. 443.
(3) 50 L. T. N. S. 214.
(4) 7 L. T. N. S. 680.
(5) 7 U. C. C. P. 521.
(6) 6 L. T. N. S. 604.
(7) 16 Q. B. D. 532.

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love v. *Shrewsbury* (1), on the question of possession avoiding the necessity of registry.

SIR W. J. RITCHIE C. J.—The first question that arises in this case is: Was this deed of assignment an instrument which required to have an affidavit attached? If it was, was the affidavit so attached a compliance with the statute, or if it was not were the executions under which the sheriff levied, valid executions?

As to the first question, the court below appears to have considered that the instrument not being for the general benefit of creditors, the statute required that to be valid against an execution creditor the provisions of ch. 92 R.S.N.S. 5th ser. must be complied with, and that therefore there should have been an affidavit; in this I quite agree with the court below.

Secondly: Was the affidavit in this case a compliance with the statute? I think it was not; it was without date and the words "before me" were omitted. I have no hesitation in saying that the omission of the date and the words "before me" are fatal, and I quite agree with Mr. Justice Ritchie that

> When the legislature required an affidavit to be filed with the bill of sale they meant a document that had all the requisites of an affidavit according to the common law and the well recognized practice of the Superior Courts.

These omissions are not mere matters of form. In addition to the cases cited in the court below I may mention as to the want of a date *Re Lloyd* (2), and *The Duke of Brunswick* v. *Slowman* (3), and as to the absence of the words "before me" as Lord Denman remarked in *The Queen* v. *Bloxham* (4):

> The objection is not ambiguity but insufficiency.

And again:

(1) 21 Q. B. D. 41.
(2) 15 Q.B. 683.
(3) 8 C.B. 617.
(4) 6 Q.B. 528.

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I think this is not an irregularity which can be waived; a defect of jurisdiction is shown and the objection is one which we cannot avoid giving effect to.

And in the same case Coleridge J. says:

The objection is not a mere irregularity but affects the jurisdiction.

But I do not think it necessary to refer to the effect of such omission in affidavits at common law, or those used in judicial proceedings based on the practice or rules of the court. We have a statutory enactment by which we must be governed; the statute ch. 92 R.S.N. S. 5th ser. expressly provides by the 11th sec. that the affidavits mentioned in secs. 4 and 5 shall be as nearly as may be in the form in schedules A and B respectively, and the following is the form of jurat in said schedules:

Sworn to at , in the
county of this day
of , A.D. 18 , (Sgd.) A.B.
Before me,

How can it be said that this affidavit is as nearly as may be in the forms of schedules A and B. respectively? Certainly the date and the words "before me" are material ingredients in affidavits. If these can be omitted why may not the place where sworn be likewise dispensed with, and so the whole jurat be got rid of? I cannot think the words "as nearly as may be" were intended to permit material and substantial omissions and departures from the forms given, but rather referred to the material facts set forth in the body of the affidavit, which, under the peculiar circumstances of the case, cannot be, or are not, in the exact words of the affidavit given, but are, as nearly as may be, substantially the same. The jurat, unless strictly as provided for, cannot be "as nearly as may be," for the substantial requisites of the jurat are entirely omitted. How can this affidavit be said to be a substantial

equivalent to the form when it cannot be said to have the same legal effect? The cases of *Parsons* v. *Brand* and *Colson* v. *Dickson* (1), on the English Bills of Sale Act, show how rigidly the Court of Appeal held parties to a strict adherence to the provisions of the statute and to a compliance with the forms prescribed. In those cases Lord Justice Cotton said:

> There was nothing in the act itself requiring that the names, addresses and descriptions of the attesting witnesses should be added. The question was, whether either of these bills of sale complied with the requirement of sec. 9—that they should be made in accordance with the form in the schedule to the act.

And the court held that the bills of sale did not comply with what that section required, but were void for want of the addresses and description of the attesting witnesses as required by the form in the schedule. And see *Bird* v. *Davey* (2).

And I am quite clear that this deficiency cannot be supplied by parol evidence. If this could be done, and the date established, and the person before whom sworn and his authority to take affidavits can be shown by parol testimony, why may not the whole jurat be dispensed with and even the signature of the attesting party himself?

I cannot, however, agree with the court below that the execution under which the sheriff justifies is void because, though sealed with the seal of the court, it is not signed by the prothonotary. It appears to me to be utterly useless to go back a hundred years to ascertain what the practice of the Supreme Court of Nova Scotia then was; though this may be a very interesting antiquarian study for those who have the time to pursue it I fail to see that it has any practical bearing on the case we are now considering, because the whole matter of the practice of suing out writs has been in

(1) 25 Q. B. D. 110. (2) [1891] 1 Q. B. 29.

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modern times the subject of special legislation. By the first series R.S.N.S. (1857) ch. 133, it was provided—

That all writs should be signed by the prothonotary with his name and the date of their issue and be subscribed with the name of the attorney or party by whom they are sued forth, and shall be directed to the proper officer and be in the form theretofore used.

When the statutes were again revised in 1859, the second series, this section was omitted; so also in the third and fourth series this provision was likewise omitted, clearly showing, to my mind, that the legislature did not deem the signing of the prothonotary necessary; in the fifth series, 1884, there is the strongest possible confirmation of this view, with reference to writs of summons:

Every writ of summons shall be issued out of the office of one of the prothonotaries. Every writ of summons shall be sealed by the officer issuing the same and shall thereupon be deemed to be issued.

Then we have the provisions with reference to executions as follows:—

20. A writ of execution, if unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided, but such writ may at any time before its expiration, by leave of the court or a judge, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writs, either by being marked with a seal of the court, and having indicated the date of the day, month and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his solicitor, and bearing the like seal of the court and date; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof.

The production of a writ of execution, or of the notice renewing the same, purporting to be sealed and marked as in the last preceding rule mentioned, showing the same to have been renewed, shall be sufficent evidence of its having been so renewed.

All this showing, to my mind, beyond all doubt, that the proper authentication of the execution was the seal of the court, not the signature of the prothonotary; and I think it cannot be doubted that the seal

of the court is the proper authentication of all acts of the court and not the signing of the prothonotary. This is evidenced by order 59, sec. 2, applicable to copies and other documents, which declares that

All copies, certificates and other documents appearing to be sealed with a seal of the court, used by the prothonotary, shall be assumed to be authenticated copies or certificates or other documents issued by the prothonotary, and may be received in evidence, and no signature or other formality except the sealing with the prothonotary's seal shall be required for the authentication of any such copy, certificate, or other document.

Then section 10 provides:

The forms contained in the appendices shall be used in or for the purposes of the prothonotary's office, with such variations as circumstances may require.

The form for an execution is the following:

TITLE OF CAUSE.

Seal a writ of execution directed to the sheriff of to levy against C.D., the sum of $ and interest thereon at the rate of $6 per centum per annum from the day of (and $ costs) to judgment (or order) dated day of .

X. Y.

Solicitor for party on whose behalf writ is to issue.

Therefore, in my opinion, it is unquestionably the seal which is necessary to the validity of the writ and gives it vitality, and not the signature of the prothonotary. But assuming, for the sake of the argument, that the signature of the prothonotary is necessary his omission to put it to an execution in all other respects regularly issued, as this appears to have been, would amount to no more, in my opinion, than an irregularity and render the writ voidable and not void, and the execution would be a good and valid instrument until set aside which has not been attempted to be done in this case. The following authorities may be referred to on this point:

Chitty's Practice of the Law (1):

(1) Vol. 3 ch. 5 p. 224.

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The sealing or resealing seems to be considered more important than signing. Original writs issued out of the Court of Chancery, were not only in the King's name, but sealed with his great seal, but mesne process founded thereon always issued under the private seal of the particular court, and not under the great seal, and are tested, not in the King's name, but in the name of the chief justice, or chief baron of the particular court. The seal at present is the same as heretofore. In the King's Bench and Common Pleas the sealing of the writ is considered of principal importance, and is the act which completes its authenticity.

Bacon's Abridgement.—Sheriff M. (1).

2. That he cannot dispute the authority by which writs issue, nor object to any irregularity in them. Neither the sheriff nor his officers are to dispute the authority of the court out of which any writ, process, or warrant issues, but are at their peril truly to execute all such writs, &c., as are directed to them by the King's judges and justices, according to the command of the said writs, and hereunto they are sworn.

And in *Burt* v. *Jackson* (2) Tindall C.J. says :—

Although by the rule of M. T. 3 Will. 4 the filacer is entitled to certain fees for signing writs, it does not therefore follow that he must sign them.

In *Frost* v. *Eyles* (3), on a motion to set aside a proceeding for irregularity, the name of the filacer not being on a common capias, the court held the proceedings regular, the addition of the filacer's name not being necessary. In *Wilson* v. *Joy* (4), it was held that the omission of the name of the chief clerk of the King's Bench on a writ of summons is but an irregularity, and Taunton J. said :

I think it is sufficient if the writ of summons is conformable to the form given in the schedule of the act.

And the same rule appears to prevail in the United States. In *Benjamin* v. *Armstrong* (5) Tilghman C. J. says as to the writ not being signed by the prothonotary :

(1) P. 690.
(2) 2 Dowl. 748.
(3) 1 H.Bl. 120.
(4) 2 Dowl. 182.
(5) 2 Serg. and Raw. 392.

The omission in this case is but an informality; the writ derives authenticity from the seal of the court.

Lessee of Boal v. *King* (1). Judge Lane delivered the opinion of the court :

No principle is more definitively settled than that the process of a court having a seal can only be evidenced by its seal, which is the appointed mode of showing its authenticity. Without it, a majority of the court hold such process void. The cases in 19 Johns. 170, 5 Cow. 550, and 5 Wend. 133, show the necessity of a seal to writs.

The affidavit then being clearly necessary and being, as I think, substantially defective, and the executions having been regularly issued, I think this appeal should be allowed with costs in this court and in all the courts below.

FOURNIER J.—I am in favor of allowing this appeal for the reasons given by the learned Chief Justice.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed with costs.

GWYNNE J.—I am of opinion that the appeal in this case should be dismissed with costs. The bill of sale under consideration does not appear to be avoided by the statute of Elizabeth, and as to the alleged defect in the affidavit filed with the bill of sale, assuming an affidavit to have been necessary in the present case, I do not consider that we are bound by the decision in *The Queen* v. *Bloxham* (2) and such like cases, or that they apply in the circumstances of the case before us. In that case a writ of certiorari was quashed because the words " before me " were not inserted in the jurat of the affidavit upon which it had been issued, although the name of a commissioner for taking affidavits was inserted at the foot of the jurat. The Court of Queen's Bench held that they had no jurisdiction to

(1) 6 Ohio 11. (2) 6 Q.B. 528.

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grant the certiorari upon such a document. Without evidence of the matter relied upon in the affidavit filed upon a motion for a certiorari the court clearly had no jurisdiction to grant the writ. It was by affidavit alone that the matter necessary to give the jurisdiction could be laid before the court. The court had the right to determine the sufficiency or insufficiency of the mode in which such matter was laid before it, and as it held that the affidavit was defective and could not be amended, there was no matter laid before the court so as to give it jurisdiction to interfere by granting the certiorari. But in the case of these bills of sale, when a question arises affecting their validity, it is raised in a suit in court upon the trial of which evidence upon oath taken in the ordinary way in suits *inter partes* can be given showing, as matter of fact, that the affidavit was duly sworn before it was filed. The courts in Nova Scotia are not governed in a matter of this nature by the rules by which the Court of Queen's Bench was governed in *The Queen* v. *Bloxham* (1). In an issue in a cause in court whether an affidavit was filed with the bill of sale, the question would be one of fact, to be tried in the ordinary way, upon evidence taken in the cause in court upon the issue joined therein ; upon the trial of such an issue the judge presiding could not as a point of law, because of the absence of the words " before me " from the jurat, exclude the evidence, for example, of the commissioner whose name was at the foot of the jurat, to the effect that he had administered the affidavit, and that in point of fact it was sworn before him. *The Queen* v. *Bloxham* (1) is no authority that upon such an issue such evidence can be excluded ; it is, in my judgment, an authority only to the effect that the Court of Queen's Bench in England had no jurisdiction to entertain a motion upon matter which can only be brought to its notice by affidavit, unless the

(1) 6 Q. B. 528.

words "sworn before me" are inserted in the jurat above the name of the commissioner by whom the affidavit was administered, when the affidavit purports to have been administered by a commissioner, for the same court has held that an affidavit sworn before a judge at chambers will be received on a motion in court although the words "before me" do not appear in the jurat. In *The Queen* v. *Bloxham* (1) the court held that the defect in the jurat was not amendable although a defect of a somewhat similar nature had been amended by the court, and they pronounced the document upon which the certiorari had been obtained as no affidavit at all and, as such, to have been absolutely void. No such rule of law prevails in the Province of Nova Scotia. Ch. 104 of the Revised Statutes, 5th series, order 36, prescribes all that is necessary to be done by a commissioner in administering an oath taken before him in order to the filing of an instrument, and the words "before me" are not there mentioned as necessary to be inserted to give validity to the affidavit, and sec. 14 of that act enacts that:

> The court or a judge may receive any affidavit for the purpose of being used in any cause or matter notwithstanding any defect by misdescription of parties or otherwise in the title or jurat or any other irregularity in the form thereof.

So that the defect in the jurat which, in *The Queen* v. *Bloxham*, (1) was pronounced to occasion nullity is, by the law of Nova Scotia, declared to be no nullity, and if not nullity in an affidavit upon which a motion is made in court how can it possibly exclude evidence upon an issue joined *inter partes*, to show that the affidavit before it was filed was duly administered? Or upon what principle can we hold the case of *The Queen* v. *Bloxham* (1), an incontrovertible authority in the Nova Scotia courts governing a case like the present?

(1) 6 Q. B. 528.

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But, further, the point upon the omission of the words " before me," from the jurat of the affidavit under consideration, does not, as it appears to me, apply in the present case ; ch. 92 of the Revised Statutes 5th series, makes a distinction between bills of sale which are absolute or upon trust to sell, and those which are in the nature of chattel mortgages only, to secure by mortgage a debt due to the grantee. Section 1 of the act is the section within which the bill of sale in the present case comes, for it is a bill of sale absolute in its terms and on trust to sell—it requires no affidavit to be filed with it as sec. 4 does with the bills of sale there mentioned which are, as it appears to me, bills of sale by way of chattel mortgage only. The affidavit required by this section shows that the section applies to chattel mortgages only. It enacts that every bill of sale, or chattel mortgage, of personal property, other than certain excepted chattel mortgages, shall be accompanied by an affidavit of the party giving the same that the *amount set out therein, as the consideration thereof, is justly due and owing by the grantor to the grantee*, showing that the instrument which this affidavit is to accompany is a chattel mortgage securing a debt due to the grantee or mortgagee from the grantor or mortgagor.

Lastly, upon the question as to the validity of the writs of execution under which the appellant claims title to the goods in question, as at present advised I am disposed to regard that as a question of practice and procedure which the Supreme Court of Nova Scotia was itself competent exclusively to determine and the most competent court for the determination of a question of that kind, namely, the essentials necessary and in use, according to the practice of the court, to constitute a valid writ of execution issued by the court, and I do not feel disposed to question, unless absolutely

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necessary, the judgment of the full court upon this question, and in the view which I take upon the other point it is unnecessary that I should express a conclusive opinion upon the point.

PATTERSON J.—I am happy to say that I find no difficulty in concurring with his lordship the Chief Justice in holding that the writ of *fi-fa* is not void for want of the signature of the prothonotary. There is a regular judgment, followed by a writ of execution which is sealed with the seal of the court, and in all respects in full compliance with the directions of the judicature act and the orders under the act. If the sheriff is not protected in executing that writ, even if it was the duty of the prothonotary to sign the writ, the law will not be administered, as it strikes me, on the same principle as in the cases of *Carratt* v. *Morley* (1) and *Hargreaves* v *Armitage* (2) referred to by one of the learned judges in the court below.

I think he is protected under any of the views of the question of practice which have been presented to us.

If we assume, what at present I think would be an incorrect assumption, that the rule which governs these matters in Nova Scotia is to be found in the regulations adopted by the Executive Council in 1749, we find a direction that "all original process, and all executions, and all process whatsoever, belonging to any matter prosecuted in the general court, be issued from the secretary's office, signed by the clerk of the court, and also be returned into the same office;" and further, "that all writs be in the same form as in England."

I borrow the quotation as abbreviated in *Leary* v. *Mitchell* by Mr. Justice Ritchie, copies of whose judgment have been furnished to us by the respondent.

(1) 1 Q. B. 18. (2) L. R. 4. Q B. 141.

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The order deals of course with writs, one essential of which is the seal.

A writ, *breve*, is said to be a formal letter of the King, in parchment, sealed with a seal, &c., &c. (1).

I understand the regulations to be, as correctly expressed by Mr. Justice Ritchie, "regulations in respect to the court." They provide for the administrative service, but leave the substantial requirements of the writ to follow the English law. No doubt it would be irregular to issue process from any office but that of the secretary, or to return it into any other office, or to omit the signature of the clerk, but those would be venial irregularities. In *Leary* v. *Mitchell* the question was only one of irregularity.

In his judgment in the case now in hand Mr. Justice Ritchie refers to *Hooper* v. *Lane* (2) which turned a good deal upon an arrest made under a document which had been placed in the hands of the sheriff as a writ of capias, but which in *Hooper* v. *Lane* (2) was conceded to be void. The learned judge understands the defect to have been that—to quote his own words :—

> The capias under which the arrest was made was in regular form, properly tested and sealed, but did not have an extra mark or stamp called signing, which was required for the validity of a writ of capias or mesne process.

With great respect for the learned judge who has given us, on other branches of this appeal, the assistance of much learning and industry, I am unable to read *Hooper* v. *Lane* (2) as he has done. It was an action against the sheriff for negligence in not executing a good capias which the plaintiff had put in his hands against one Bacon. The misadventure was caused by the sheriff having arrested Bacon on the other document, from which arrest he was discharged by a judge's

(1) Old Nat. Br. 4—Shep. Abr. 245 —Tomlin's L. D. Writ.

(2) 10 Q.B. 546 ; 8 E. & B. 1095.

order. What we know of the void writ we learn from the bill of exceptions in the case, and that is that a piece of parchment purporting to be a capias against Bacon at the suit of one Aramburn, indorsed for bail, had been brought to the sheriff's office by an attorney's clerk. The piece of parchment was produced at the trial, purporting to be a writ of capias issued out of the Court of Exchequer at the suit of Aramburn, but it was not duly signed or marked by the sealer of writs, nor had a præcipe thereof been taken to the office of the court according to the practice of the Exchequer. The point in the case was the sheriff's liability for negligence in so acting on this document, which is spoken of not as a void writ only but as no writ at all, as to leave the plaintiffs' good writ unexecuted until Bacon was gone. It was not that the so called writ, which came into being we are not told how, was worse for want of the signature, but that the sheriff had been misled by what was not only worthless in fact but had not on it the indicia of genuineness which a signature would have afforded. The case does not appear to me to touch our subject.

I suppose, though I have not verified the supposition, that the practice of the Exchequer referred to in the Bill of Exceptions was under a general rule. The rules of Hilary Term, 1832, which applied to all three courts, did not, I believe, regulate the issue of mesne process. They did provide, as to executions, that

> It shall not be necessary that any writ of execution should be signed; but no such writ shall be sealed till the judgment paper, postea or inquisition has been seen by the proper officer.

I observe a Common Pleas case, in 1833, *Burt* v. *Jackson* (1), the headnote of which is:

> It is not necessary for the filacer to sign his name to a writ of summons; if he impress upon it the stamp of court it is sufficient, al-

(1) 3 M. & Scott 552.

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though the rule of Mich. 3 Will. 4, r. 2, allows fees to be taken for signing as well as for sealing the writ.

And approaching a little nearer to the remote date of the order in council, there is this note of an anonymous case in 1814 (1):

> Reader moved to set aside proceedings for irregularity, stating that an old copy of writ had been used, with the names of clerks of the court subscribed who were no longer so. Bayley J. That is an immaterial part.

I have looked rather extensively into the subject, and I have not seen any reason for considering the regulations of the order in council otherwise than directory, and as being matters of practice. It may not add to this to say that they strike me as coming within Order LXVIII., as "rules of practice for the time being in force."

We are told that ever since the Judicature Act of 1884 has been in force the practice of signing executions, which had continued from 1747, has been discontinued, signature by the prothonotary not being in terms required by that act which follows in this respect the English rule expressed in the rule of Hilary, 1832, and continued under the Judicature Act 1875.

A question is made whether the rule of the Judicature Act has superseded the practice as it was before.

The practice inaugurated so long ago by the order in council was adopted and continued under the provincial legislation, as has been explained to us, the rule under the statute in the first series of revised statutes requiring in express terms the signature of the officer, and in the later series down to the fourth that express enactment being dropped, but the form appended to the statute continuing to indicate, by a place for the signature, that the practice was to be the same. Of course, whatever has been said as to the directory

(1) 2 Chitty 239.

character of the legislation when it was under the order in council is, to at least as great an extent, applicable to it under these statutes.

The provisions of ch. 94 of the fourth series of the Revised Statutes, which included those in question, remain in force only so far as not altered by the Judicature Act (1). The excepted provisions, some of which relate to executions, are pretty numerous, but those regulating procedure cannot be among them. The mode of issuing executions is one of those things dealt with by the orders under the Judicature Act, and it would be anomalous to hold that an isolated provision of the old statutory rule of practice or procedure, such as that which directs the prothonotary to sign executions, survives to supplement those of the new system.

The objection to the assignment by reason of the omission of the words " before me " in the jurat of the affidavit is one that I should gladly deal with as it has been ably dealt with in the court below if I could distinguish the case of *Parsons* v. *Brand* (2), to which his lordship the Chief Justice called my attention when it appeared in the Times Law Reports. I regret to say that I cannot distinguish it. By section 11 of the Nova Scotia Bills of Sale Act the affidavit required by sections 4 and 5 shall be as nearly as may be in the forms in schedules A and B respectively. Those forms require the commissioner or person before whom the affidavit is taken to certify that it was sworn " before me." Omit those words and the certificate is merely his certificate that it was sworn, which is not as nearly as may be to the same effect. By sec. 4 the mortgage or bill of sale is to be null and void as against creditors unless the prescribed affidavit of *bona fides* is made, and sec. 11 is imperative that it shall be as nearly as may be in the given form. This is undis-

(1) Jud. Act. sec. 45.

(2) 25 Q. B. D. 110.

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tinguishable from the English act of 1882 which provides in sec. 9 that the bill of sale shall be void if not made in accordance with the form in the schedule to the act, the form in the schedule containing the words "add witness's name, address and description." The absence of these particulars was held fatal to the bill of sale attacked in the case of *Parsons* v. *Brand* (1), for reasons which I can neither controvert nor hold inapplicable to the statute or the facts before us. Some of the decisions in Ontario which have been cited have gone as far as liberal construction of the facts would allow to uphold defective affidavits in cases of this kind, but no case has gone the length we are asked to go in this case and, besides, they have no provision in Ontario like that of the 11th section of the Nova Scotia act. It has been contended that the statute does not, under the circumstances, require this assignment to be accompanied by the affidavit or, indeed, to be registered. I am afraid the circumstances must be somewhat strained to arrive at that conclusion. The first section requires that, at the risk of losing priority over creditors, &c, every bill of sale shall be filed whereby the assignee shall have power, either with or without notice, on the execution thereof or at any subsequent time, to take possession of the property. It cannot be doubted that this bill of sale comes within that category. Possession was not given at the time it was made, and the right to take possession depended on the terms of the deed. The definition of a bill of sale is similar to that contained in the English bills of sale acts, 1878 and 1882, and is illustrated by several decisions, the latest of which is the case of *Mills* v. *Charlesworth* (2) which was decided since the argument of this appeal.

The first section of the Nova Scotia statute does not

(1) 25 Q. B. D. 110. (2) 25 Q.B.D. 421.

require the affidavit now in discussion, but it is required by the 4th section in all cases except those excepted by the tenth section. Assignments for the general benefit of creditors form one exception, but assignments for a select number of creditors, like the deed before us, are not excepted.

But it is said that possession was taken by the assignee. His statement is that about two months after the date of the assignment of the 15th of September, 1887, which is the one on which the questions arise, he received another which the assignor, who was in the United States, had executed in order to include all his creditors, but which could not be registered for want of affidavits sworn before a proper person. On receiving that deed the assignee went to the house of the assignor, whose wife was still living there, and removed one piece of furniture to his own house. Two or three days afterwards he took an inventory of all the furniture in the house but permitted the wife to remain in possession and use of it in the house, and she was in possession of it when the sheriff seized.

This taking of possession was only formal, there was no actual change of possession.

What the effect of taking actual possession and retaining it might have been I do not think we are called on to consider for the purpose of this case, and I should not venture to do so without more acquaintance than I have at present with the course of decisions in Nova Scotia under this statute.

The statute departs from the English bills of sale Acts of 1854 and 1878 (1) which furnished the language, at least, in which some of its enactments are partly framed by providing that a bill of sale of the class described in the first section shall take effect, as against persons whom we may in general terms call creditors, only

(1) 17 & 18 V. c. 36; 41 & 42 V. c. 31.

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from the time of its registration, in place of the provisions of the English acts that it shall be null and void to all intents and purposes whatsoever so far as regards the property or right to the possession of any personal chattels comprehended in it which at or after the time of the bankruptcy, &c., shall be in possession or apparent possession of the person making such bill of sale, &c. But, while thus dropping the reference to "apparent possession," it retains the definition of those words in the interpretation clause which is borrowed, with slight modifications, from the English statutes. We have thus "apparent possession" of an assignor contrasted with "formal possession;" and although there is nothing in the statute to declare the effect of the giving or taking of possession, either apparent or formal, we may at least regard the interpretation clause as recognizing the two kinds of possession which may have to be distinguished from each other when questions of possession happen to arise in connection with the working of the act.

The formal possession that was taken gave the assignee no better title to the goods than he already had. He had title by the deeds. A delivery by the assignor might perhaps have operated as a conveyance at common law to cure defects, if any there were, in the instruments under which he held, but the assignor did not make any delivery. He executed the deeds, being himself at a distance from the goods, and the assignee thereby acquired the right to take possession or, as expressed in the first section, the power to take possession. The deeds were thus of the category dealt with by the first section and which, under the fourth, were null and void against creditors. The case of *Davies* v. *Jones* (1), which was cited by Mr. Eaton, turned on the character of the possession. The assignor sold his goods

(1) 7 L.T.N.S. 130.

or stock in trade and went away, and the assignees put an agent of their own in possession to carry on the business for them, and added to the stock. They retained a relative of the assignor in their service in the shop and kept the assignor's sign over the door. The question of " apparent possession " was held to be one of fact. It was held that there had not been a mere formal possession but a *bonâ fide* sale, an actual delivery, and a complete change of possession, and that it was not within the statute at all. I do not see that that case can aid the argument. Nor can *Graham* v. *Wilcockson* (1), another case which was cited. It was an interpleader issue relating to household goods which a landlord had bought from his tenant, taking them in payment of rent, taking possession of them, and then letting them to the tenant at a weekly rent. The tenant signed a paper acknowledging payment for the goods by way of the rent account, and the only question argued in the case was whether the paper was a bill of sale or only a receipt. It was held to be a receipt and therefore not to require registration.

The result is that while I am clearly of opinion, for reasons similar to those which I gave at some length in *Whitman* v. *Union Bank of Halifax* (2), that the assignment is not bad under the 13 Eliz. c. 5, I have to concur in holding it void under the Nova Scotia Bills of Sale Act for want of a sufficient affidavit of *bona fides*.

I agree that we must allow the appeal.

Appeal allowed with costs.

Solicitors for appellant : *Ross, Sedgewick & McKay.*

Solicitors for respondent: *Eaton, Parsons & Beckwith.*

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(1) 46 L.J. Ex. 55.

(2) 16 Can. S.C.R. 410.

1890
*Oct. 29.

SAMUEL CREIGHTON (DEFENDANT)...APPELLANT ;

AND

THE HALIFAX BANKING COMPANY (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Partnership—Fraud against partners—Use of firm name—Promissory note—Authority to sign—Notice to person taking.

E. was a member of the firm of S. C. & Co. and also a member of the firm of E. & Co., and in order to raise money for the use of E. & Co. he made a promissory note which he signed with the name of the other firm and indorsing it in the name of E. & Co. had it discounted. The officers of the bank which discounted the note knew the handwriting of E. with whom the bank had had frequent dealings. In an action against the makers of the note C. pleaded that it was made by E. in fraud of his partners and the jury found that S. C. & Co. had not authorized the making of the note but did not answer questions submitted as to the knowledge of the bank of want of authority.

Held, reversing the judgment of the court below, that the note was made by E. in fraud of his partners and that the bank had sufficient knowledge that he was using his partners' names for his own purposes to put them on inquiry as to authority. Not having made such inquiry the bank could not recover against C.

APPEAL from a decision of the Supreme Court of Nova Scotia setting aside a verdict at the trial for the defendant, Creighton, and ordering a new trial.

The action was on a promissory note. The defendant Creighton entered an appearance and pleaded that the note was made by his partner Esson without his knowledge or consent and used by Esson for his own private purposes. The evidence at the trial showed that Esson was also a member of the firm of Esson & Co., which was largely indebted to the plaintiff bank,

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

and the note was endorsed by Esson, in the name of the firm, to the bank to reduce such indebtedness. Certain questions were submitted to the jury which, with their findings, are as follows:—

1. Did the defendant Creighton authorise Wm. Esson to sign the note in question with the name of S. Creighton & Co.? No.

2. Where the proceeds of the note appropriated by the plaintiff bank, at the request of William Esson, to the payment of the indebtedness of Esson & Co. to the plaintiff bank? Yes.

3. Was the firm of Esson & Co., when this note was discounted, financially embarrassed, and did the cashier of the plaintiff bank know this? Yes.

4. Had the plaintiff bank, at the time this note was discounted, notice that William Esson had no authority to sign the name of the firm of S. Creighton & Co. to this note? Don't know.

5 Was the plaintiff company or its officers aware, when this note was discounted, of circumstances connected with the business transactions of the firm of Esson & Co. with the plaintiff bank which would, or ought to, raise in the mind of the cashier of the bank a reasonable doubt as to the authority of William Esson to sign this note? Yes.

6. Had the firm of S. Creighton & Co. ever given authority to William Esson or the firm of Esson & Co. to sign notes for them in the management of the business of the firm of S. Creighton & Co.? No.

7. Had the firm of S. Creighton & Co. ever given authority to William Esson or to Esson & Co. to sign notes in the name of S. Creighton & Co. and appropriate the proceeds to the credit of Esson & Co? No.

8. Did the cashier of the plaintiff bank discount this note with the intention and purpose to appropriate the

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proceeds to the reduction of the account of Esson & Co. with the plaintiff bank? Yes.

9. Was the cashier of the plaintiff bank justified, from his former dealings with Samuel Creighton of the firm of Creighton & Co., in believing that William Esson was authorised in signing this note for the firm of Creighton & Co? No.

The following additional questions were submitted at the instance of plaintiffs' counsel:

10. Did the plaintiff bank or the manager know when the note was discounted that the firm of S. Creighton & Co. was not indebted to the firm of Esson & Co? Don't know.

11. Did the plaintiff bank in discounting the said note know that Esson, made the note in fraud of his co-partner? Don't know.

12 Did the plaintiff bank give value for the said note? They did by placing the proceeds to the credit of Esson & Co.

13. Did Esson when, or shortly before, the note was offered for discount inform the manager of the bank that the firm of S. Creighton & Co. was indebted to the firm of Esson & Co.? Don't know.

14. Did the plaintiff bank pay the proceeds of the said note to Esson or to Esson & Co.? To Esson & Co.

Upon these findings judgment was entered for the defendant. On motion to the Supreme Court of Nova Scotia this judgment was set aside and a new trial ordered, the majority of the court being of opinion that it was essential that the jury should find upon the fact whether or not the bank knew, when discounting the note, that it was made by Esson in fraud of his co-partner, and that the jury having answered "don't know" to questions involving such knowledge there was no such finding and no verdict could be entered.

The defendant appealed from the judgment ordering a new trial.

Newcombe for the appellant. The fact that the bank had sufficient knowledge of want of authority in Esson to make the note to put them to inquiry before discounting it is sufficiently found by the questions answered. See *In re Richards* (1); *Leverson* v. *Lane* (2); *Kendall* v. *Wood* (3).

Russell Q.C. for the respondents. There is a distinction between a partner ostensibly acting on his own behalf or acting as agent for a lesser firm. Ames Select Cases on Bills and Notes (4).

The rights of a third party taking such paper will vary according to the form of the instrument. See *ex parte Bushell* (5); *Ridley* v. *Taylor* (6).

Newcombe was not called upon to reply.

SIR W. J. RITCHIE C. J.—We do not think it necessary to hear further argument in this case. I think the evidence and findings of the jury afford sufficient material to establish that Esson signed the note in question in the name of the firm of Creighton & Co. without the authority of his co-partners, that he endorsed it in the name of Esson & Co.—whether with or without authority is not material—and that he took it to the bank and had it discounted, and I am of opinion that the bank had a fair intimation that Esson was using the name of the firm, of which Creighton was a partner, for his own private purposes, which was an illegal transaction; therefore, I think it should have put the bank on inquiry as to Esson's authority, and the facts shown threw on the plaintiffs the burthen of showing that the transaction was a right and proper one. Had they made the inquiries they should have

(1) 4 DeG. J. & S. 581.
(2) 13 C. B. N. S. 278.
(3) L. R. 6 Ex. 243.
(4) Vol. 3 p. 869, sec. 14.
(5) 8 Jur. 937.
(6) 13 East 175.

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made they would have seen that Esson was using the name of Creighton & Co. without authority, and that they should not have discounted the note. Not having made such inquiries the loss should not fall upon Creighton, the partner whose name was unlawfully used, but upon the bank.

The judgment of the learned Chief Justice at the trial rightly stated the law, and I cannot think there could be a doubt in anybody's mind as to its correctness. The appeal should be allowed with costs.

STRONG J.—There were two firms with two partners common to each, the firm of Creighton & Company composed of Creighton (the present appellant) Esson and Anderson; this firm carried on business as lumber merchants at Liscomb; then there was the firm of Esson & Company, composed of Esson & Anderson, which carried on business as general merchants at Halifax. The circumstance that there were in the present case two partners instead of one common to each firm constitutes the only difference between this case and those of *Leverson* v. *Lane* (1), and *Re Riches* (2), in both of which the facts were that the name of the firm was, in fraud of the partnership, attached by one partner to securities which he applied for his own individual benefit. The circumstances that there are here two partners who are members of each firm is, of course, wholly immaterial.

Esson made the note sued upon payable to Esson & Co. and signed to it the name of Creighton & Co. and endorsed it in the name of Esson & Co. The respondents then discounted it and placed the proceeds to the credit of Esson & Co. who kept an account with them

The law applicable to such a state of facts was laid

(1) 13 C. B. (N.S.) 278. (2) 4 DeG. J. & S. 581.

down with great clearness by Lord Westbury L. C. in *re Riches* (1), to be as follows :—

> If an individual partner gives directly to his private creditor the paper of his firm for his own individual benefit, and thus uses the credit of the firm for his own private purposes, in that case such partner is guilty of fraud.

Such a transaction, Lord Justice Lindley says (Lindley on Partnership) (2).

> Is fraudulent against the firm whose name is affixed to the paper even if the partner using it does not himself sign the name of the firm; *a fortiori* when he does sign it.

See also Smith's Mercantile law (3); *Leverson* v. *Lane* (4); *re Riches* (1).

The person who accepts the paper having, from the very nature of the transaction, *primâ facie* notice that the partner in applying the security of the firm for his own private ends is acting beyond the scope of his authority as a partner, and is thus committing a fraud upon the other partners, is put upon inquiry, by which it is meant that he takes the paper at his peril and cannot afterwards protect himself by saying that he had not notice of the particulars of the fraud upon the firm. In other words, the party taking the bill or note has cast upon him the onus of establishing that no fraud was perpetrated by proving that the transaction was with the assent of the other partners or in some way for the benefit of the firm.

In the case of *The Bank of Commerce* v. *Moul* (5) the bank when it took the note had no notice that the partner from whom it received it was using it for his own purposes, for it was found as a fact in that case that the manager of the bank did not know that McCarthy, the fraudulent partner, was a member of the firm.

(1) 4 DeG. J. & S. 581.
(2) 5th ed. p. 171-172.
(3) 10th ed. p. 41-42.
(4) 13 C. B. N. S. 278.
(5) 36 U.C.Q. B. 9.

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Strong J.

It is beyond doubt in the present case that the bank through its officers, Mr. Pitcaithly and Mr. McIntyre, had notice that the signature of Creighton & Co. to this note was signed by Esson. They had had dealings with Esson and well knew his handwriting. The case on that point of evidence is as strong as it possibly could be. The bank must, therefore, when the proceeds of the discount were applied by placing them to the credit of Esson & Co., have been aware that the paper and credit of Creighton & Co. were being used by Esson, one of the partners in that firm, for the benefit of Esson & Co., a firm in which, as they knew, Creighton had no concern or interest. The case is thus brought directly within the principles laid down by Lord Westbury and by the Court of Common Pleas in the authorities already quoted; it was, therefore, for the bank, if they could, to shew that Creighton, the appellant, had assented to such a use of the name of his firm, or that the latter firm had reaped the benefit of the transaction, but this they have wholly failed to do. The judgment of Mr. Justice Townshend in the court in banc and that of the Chief Justice of Nova Scotia at the trial were, consequently, in all respects right both as regards the conclusion arrived at and the reasons assigned.

Mr. Russell has argued the appeal with great ingenuity but he has, I think, failed to establish that the case is not covered by the English authorities before referred to which, as appears from the work of Lord Justice Lindley as well from the late Edition of Smith's Mercantile Law, are now universally recognised as having established a settled principle of commercial law.

The judgment must be that the appeal should be allowed and that an order discharging the rule for a new trial be entered in the court below, and the judg-

ment for the defendant which was pronounced by the Chief Justice at the trial restored with costs to the appellant in all the courts.

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Fournier J.

FOURNIER J.—I think the judgment should be for the defendant, and that the appeal should be allowed, for the reasons given by Mr. Justice Townshend in the court below.

TASCHEREAU and GWYNNE JJ. Concurred.

PATTERSON J.—I also concur. I read the case with some care before the argument and do not think there is any reason for delaying the judgment.

Appeal allowed with costs.

Solicitor for appellant: *E. L. Newcombe.*

Solicitor for respondents: *John T. Ross.*

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*Feb. 18, 20.

*Nov. 10.

MARIA KEARNEY, (PLAINTIFF).....APPELLANT;

AND

STEPHEN D. OAKES, AND JOHN PAW, (DEFENDANTS)..... ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Action—Notice of—Contractor to build Government Railway—Government Railway Act, 44 Vic. ch. 25, s. 109—Construction of term "employee."

Sec. 109 of the Government Railway Act of 1881, (44 Vic. ch. 25), provides that "no action shall be brought against any officer, employee or servant of the department, [Railways and Canals], for anything done by virtue of his office, service or employment, except within three months after the act committed, and upon one month's previous notice in writing."

Held, reversing the judgment of the court below, Ritchie C. J. and Gwynne J. dissenting, that a contractor with the Minister of Railways and Canals, as representing the crown, for the construction of a branch of the Intercolonial Railway, is not an "employee" of the department within this section.

Held, per Patterson and Fournier JJ., that the compulsory powers given to the Government of Canada to expropriate lands required for any public work can only be exercised after compliance with the statute requiring the land to be set out by metes and bounds and a plan or description filed; if these provisions are not complied with, and there is no order-in-council authorizing land to be taken when an order-in-council is necessary, a contractor with the crown who enters upon the land to construct such public work thereon is liable to the owner in trespass for such entry.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), reversing the judgment at the trial in favor of the plaintiff.

This was an action for trespass on plaintiff's land. The defendants were contractors with the Dominion

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

(1). 20 N.S. Rep. 30.

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Government, represented by the Minister of Railways and Canals, for the construction of a branch of the Intercolonial Railway at Dartmouth, N. S. The plaintiff's land was expropriated by the Government for the purposes of the railway, and an action was brought in the Exchequer Court and damages recovered therein by the plaintiff in respect of such expropriation, and to the present action the defendants pleaded that the plaintiff having admitted the right of the crown to expropriate the land could not now claim that the entry by defendants, which was for the purpose of executing the work for which the expropriation was made, was a wrongful entry. Another defence pleaded was that the defendants, by virtue of their contract, were employees of the Department of Railways and Canals within the meaning of sec. 109 of the Government Railways Act of 1881, and entitled to notice of action which they had never received.

The Supreme Court of Nova Scotia decided the case in favor of the defendants upon this latter ground, reversing the judgment of the Chief Justice at the trial who had awarded the plaintiff $100.00 damages. The plaintiff then brought the present appeal.

Wallace for the appellant referred to Abbott's Law Dictionary under the word "servant" and Bouvier title "employé," to show that defendants were not "employees" under the statute.

Borden for the respondent, cited on the same point *Lowther* v. *Earl of Radnor* (1); *Ellis* v. *Sheffield Gas Co.* (2); *Water Co.* v. *Ware* (3); and contended that as the crown was in possession of the land no action would lie against the defendants who were on the land merely as the servants or agents of the crown, citing *Carr* v. *United States* (4); *The Davis* (5).

(1) 8 East 113.
(2) 2 E. & B. 767.
(3) 16 Wall. 566.
(4) 98 U.S.R. 433.
(5) 10 Wall. 15.

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SIR W. J. RITCHIE C. J.—Sec. 109 of the Government Railways Act is as follows :—

No action shall be brought against any officer, employee or servant of a department for anything done by virtue of his office, service or employment, unless within three months after the act committed and upon one month's previous notice thereof in writing, and the action shall be tried in the county or judicial district where the cause of action arose.

In this case there was no notice of action; the Government undertook to perform certain work which, as they could not do it personally, they agreed with, that is to say they employed, the defendants for a certain consideration to do it. Whether the agreement was in the nature of a contract in writing or verbal for a fixed sum or otherwise to do certain specified work, can it be said that those who agreed to do the work were not employed to do it? And if so, how can it be said they were not employees of the parties for whom they were to do the work ? Though those who actually did the work may properly be called contractors, as between the Government and themselves, how did that make them the less persons employed to do the work and, therefore, the less employees of the Government ? By what process of reasoning can it be said that the contractors in this case were not employed to do this work, and did not become employees of the crown, or that what they did was not done by virtue of their office, service or employment ? By the terms of their contract what they were employed to do was :

To provide all and every kind of labor, machinery and other plant, articles and things whatsoever necessary for the due execution and completion of all and every the works set out or referred to in the specifications annexed, &c. in the manner required by, and in strict conformity with, the said specifications and drawings relating thereto and the working and detail drawings which may from time to time be furnished, (which said specifications and drawings were thereby declared to be part of the contract) and to the complete satisfaction of the chief engineer for the time being having control over the work.

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The said contract gave the chief engineer, with the sanction of the Minister, liberty at any time before the commencement or during the construction of the works, or any portion thereof, to order any work to be done or to make any changes which he might deem expedient in the grades, width of cuttings and fillings, nature, character or position of the works or any part or parts thereof, or any other thing connected with the works, or connected with such changes, &c., and provided that the contractors should immediately comply with all written requisitions of the engineer in that behalf, but that they should not make any change in, or addition to or omission or deviation from, the works unless directed by the engineer, and should not be entitled to any payment therefor unless first directed in writing by the engineer to make such changes, etc., nor unless the price to be paid for any additional work was previously fixed by the Minister in writing, and the decision of the engineer as to whether such change or deviation increased or diminished the cost of the work and the amount to be paid or deducted therefor, as the case might be, should be final, and the obtaining of his certificate should be a condition precedent to the right of the contractors to be paid therefor. If any such change or alteration should, in the opinion of the engineer, constitute a deduction from the works his decision as to the amount to be deducted on account thereof should be final and binding. The engineer by the said contract was the sole judge of the work and material in respect to both quantity and quality, and his decision in respect to disputes with regard to work or material, or as to the meaning or intention of the contract and the plans, etc., was to be final.

The contract also provided that a competent foreman should be kept on the ground by the contractors during all the working hours to receive the orders of the

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engineer, and should the person so appointed be deemed by the engineer incompetent or conduct himself improperly he might be discharged by the engineer, and another should at once be appointed in his stead. Such foreman should be considered the lawful representative of the contractors and should have full power to carry out all requisitions and instructions of the engineer.

Sec. 12. All machinery and other plant, material and things whatsoever provided by the contractors for the works hereby contracted for, and not rejected under the provisions of the last preceding clause, shall from the time of their being so provided become, and until the final completion of the said works shall be, the property of Her Majesty for the purposes of the said works, and the same shall on no account be taken away or used or disposed of except for the purposes of the said works, without the consent in writing of the engineer.

Sec. 13. If the engineer shall at any time consider the number of workmen, horses or quantity of machinery or other plant, or the quantity of proper material respectively employed or provided by the contractor on or for the said works, to be insufficient for the advancement thereof towards completion within the limited time, or that the works are, or some part thereof is, not being carried on with true diligence, then in every such case the said engineer may by written notice to the contractors require them to employ or provide such additional workmen, etc., as the engineer may think necessary, and in case the contractors shall not thereupon within three days or such other longer period as may be fixed by any such notice in all respects comply therewith then the engineer may, either on behalf of Her Majesty, or if he see fit may as the agent of and on account of the contractor but in either case at the expense of the contractors, provide and employ such additional workmen, etc., as he may think proper, and may pay such additional workmen such wages and for such additional horses, etc., such prices as he may think proper, and all such wages and prices respectively shall thereupon at once be repaid by the contractors, or the same may be retained and deducted out of any moneys at any time payable to the contractors.

Sec. 28. Her Majesty shall have the right to suspend operations from time to time at any particular point or points or upon the whole of the works, and in the event of such right being exercised so as to cause delay to the contractors, then an extension of time equal to such delay or detention, to be fixed by the Ministers as above provided for, shall

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be allowed them to complete the contract, but no such delay shall vitiate or avoid this contract or any part thereof.

Sec. 35. In the event of it becoming advisable in the interests of the public to suspend the work hereby contracted for or any portion thereof, at any time before its completion, and to put an end to this contract, the Minister for the time being shall have full power to stop the work and cancel this contract, on giving due notice to that effect to the contractors.

These provisions clearly show that the whole work was performed under the control and immediate superintendence of the Government and appear to me to bring this case directly within the case of *Newton* v. *Ellis* (1). In that case it was claimed as in this case that the contractor was entitled to notice under 11 & 12 Vic. ch. 63, sec. 139, which is as follows:—

And be it enacted, that no writ or process shall be sued out against or served upon any Superintending Inspector or any officer or person acting in his aid, or under the direction of the general Board of Health, nor against the local Board of Health, or any members thereof or the officer of health, clerk, surveyor, inspector of nuisances, or other officer or person whomsoever acting under the direction of the said local board, for anything done or intended to be done under the provisions of this Act, until the expiration of one month next after notice in writing shall have been delivered to him, or left at their or his office, or usual place of abode, clearly and explicitly stating the cause of action, and the name and place of abode of the intended plaintiff, and of his attorney or agent in the cause; and upon the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the last mentioned notice and unless such notice be proved the jury shall find for the defendant; and every such action shall be brought or commenced within six months next after the accrual of the cause of action, and shall be laid and tried in the county or place where the cause of action occurred, and not elsewhere, and the defendant shall be at liberty to plead the general issue, and give this Act and all special matter in evidence thereunder, and any person to whom such notice of action is given as aforesaid may tender amends to the plaintiff, his attorney or agent, at any time within one month after service of such notice.

In fact the present case appears to me to be stronger,

(1) 5 E. & B. 119.

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for here the word "employee" is specifically used which is not the case in the statute referred to.

In *Newton* v. *Ellis* (1), Lord Campbell C. J. says:—

I am of the opinion that the defendant was a "person" acting under the direction of the local board in doing what the declaration complains of. The declaration complains of his wrongfully, negligently and improperly making or digging a hole or cutting, and continuing it without placing a sufficient light, whereby the plaintiff was injured and his carriage broken. The contract shews that the defendant was acting under the direction of the board; he contracted with them to make the well; and in this particular contract there is a stipulation which removes all doubt. We are not bound to lay down any general rule; the contract here requires all to be done to the satisfaction of the surveyor and by his direction; and Mr. Bittleston very properly admits that the surveyor is for this purpose indentified with the board. That is not all; the surveyor has power to interfere; he may dismiss any workman if he is dissatisfied with the way in which the workman performs the works. The defendant was emphatically a person acting under the direction of the board.

Coleridge J.:

There are two things which have been perhaps a little confounded. The question where the work has been done by an independent contractor or by a servant relates only to the liability of the principal. But, so far as regards the effect of a clause such as the one now in question, what the contractor does is done under the direction of the party with whom he contracts for that purpose.

In Ellis v. *Sheffield Gas Co.*, (2). Lord Campbell C. J. says:—

I am clearly of opinion that if the contractor does the thing he is employed to do, the employer is responsible for that thing as if he had done it himself.

He also says:

It would be monstrous if a person causing another to do a thing were exempted from liability for that act merely because there was a contract between him and the person immediately causing the act to be done.

In *Hole* v. *Sitting-Bourne and Sheerness Railway Co.*(3).

(1) 5 E. & B. 122. (2) 2 E. & B. 769.
(3) 6 H. & N. 497.

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Pollock C. B. says :

I am of opinion that the rule must be discharged. The short ground on which my judgment proceeds is, that this does not fall within that class of cases where the principal is exempt from responsibility because he is not the master of the person whose negligence or improper conduct has caused the mischief. This is a case in which maxim *qui facit per alium facit per se* applies. Where a person is authorized by act of parliament or bound by contract to do particular work he cannot avoid responsibility by contracting with another person to do the work. In *Ellis* v. *The Sheffield Gas Consumers Co.* (1) Lord Campbell said it is " a proposition absolutely untenable that in no case can a man be responsible for the act of a person with whom he has made a contract. I am clearly of opinion that if the contractor does the thing which he is employed to do the employer is responsible for that thing as if he did it himself." Here the contractor was employed to make a bridge, and he did make a bridge, which obstructed the navigation. The case then falls within the principle laid down in *Ellis* v. *The Sheffield Gas Consumers Co.* (1).

Wilde B. :

But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorized the act and is responsible for it. The present defendants were authorized to take land for the purpose of their railway, and to build a bridge over the Swale. Instead of erecting the bridge themselves they employed another person to do it. What was done was done under their authority. In the course of executing their order the contractor, by doing the work imperfectly, obstructed the navigation. It is the same as if they had done it themselves. It is not distinguishable from the case where a landowner orders a person to erect a building upon his land which causes a nuisance. The person who ordered the structure to be put up is liable, and it is no answer for him to say that he ordered it to be put up in a different form.

How then can there be an employer and not an employee ? I am very clearly of opinion that the contractor in the present case is an employee within the meaning of sec. 109 of the Government Railways Act of 1881, and therefore entitled to the notice provided for by that section, and not having received such notice

(1) 2 E. & B. 767.

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the plaintiff was not entitled to recover. I therefore think that this appeal should be dismissed with costs.

FOURNIER J.—I am in favor of allowing the appeal for the reasons given by Mr. Justice Patterson in his judgment in this case.

TASCHEREAU J.—I am also of opinion that the appeal should be allowed.

GWYNNE J.—This case would appear to be by way of supplementary claim to that in *Kearney* v. *The Queen*, in which the present appellant obtained in this court the sum of $5,131.60 by way of compensation, in lieu of $2,012.00 with interest on $1,512.00 from the 23rd August, 1884, awarded to her by the Exchequer Court for the same land, for entry upon which this action was brought, taken by the Dominion Government for the Dartmouth Branch of the Intercolonial Railway, and which has been constructed upon the land so taken.

A statement of the facts will serve, I think, to show the utter absence of all merit in the plaintiff's claim, which, if she shall succeed, will afford a marked instance of the triumph of the merest technicality against the justice of the case.

By an act passed by the legislature of the Province of Nova Scotia, upon the 19th day of April, 1883, 46 Vic. ch. 33, the municipality of the Town of Dartmouth was empowered to enter into an agreement with the Government of Canada represented by the Minister of Railways of Canada, or with the Government of Nova Scotia represented by the Commissioner of Works and Mines for the province of Nova Scotia for the time being, for the payment to such Government of a sum not exceeding $4,000.00, for a period not exceeding twenty years, or in the alternative a sum not

exceeding two thousand dollars per annum for a period not exceeding fortyyears, in the event of the Intercolonial Railway or a line of railway connected therewith being extended into the Town of Dartmouth to a point to be determined in such manner as should be approved by the town council. With the view apparently of giving effect to this act of the legislature of Nova Scotia, the Parliament of Canada by the act 46 Vic. ch. 2, passed on the 25th May, 1883, granted a sum of

$110,000 for a branch of the Intercolonial Railway to Dartmouth, provided the Municipality of Dartmouth undertake the payment to the Government of the amount of $4,000 per annum for twenty years, or so much of that amount as may be required in addition to the net revenue to pay four per centum per annum on the sum expended.

It appears that on or about the 12th of June, 1883, an agreement in accordance with the provisions of the above statute, 46 Vic. ch. 2, in relation to the grant of the $110,000 was entered into between the Government of Canada and the Corporation of Dartmouth. Thereupon the Minister of Railways, thinking himself to be justified in proceeding to have a survey made for the purpose of determining the route of the proposed branch railway, and of acquiring the right of way, proceeded to act under the provisions of the Dominion acts, 31 Vic. ch. 12, 35 Vic. ch. 24, 37 Vic. ch. 15, and 44 Vic. ch. 25, certain sections of which acts appeared to him to afford ample authority for every thing done or authorized to be done by him in the circumstances as they then existed.

By the 10th sec. of 31 Vic. ch. 12, among the works there enumerated as placed under the control and management of the Minister of Public Works, are :

The railways and rolling stock thereon, and also the works acquired or to be acquired, constructed or to be constructed, repaired or improved at the expense ot Canada.

By the 22nd section the Minister is empowered to authorise :

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The engineer, agents, servants, and workmen employed by or under him to enter into and upon any ground to whomsoever belonging and to survey and take levels of the same, and to make such borings and sink such trial pits as he deems to be necessary for any purpose relative to the works under his management.

Then by the 24th section it is enacted that :

The Minister may at all times acquire and take possession for and in the name of Her Majesty of any land or real estate, etc., the appropriation of which is in his judgment necessary for the use, construction and maintenance of any public work, etc., and he may for such purpose contract, and agree with all persons possessed of or interested in such land, real property, etc., and all such contracts and agreements shall be valid to all intents and purposes whatever.

By the 26th section it is enacted that:

The compensation agreed on between the parties or awarded in the manner hereinafter set forth, shall be paid for such land, real property, etc., to the owners within six months after the amount of such compensation has been agreed on or awarded.

By the 27th section it is enacted that:

When any such owner refuses or fails to agree for conveying his estate or interest in any land, real property, etc., the Minister may tender the reasonable value in his estimation of the same with notice that the question will be submitted to the arbitrators hereinafter mentioned, and in every case the Minister may, three days after such agreement or tender and notice, authorise possession to be taken of such land, real property, etc., so agreed or tendered for.

By the 34th section :

If any person or body corporate has any claim for property taken or for alleged direct or consequential damage to property arising from the construction or connected with the execution of any public work undertaken, commenced or performed at the expense of the Dominion, etc., such person or body corporate may give notice in writing of such claim to the said Minister, etc., who may, within thirty days after such notice, tender what he considers a just satisfaction for the same with notice that the said claim will be submitted to the decision of the arbitrators acting under this Act, unless the sum so tendered is accepted, etc.

2. But before any claim under this or any other section of this Act shall be arbitrated upon the claimant shall give security to the satisfaction of the arbitrators or any one of them for the payment of the costs and expenses incurred by the arbitration, in the event of the

award being against such claimant or of its not exceeding the sum tendered as aforesaid.

By the 35th clause the Minister may refer any of the clauses aforesaid either to one or any greater number of arbitrators as he may see fit, subject, however, in the case of a reference to one arbitrator or to a less number than the full board to an appeal to the full board which is provided for by section 44.

By the statute 35 Vic. ch. 24, passed on the 14th June, 1872, the above 10th section of 31 Vic. ch. 12 is amended and extended, for it is enacted thereby that every work of the nature of any of those mentioned in the 10th section of 31 Vic. ch. 12:

Acquired or to be acquired, constructed or to be constructed, extended, enlarged, repaired or improved at the expense of the Dominion of Canada, or for the acquisition, construction, requiring, extending, enlarging or improving of which any public money has been or shall be hereafter voted and appropriated by Parliament, and every work required for any such purpose, is and shall be a public work, under the control and management of the Minister of Public Works, and all the provisions of the said Act, and of any Act amending it, do and shall apply to every such work as aforesaid, and all the powers, privileges and duties thereby vested or assigned to the Minister of Public Works may be exercised by the said Minister in relation to any and every such work, subject always to the exceptions made in the said tenth section of the said Act, etc. Provided that this Act shall not apply to any work for which money has been appropriated as a subsidy only.

By 37 Vic. ch. 15, passed on the 26th May, 1874, it was enacted that from and after the 1st day of June, 1874:

The Intercolonial Railway shall be a public work vested in Her Majesty, and under the control and management of the Minister of Public Works, etc.

And further that the powers of the commissioners appointed under the act 31 Vic. ch. 13, respecting the construction of the Intercolonial Railway thereby transferred to the Minister of Public Works, should—

as respects the said Intercolonial Railway and works be in addition

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to any powers the said Minister may as such have with respect to the same as a public work, under 31 Vic. ch. 12, and the Minister may in any case relating to the said railway and works exercise any powers given him by either of the said Acts, and applicable to such case.

Then by 42 Vic. ch. 7, 1879, the Public Works Department was divided into two departments, namely, the Department of Railways and Canals, presided over and managed by an officer designated "Minister of Railways and Canals," and the Department of Public Works, presided over and managed by an officer designated "Minister of Public Works," and it was thereby enacted that the Minister of Railways and Canals should have the management, charge and direction of all railways, and works and property appertaining or incident thereto, which were, or immediately before the coming of the act into force might be, under the management and direction of the Department of Public Works, and to the same extent and under the same provisions, subject to those of the act, and that the Minister of Railways and the officer acting under him should, as respects the works under his charge and direction, have all the powers and duties which at the time of the act coming into force should be vested in the Department of Public Works as formerly constituted, and that the Minister of Railways and the officers acting under him as to such works as should be under his charge should be deemed to be successors in office of the former Minister of Public Works and the officers acting under him or his department. This act, in pursuance of a provision in that behalf in the act, came into force by proclamation upon the 30th May, 1879.

Now, upon the organization of the Department of Railways and Canals under this act, it cannot, I think, be doubted that the Intercolonial Railway and all works thereafter to be constructed by public money of

the Dominion must be regarded as being public works under the control, direction and management of the Minister of Railways, and that, unless there be some express provision in some subsequent act of Parliament, plainly and in unequivocal terms enacting to the contrary, upon the perfection of the arrangement between the Government of Canada and the Corporation of Dartmouth, as provided in 46 Vic. ch. 2, the Minister of Railways became invested with all the powers contained in 31 Vic. ch. 12, and which were necessary for the purpose of determining the site by survey and of acquiring the right of way for the construction of the Dartmouth branch of the Intercolonial Railway as a public work of the Dominion of Canada without any powers or authorities whatever additional to those contained in 51 Vic. ch. 12.

Upon the 21st of March, 1881, The Government Railway Act, 44 Vic. ch. 25, was passed. That act increases rather than diminishes the powers vested in the Minister by 31 Vic. ch. 12, 35 Vic. ch. 24 and 37 Vic. ch. 15.

The 1st, 2nd, 3rd and 5th sub-sections of sec. 5 of 44 Vic. ch. 25 correspond with sec. 22 of 31 Vic. ch. 12. By this 5th section and sub-sections it is enacted that:

> The Minister shall have full power and authority by himself, his engineers, superintendent, agents, workmen and servants—
>
> 1. To explore and survey the country through which it is proposed to construct any Government railway;
>
> 2. And for that purpose to enter into and upon any public lands or the lands of any corporation or person whatsoever;
>
> 3. To make surveys, examinations or other arrangements on such lands necessary for fixing the site of the railway, and to set out and ascertain such parts of the land as shall be necessary and proper for the railway;
>
> 5. To enter upon and take possession of any lands, real estate, streams, waters and water-courses, the appropriation of which is in his judgment necessary for the use, construction, maintenance or repair of the railway.

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Then the 15th sub-section of this section 5 made provision for the Minister contracting with the owners for the land required, corresponding with the provisions of sec. 27 of 31 Vic. ch. 121, and the 17th sub-section made this aditional provision that the Minister should have full power—

At any time to change the location of the line of railway in any particular part for the purpose of lessening a curve, reducing a gradient or otherwise benefiting such line of railway or for any other purpose of public advantage; and all and every the provisions of this act shall refer as fully to the part of such railway, so at any time changed or proposed to be changed, as to the original line.

Then the 10th section of 44 Vic. ch. 25 enacted that:

Where no proper deed or conveyance to the crown is made and executed by the person having the power to make such deed or conveyance, or where a person interested in such lands is incapable of making such deed or conveyance, or where for any other reason the Minister shall deem it advisable so to do, a plan and description of such lands, signed by the Minister, his deputy or secretary, or by the superintendent, or by an engineer of the department, or by a land surveyor duly licensed and sworn in and for the province in which the lands are situate, shall be deposited of record in the office of registry of deeds for the county or registration division in which the lands are situate, and such lands by such deposit shall thereupon become and remain vested in the crown ;

2. In case of any omission, mis-statement or erroneous description in such plan or description, a corrected plan and description may be deposited with like effect ;

3. Such plan and description may be deposited at any time either before entry upon the lands or within twelve months thereafter.

Section 11 made binding all contracts at the price agreed upon for lands which might be purchased for the railway

before the setting out and ascertaining of the lands required if they should be set out and ascertained within a year from the date of the contract even although land may, in the meantime, have become the property of a third party.

Then sec. 15 of 44 Vic. ch. 25 made provision for tender of compensation, and arbitration if tender should

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be refused, corresponding with sec. 27 of 31 Vic. ch. 12, and sections 27, 28, 30 and 31 of 44 Vic., all relating to arbitration, correspond severally and respectively with sections 34, 35, 37 and 38 of 31 Vic. ch. 12.

Acting under the powers vested in the Minister by the several sections of the acts above referred to the Minister, after the agreement of the 12th June, 1883, between the municipality of Dartmouth and the Dominion Government, as contemplated by the above extract from the Dominion Statute 46 Vic. ch. 2, had been entered into, proceeded to have a survey made for determining the route of the proposed railway, and had it staked out upon the ground in the usual manner for designating the line of the railway by stakes planted in the ground showing the centre line of the railway. The plaintiff was then approached by persons acting under the authority of the Minister with the view of making a contract with her for the purchase of the portion of her land required for the railway. She appears to have, at first, expressed herself as willing to take $200, and afterwards to have demanded $1,000, and finally to have refused to enter into any arrangement without the approbation of her solicitor who appears to have advised her to agree to nothing but to insist upon such compensation as should be awarded to her under the statutes in that behalf. Upon the 3rd of April, 1884, the Minister had a tender made to her and a notice served upon her in accordance with the provisions of section 27 of 31 Vic. ch. 12, and of section 15 of 44 Vic. ch. 25. In this notice the land mentioned as taken was described as embracing a width of twenty feet throughout the plaintiff's lot on each side of the centre line of the railway " as shown on the plan filed in the office of the Chief Engineer at Moncton." At this time the engineer was, however, making a slight alteration in the width of the land proposed to be taken; no

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alteration was made in the centre line as staked upon the ground, but only in the width of the land taken on either side of such centre line. This location of the railway appears to have been finally completed before the 9th of April, 1884, by a plan and description of the land as taken which were filed in the office of the registrar of deeds for the county of Halifax, in pursuance of the provisions of sec. 10 of 44 Vic. ch. 25, on the 13th of August, 1884, wherein the land as taken upon the 9th of April, 1884, is described as follows :—

Now, it is hereby declared and made known that the said lands are described as follows, that is to say : Beginning at a point where the centre line of the Dartmouth Branch Railway intersects the northern boundary line of the lot belonging to the said Maria Kearney, thence southerly following the several courses of the said centre line a distance of one hundred and forty-eight feet, embracing a width of twenty feet on the eastern and fifteen feet on the western side of the said centre line, thence southerly a further distance of two hundred and fifty feet along the said centre line embracing a width of twenty feet on each side of the same, thence southerly a further distance of five hundred feet along the said centre line, embracing a width of thirty feet on the eastern and twenty-five feet on the western side of the same ; thence southerly a further distance along the said centre line of two hundred and forty-one feet more or less, or to the southern boundary line of the said lot, embracing a width of twenty-five feet on each side of the said centre line, the whole containing an acre and twenty-six hundredths of an acre, more or less, being land and land covered with water as shown on annexed plan colored red.

Whether any notice was served upon the plaintiff showing this trifling variation from the land as described in the notice served upon her on the 3rd of April does not appear. Most probably the slight variation was deemed to be quite immaterial as it seems to have been, for the plaintiff in any arbitration must have recovered compensation for the land actually taken however erroneously it had been described in the notice served upon her on the 3rd of April; and if she had found any difficulty upon that point she herself could have taken the initiative under the 34th section of 31

Vic. ch. 12, or the 27th section of 44 Vic. ch. 25, to have compensation awarded to her for the land actually taken, to shew which the Department of Railways must have produced their locating plan. Upon the 9th of April the Department of Railways telegraphed to Mr. Compton, an official arbitrator residing at Halifax, directing him to take the evidence in the plaintiffs case for submission to the full board ; this telegram was supplemented by a written authority to Mr. Compton from the department, signed by the secretary, and dated the 17th of April, 1884, as follows :

Sir,—With reference to the claim of Mrs. Widow Kearney, in the matter of the expropriation of certain land for the purposes of the Dartmouth Branch Railway, you are hereby instructed to take the evidence in the case, and submit the same to the full board of arbitrators for award upon the claim under the powers conferred by the act 31 Vic. ch. 12. I write this in confirmation of telegram sent you on the 9th instant.

In the meantime Mr. Compton, acting upon the authority of the telegram of the 9th of April, had given notice to the plaintiff's solicitor, and also to a gentlemen acting as counsel for the Dominion Government, that he would hold his court at the 17th of April to take the evidence. On that day the plaintiff and her solicitor and the counsel acting for the Dominion Government attended, and the court was opened by Mr. Compton. A surety was then offered by and on behalf of the plaintiff to sign with her the necessary bond as required by the 34th section of 31 Vic. ch. 12, and the 27th section of 44 Vic. ch. 25 ; the surety tendered not having been approved the case was adjourned to the following day, when plaintiff's solicitor attended and produced and tendered a bond duly executed in his presence by the plaintiff and a surety, and bearing date the 17th day of April, 1884. This bond was approved and accepted and was subject to the condition following :

Whereas Maria Kearney of Dartmouth, N. S., hath preferred a

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certain claim against the Civil Government of Canada for a certain piece or parcel of land lying and being in the town of Dartmouth, in the county of Halifax, and Province of Nova Scotia, taken by the Government of Canada for the purposes of the Dartmouth Branch of the Intercolonial Railway. Whereas the claimant cannot agree with the Honorable Minister of Public Works of Canada, (acting in the capacity of representative of Our Sovereign Lady Victoria), with regard to the said claim, the same has been referred to the full board of official arbitrators of Canada, appointed under and by virtue of the act of the legislature of Canada, 31 Vic. ch. 12.

And whereas by the said act it is expressly required that before any claim shall be arbitrated upon the claimant shall give security to Her Majesty to the satisfaction of the arbitrators, or any one of them, for the payment of the costs and expenses incurred by Her Majesty in the arbitration in the event of the costs on such arbitration, or any part thereof, being awarded against the said claimant, or of the award not exceeding the sum tendered by the said Minister to the said claimant.

The plaintiff's solicitor having then stated that he was not ready with his witnesses, and having applied to the official arbitrator for an adjournment, the case sat adjourned "until such time as the arbitrator can conveniently resume it." In point of fact it never was resumed by the official arbitrators, nor was any reason suggested why it was not. The plaintiff and her solicitor perhaps thought, as is generally found to be the case, that a much larger sum is usually awarded after the work is completed than would be awarded, or than may be asked, if the arbitration should take place before the work is commenced. However, nothing further was done in the arbitration until after the 31st October, 1887, when, in pursuance of the provisions of the Dominion Statute, 50 & 51 Vic. ch. 16, the case was transferred to the Exchequer Court for adjudication by the judge of that court to whom was submitted all the evidence taken in the present action, and the result has been that, upon appeal to this court from the judgment of the learned judge of the Exchequer, the plaintiff has succeeded in recovering for the land the sum of $4,000 together with interest thereon from

the 23rd of August, 1884, as already stated, for land for which she had expressed herself, in April, 1884, as willing to take $1000.

In the meantime the Department of Railways by the Minister of Railways, upon the 22nd of July, 1884, entered into a contract with the defendants for the construction of the railway, and after having, upon the 23rd day of August, 1884, caused a plan and a description of the land taken from the plaintiff to be duly registered in the registry office of the county of Halifax, authorized and directed the defendants afterwards, and on or about the 18th day of September, to enter upon the land of the plaintiff so taken and to do the several acts which they did, and for which this action was commenced upon the 30th of September, 1884.

It is unnecessary to set out the pleadings which display no small amount of prolixity and irrelevancy, for the whole substance of the case is that the action for an alleged wrongful entry upon the plaintiff's land, and for doing such acts as were done by the defendants between the 15th and 30th September in constructing the railway,—to which action the defendants plead, first in justification, that the Minister of Railways had authority to enter upon and take the plaintiff's land for the construction of the Dartmouth branch of the Intercolonial Railway, and to do and to authorize to be done the acts complained of, and that the defendants, by the direction and command of, and as the agents and servants of, the Minister entered upon the land and there did the thing complained of; and secondly, that the defendants did what they did as the servants and employees of the Department of Railways, and that no notice in writing of this action was ever given to them as required by the 109th sec. of 44 Vic. ch. 25.

The case proceeded at the trial upon the contention, in which the learned Chief Justice of Nova Scotia who

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tried the case concurred, that as it appeared that an order in council authorising the construction of the Dartmouth branch was not made until the 12th December, 1884, none of the acts authorized by the Minister prior to that date were legal, and he rendered a verdict for the plaintiff for $100. Upon appeal from that judgment the Supreme Court of Nova Scotia reversed it and ordered judgment to be entered for the defendants upon the ground that they were entitled to have had, but had not, notice of action. From this judgment the present appeal is taken.

The Minister of Railways certainly appears to have received the impression or formed the opinion that in November, 1884, an order in council was necessary, but in this opinion or impression I think he was mistaken. Both he and his advisers seem to me to have lost sight altogether of 35 Vic. ch. 24 and 46 Vic. ch. 2, and also to have misconceived the object and the effect of the 6th sec. of 44 Vic. ch. 25.

It cannot, I apprehend, admit of a doubt that the 6th sec. of 44 Vic. ch. 25 did not effect a repeal of 35 Vic. ch. 24; neither can it be doubted that if this 6th section had never been enacted the Minister would have had complete authority to construct the Dartmouth branch as a public work of the Dominion of Canada under the powers vested in him by 35 Vic. ch. 24, in connection with 46 Vic. ch. 2, and that for such purposes all the provisions of 44 Vic. ch. 25, as well as 31 Vic. ch. 12, would apply in maintenance and support of the acts of the Minister Now, the object and effect of the 6th sec. of 44 Vic ch. 25, seems to me to be this: It authorises the Minister of Railways, without any order in council or any other authority whatever, to construct a branch line of the Intercolonial Railway, provided such branch should not exceed one mile, and it makes applicable to the construction of such a branch all the provisions

applicable to the acquiring the necessary land and to the complete construction of the work. Now if the Dartmouth branch railway had not exceeded one mile in length the Minister could have constructed it upon his own responsibility without the assistance of any previous appropriation by Parliament for the purpose such as was granted by 46 Vic. ch. 2; and if a sum of money had been appropriated for such a branch by a Parliamentary grant the Minister would have that appropriation as an additional authority under the powers vested in him by 35 Vic. ch. 24, as justifying him in all his acts for the purpose of constructing such a branch. But the section 6 further provides that the Minister may, by and with the authority of the Governor in council, and without any other authority, construct a branch railway not exceeding six miles in length, and this authority may be exercised without any previous appropriation of any sum by Parliament for such a branch. This is a power given to the Governor in council *ex mero motu*, to construct a branch in connection with a Government railway without any previous appropriation for the purpose or any other Parliamentary sanction whatever. But the vesting such a special authority in the Governor in council does not detract one iota from the authority vested in the Minister by 35 Vic. ch. 24, when an appropriation is made by an act of Parliament for the construction of a branch line between two places whether they be or be not more than six miles apart from each other. The 46 Vic. ch. 2 shows that the Dartmouth branch of the Intercolonial Railway was a line known to Parliament. It required no order in council to bring it into existence.

By 44 Vic. ch. 25, it is enacted that all the provisions of that act shall apply to all railways vested in Her Majesty, and that are under the control and management of the Minister of Railways. The word "rail-

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way" as used in the act is declared to mean every railway and property connected therewith under the management of the department.

By 37 Vic. ch. 15 the Intercolonial Railway, with all property thereunto appertaining, is expressly declared to be a public work vested in Her Majesty and under the control and management of the Minister.

By 35 Vic. ch. 24 every railway for the construction of which any public money shall be appropriated by parliament is declared to be a railway and public work under the control and management of the Minister.

Upon the passing, therefore, of 46th Vic. ch. 2 the Branch of the Intercolonial Railway to Dartmouth became a railway vested in Her Majesty and under the control and management of the Minister, to which all the sections of 44 Vic. ch. 25, relative to the acquiring title to lands for the purposes of the railway, as well as all the like sections of 31 Vic. ch. 12, are made applicable wholly apart from and independently of anything in the 6th section of 44 Vic. ch. 25. I am of opinion, therefore, that for the protection and justification of the Minister, in doing and authorising to be done every thing that was necessary for the construction of the Dartmouth Branch Railway, an order in council under the said 6th section was not necessary; and that upon registration in August, 1884, of the plan and description of the plaintiff's land, which was required for that purpose, that land became vested in Her Majesty for the use of the Dominion Government under section 10 of 44 Vic. ch. 25, and the plaintiff's rights were converted into a claim for compensation, the proceedings to obtain which it was quite competent for the plaintiff herself to have initiated under the 27th section of the act, which she might have done at any time. and no doubt would have done if

she or her advisers had not formed the opinion, in which they have been justified by the result, that it would be to her advantage to delay proceedings towards arbitration until after the work should be completed. I am of opinion, therefore, that it clearly appeared that the acts of the defendants under the authority of the Minister were justified, and that for this reason the verdict should have been for the defendants. But I am also of opinion that the defendants were entitled to notice of action. If the Minister was authorised in causing the acts complained of to be done, the defendants were justified as acting by his command and as his servants. If the Minister was not justified he was himself equally responsible as the defendants for the acts of the defendants, and he would have been entitled to notice of action, and as the defendants acted under the authority of the Department of Railways and the Minister and employed by them to do what they did, as they would be justified as the servants and employees of the department if the Minister had been justified, so are they equally the servants and employees of the department and the Minister if the Minister was not justified and equally with him entitled to notice. He who does a thing by the command and authority of another, and employed by such other, is surely, as regards the act authorized, both in law and common sense, rightly described as the servant and employee of the person employing him.

I am of opinion, therefore, for the above reasons, that the appeal should be dismissed with costs.

PATTERSON J.—The plaintiff brought this action on the 30th September, 1884, charging the defendants with trespassing on her lands, and claiming $8,000 damages.

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The pleadings, which do not err on the side of needless brevity, need not be noticed in detail.

The defendants, by indenture dated the 22nd day of July, 1884, entered into a contract with Her Majesty Queen Victoria, represented by the Minister of Railways and Canals of Canada, to construct a railway of five or six miles, being a branch of the Intercolonial Railway, the work to be completed to a named point on or before the 15th September, 1884, or if extended the whole contemplated distance then to be completed on or before the 1st November, 1884.

This branch railway was a work which the Minister of Railways and Canals was authorized by the 6th section of the Government Railways Act, 1881, to construct, but only by and with the authority of the Governor in Council. The order in council was essential whenever such a branch railway exceeded one mile in length.

An order in council was passed, but not until the 12th December, 1884, which was after the contract time for the completion of the whole work and after the commencement of this action.

The entry upon the lands of the plaintiff of which she complains was made in September, 1884.

The action was tried in 1886, before the Chief Justice of Nova Scotia, who gave judgment for the plaintiff with $100 damages.

The defendants moved against that judgment, and it was reversed by a majority of the court on the ground that the defendants were entitled, under section 109 of the statute of 1881, (44 Vic. ch. 25), to a notice of action which had not been given. Two of he learned judges of the court held that opinion, the learned Chief Justice dissenting.

Section 109 is thus expressed :

No action shall be brought against any officer, employee or servant

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of the Department for anything done by virtue of his office, service or employment unless within three months after the act committed, and upon one month's previous notice thereof in writing, and the action shall be tried in the county or judicial district where the cause of action arose.

The question was whether these contractors were employees of the Department of Railways and Canals within the intention of the enactment.

The dispute is over the word "employee" which has of late years found a place in our popular vocabulary, and has now been adopted in Dominion legislation.

In the absence of any definition in the interpretation clause of the statute we have to find what the word means.

Several dictionaries have been quoted from in the judgments delivered in the court below. In those of them within my reach I do not find the word "employee," but I find the French term "employé," in the masculine form, inserted as a word that retains in English speech its French meaning of one who is employed.

That is doubtless the term intended by the legislature.

In fact we find the two expressions used convertibly, as *e. g.* in section 112 "any officer or servant of, or any person employed by the department," and in section 121 "any officer or servant of, or person in the employ of the department," obviously denoting the same persons described in sections 64, 74, 82, 106 and 109, as officer, servant or employee of the department.

The word as used in the statute means, in my opinion, "servant" and nothing more. It is, perhaps, inserted to save the feelings of those servants who do not like to be called servants, or by way of concession to the tendency of the day to understand the word servant as expressive only of service of a lower or quasi menial grade.

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Section 120 illustrates this. It provides for the "punishment of every person wilfully obstructing any officer or employee in the execution of his duty," obviously including under the term "employee," persons who might be called servants without fear of resentment on their part—switchmen for example—and proving that words "employee or servant" are used to denote one class and not two classes of retainers.

Thus the statute is its own interpreter. The "employee or servant of the department" is not a contractor like these defendants who agree with Her Majesty to provide materials and labor, and to execute such works as the construction of a branch railway. There is not often occasion to speak of contractors in the Railway Act, but the term does occur once or twice. In section 104 the contractor is called "contractor" in provisions relating to his contract, and section 99 provides for attesting on oath accounts sent in by "any contractor, or person in the employ of the department," distinguishing between contractor and employee.

Then we have section 121 giving to the informer a moiety of pecuniary penalties imposed by the act, "unless he be an officer or servant of, or person in the employ of, the department," where the persons in the employ, or employees, must mean those regularly employed about the railway. A better definition, and one which effectually excludes contractors, is supplied by sections 112 and 113, viz: persons employed at regular wages. Section 112 makes a misdemeanor of the wilful contravention of any rule, order or regulation of the department by "any officer or servant of, or any person employed by, the department," if injury ensues to property or person; while, if the contravention does not cause injury, then, by section 113, "the officer, servant or other person guilty thereof shall

thereby incur a penalty not exceeding the amount of thirty days' pay," etc.

It is, to my mind, manifest from the light thrown by the statute itself upon the sense in which the word "employee" is used that the view of the learned Chief Justice in the court below is correct, and that the protection of section 109 is not intended to extend to persons in the position of the present defendants.

I should have arrived at the same conclusion if section 109 had been the only place in the statute where the expression in debate was found. It would, in my judgment, be impossible on the one hand to extend the meaning of the term "employee," so as to include contractors, even if they were nominally contractors with the department in place of being contractors with the Queen, and on the other hand to narrow the force of the term so as to exclude the liability of the employer for injuries caused by the negligence of the employed. It is now familiar law that a person employing a contractor is not usually liable for injuries caused by his negligence. The cases on the subject will be found collected, and discussed in a pleasant style, in Shirley's Leading Cases, (1), under *Reedie* v. *London and N. Y. Railway Company* (2.) And see Evans on Principal and Agent (3).

I have no idea that the ordinary rule on the subject is to be reversed when Government railways are concerned, but that would, as I apprehend, be the result of the judgment now in review. If the contractor is an employee or servant then the master is liable for injuries caused by his negligence or want of skill.

I do not think we derive assistance in finding the force of the terms "employee or servant," as used in our section 109, from the decisions under section 139

(1) 3 ed. pp. 291 *et seq.* (2) 4 Ex. 244.
(3) 2 ed. pp. 590 *et seq.*

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of the English Public Health Act, 1848, or section 106 of the Metropolis Management Amendment Act, 25 & 26 Vic. ch. 102. The former act requires notice of action before process is sued out against any superintending inspector, or any officer or person acting in his aid or under the direction of the General Board of Health, or against the Local Board of Health or any member thereof, or the officer of health, clerk, surveyor, inspector of nuisances, or other officer or person whomsoever acting under the direction of the Local Board of Health. A person who agreed to sink wells under a contract with a local board which contained provisions found in most contracts of the kind, and found in the contract of the present defendant with Her Majesty, that the work should be done to the satisfaction of the surveyor of the board who had power to require the contractor to reject and remove materials, &c., and to discharge foremen or workmen with whom the surveyor might be dissatisfied, was held in *Newton* v. *Ellis* (1) to be a person acting under the direction of the board, and therefore entitled to notice of action. That decision was followed by others, both under the Public Health Act, 1848, and under the Metropolis Management Amendment Act, section 106 of which is essentially the same as section 139 of the earlier act, but includes " contractor " among the persons enumerated as entitled to notice. (See *Davis* v. *Curling* (2), *Hardwick* v. *Moss* (3), *Poulsum* v. *Thirst* (4), *Wilson* v. *Mayor of Halifax* (5), *Whatman* v. *Pearson*) (6).

These enactments differ so materially from our section 109, which extends its protection only to " any officer, employee or servant of the department," as to leave them without influence on the controversy ex-

(1) 5 E. & B. 115.
(2) 8 Q. B. 286.
(3) 7 H. & N. 136.
(4) L. R. 2 C. P. 449.
(5) L. R. 3 Ex. 114.
(6) L. R. 3 C. P. 422.

cept as they tend to show that my understanding of the effect of section 109 correctly interprets the intention of the legislature ; because, with the two English statutes before them, one of which was held by force of the words " acting under the direction of the board," to include a contractor under the ordinary form of contract, and in the other of which the contractor was expressly named, notwithstanding the presence of the words " acting under their or any of their directions," the legislature has not adopted the same or, in my judgment, any equivalent phraseology. We must, as it seems to me, interpret our statute by itself, and, for the reasons I have endeavored to explain, I am unable to hold that this defendant is, within the meaning of section 109, an officer, employee or servant of the department.

It has been contended that the acts of the defendants were legally authorised. That contention was unsuccessfully advanced at the trial before the learned Chief Justice, and was dealt with in the judgment then delivered by him. Before the court *in banc* the judgments turned altogether on the objection to the want of notice of action, and no opinion is reported to have been expressed on the other grounds of defence.

The points have been ingeniously argued before us by Mr. Borden for the defendants, but without creating in my mind any doubt of the soundness of the judgment which decided them against his clients

The fundamental difficulty in his way is the absence of legal authority to enter on the lands of the plaintiff in September, 1884.

One answer, suggested rather than seriously argued, is that an order in council was passed after action commenced which professed to ratify what had been done.

No authority has been produced which supports the contention. The order in council, which under the

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Government Railway Act 1881, section 6, might have been issued to authorise the construction of this branch railway, would have taken the place of an act of Parliament. The Governor in Council would have, in making such an order, been exercising a power vested in him by the legislature.

The order made in December, 1884, could operate only from its date. It was not like the ratification of something done in the name or professedly on behalf of another. It is too plain to require elaborate demonstration thatt he act which can be effectually ratified so as to affect the rights of a stranger must be one which the person who ratifies it could himself have lawfully done. The prior mandate to which the ratification is equivalent must be a mandate that could lawfully have been issued.

It was argued that the Minister of Railways and Canals had power to enter or authorise the defendants to enter upon this land without an order in council by virtue of certain powers given to the Minister of Public Works by 31 Vic. ch. 12, and which it is said have been transmitted to the Department of Railways and Canals. Works constructed at the expense of Canada are, by section 10, vested in Her Majesty. The Minister is empowered, by section 24, to acquire and take possession of in the name of Her Majesty any land necessary in his judgment for the construction or maintenance of any public work, and if the owner refuses or fails to agree for conveying the land the Minister may, by section 27, tender the reasonable value in his estimation, with a notice to arbitrate, and may after three days authorise possession to be taken.

Without stopping to discuss the question whether these provisions are now applicable to railways which are the subject of separate legislation, we notice that the minor premiss in each syllogism is not proved. It is

not proved that this land was the property of Her Majesty under section 10. There was, in 1883, included in the estimates an item of $110,000 for a branch of the Intercolonial Railway to Dartmouth, but the grant was contingent on action to be taken by the municipality of Dartmouth. I do not know that such action was taken, and it is clear enough that the plaintiff's land had not been bought from her at the expense of Canada, or from any other source, when she brought this action. If there was any right of entry under the Public Works Act it must have been under section 27. But here the minor premiss is that there was a public work for which the land was wanted, and we are brought back to the absence of the order in council by which alone the Dartmouth branch became known to the law, but months had to elapse before such an order existed.

An argument has been pressed for the defendants founded on steps that were taken towards arbitration, and another is rested on the filing of a plan and description. Let us note together the facts touching these two matters.

A notice to arbitrate was given to the plaintiff on the 4th of April, 1884. These dates are material. It described the land proposed to be taken, and for which $150 was offered, as running all across the plaintiff's lot at the uniform distance of twenty feet on each side of a line marked on a plan filed in the office of the Chief Engineer at Moncton as the centre line of the railway. There were either one or two meetings of the arbitrators. The plaintiff attended, and she executed the bond required by the statute. The last meeting was on the 18th of April, when the arbitration was adjourned, and it was never resumed.

It is provided by the Government Railways Act, 1881, section 10, that

> Lands taken for the use of Government railways shall be laid off by

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metes and bounds; and where no proper deed or conveyance thereof to the crown is made and executed by the person having the power to make such deed or conveyance, or where a person interested in such lands is incapable of making such deed or conveyance, or where for any other reason the Minister shall deem it advisable so to do, a plan and description of such lands signed by the Minister, his Deputy or Secretary, or by the Superintendent or by an Engineer of the Department, or by a land surveyor duly licensed and sworn in and for the province in which the lands are situate, shall be deposited of record in the office of the registry of deeds for the country or registration division in which the lands are situate, and such lands by such deposit shall thereupon become and remain vested in the crown.

No part of the plaintiff's land was laid off by metes and bounds. There were stakes planted by the engineers, but they were merely to show the centre line of the railway.

The plan referred to in the notice to arbitrate was never deposited of record in the office of the registry of deeds, but another plan with a different description was prepared, omitting part of the land covered by the first description and including some land which the first description did not include. That plan was deposited in the registry office on the 13th of August, 1884, and the entry on the land was in September. It is admitted that the second description included the *locus in quo.*

It is argued that the effect of the deposit of the plan was, under section 10, to vest the lands in the crown, making the entry lawful and confirming the right of the plaintiff to her claim for compensation. I am inclined to think that that would be so if the section had been fully complied with, but I have not examined the statute closely enough to speak more decidedly on the point. It seems clear, however, that the plan and description must be of territory laid off by metes and bounds. It is upon " such lands " that the statutory conveyance operates, and the essential work on the ground is here wanting.

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The point made respecting the attempt at arbitration is that the plaintiff is estopped by her conduct from disputing the right of the crown to enter.

I confess my inability to perceive any particular in which the doctrine of estoppel has any application to the facts, but the change from the plot of land respecting which the tender was made and the arbitration initiated, to the different, or partly different, plot to which the dispute now relates, puts all question of the arbitration out of sight.

In a case very recently decided by the Court of Appeal, *in re Uxbridge and Rickmansworth Railway Co.* (1), there are some observations made by Lord Justice Cotton which are not inapplicable to one or two phases of the case before us. The private act of the Railway Company there required the subscription of a certain amount of capital before the company was authorised to exercise its compulsory powers ; in our case the order in council was necessary.

The capital there had not been subscribed, as here the order in council was not passed.

Nevertheless treaties had gone on with landowners not unlike what occurred with the present plaintiff.

The direct question to which the observations of the Lord Justice were addressed was whether or not the compulsory powers of the company had been exercised. Incidentally he had to touch upon the effect of the failure in the preliminary requisite of the subscription of capital, a question similar to that respecting the obligation of a railway company to file plans and surveys before exercising any statutory powers, on which the decision to a great extent turned in *Corporation of Parkdale* v. *West*,(2). The report of the Uxbridge Railway case is very long. The observations to which I refer are the following, and will be found at p. 563 ;

(1) 43 Ch. D. 536. (2) 12 App. Cas. 602.

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Then has there been an exercise of the compulsory powers? In my opinion there has not. It is very true the power to give notice to treat is included in that group of sections, in the Lands Clauses Act, headed "and with respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows:" Then there follows a direction that the promoters of the undertaking shall give a notice to treat in respect of the lands they require to take. But although the direction to give notice to treat is included within that group of clauses, there may never be any step taken as regards the exercise of compulsory powers: because if the company have not got their capital subscribed they cannot exercise any compulsory powers, and the notice to treat, as was the case in one instance here, may be merely a step taken towards an agreement with the landowner, in order to ascertain whether he is willing to make the contract with the railway company, the company saying: 'I want the land; will you sell it to us?' In my opinion it cannot be said that that alone is an exercise of compulsory powers. We are not deciding this for the first time, because it was decided in 1870, in *Guest* v. *Poole and Bournemouth Railway Company* (1), that notice to treat was not an exercise of compulsory powers. It was said that that was not necessary to the decision of the case—that the actual decision was only that the company could not give the notice; but all the judges (and they were judges of considerable authority), in their judgments say that giving the notice was not an exercise of compulsory powers. And in the events which have happened here service of the notice to treat is shown not to have been an exercise of the compulsory powers. It is very true it is a step towards the exercise of the compulsory powers; that is to say, the compulsory powers as regards the purchase of land cannot be exercised until the notice to treat has been given; but they cannot be exercised unless the capital has been subscribed. Subscribing the capital is not an exercise of the compulsory powers, although it is a necessary step towards the exercise of those powers; and in the same way a notice to treat is not an exercise of the compulsory powers, though it is a step that must be taken before the compulsory powers can be exercised and put in force.

I am of opinion that the appeal should be allowed with costs.

Appeal allowed with costs.

Solicitor for appellant: *T. J. Wallace.*

Solicitor for respondents: *Wallace Graham.*

(1) L. R. 5 C. P. 553.

HENRY W. RAPHAEL, *ès-qual.* (PLAINTIFF) ..... } APPELLANT;

AND

JAMES McFARLANE (DEFENDANT).....RESPONDENT.

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*Mar. 4.

*Dec. 9.

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

Commercial or Joint Stock company—Shares held "in trust" for minor—Sale of—Tutor—Arts. 297, 298 and 299 C. C.

Where a father, acting generally in the interests of his minor child, but without having been appointed tutor, and being indebted to the estate of his deceased wife, of whom the minor was sole heir, subscribed for certain shares in a commercial or joint stock company on behalf of the minor and caused the shares to be entered in the books of the company as held "in trust," this created a valid trust in favour of the minor without any acceptance by or on behalf of the minor being necessary.

Such shares could not be sold or disposed of without complying with the requirements of articles 297, 298 and 299 of the Civil Code; and a purchaser of the shares having full knowledge of the trust upon which the shares were held, although paying valuable consideration, was bound to account to the tutor subsequently appointed for the value of such shares.

The fact of the shares being entered in the books of the company and in the transfer as held "in trust" was sufficient of itself to show that the title of the seller was not absolute and to put the purchaser on enquiry as to the right to sell the shares. *Sweeny* v. *The Bank of Montreal* (12 Can. S.C.R. 661; 12 App. Cases 617) referred to and followed. Taschereau J. dessenting.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) (1) affirming a judgment of the Superior Court dismissing the appellant's action with costs.

This was an action brought by the appellant, as tutor

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

(1) M.L.R. 5 Q.B. 273.

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of the minor child, issue of the marriage of Patrick Thomas Gibb and the late Helen Raphael, to recover certain stock of the Major Manufacturing Company, held by Patrick Thomas Gibb in trust for the minor, and transferred, in breach of his trust, to respondent.

From 1879 to first February, 1884, Patrick Thomas Gibb and Edward J. Major were partners in the firm of Major & Gibb. Gibb married Miss Helen Raphael in January, 1880, after executing a marriage contract, of record, by which he made over to her and her heirs *inter alia*, a gift of ten thousand dollars, household furniture, and all the moneys coming to him as one of the residuary legatees of the Estate of the late Beniah Gibb. Gibb received from this Estate subsequent to his marriage various sums of money at different times. In November, 1880, Helen Raphael died intestate, leaving the minor child Helen Raphael Gibb, her sole heir-at-law. In the books of the firm of Major & Gibb a portion of the money therein invested ($1,315.67) was credited to Estate Gibb, the rest appears to have been included in a different account. This did not include the money that Gibb had received from the Beniah Gibb Estate subsequent to his marriage.

In February, 1884, the business of Major & Gibb was merged into a joint stock company, under the name of the Major Manufacturing Company, the partners in the former Company, for their capital, receiving an equivalent in shares of the Major Manufacturing Company. To effect this, the defendant Gibb subscribed for three allotments of stock:

1st. Thirteen shares in his name "in trust," representing $1,300.00.

2nd. Twenty-four shares in his own name, representing $2,400.00.

3rd. Three shares in his own name, representing $300.00.

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The thirteen shares were distinctly subscribed for "in trust." It was not made clear that the additional shares were subscribed for in trust, but subsequent to the subcription the words "in trust" appeared appended to the name.

In the ledger of the Major Manufacturing Company, this stock was credited at the formation of the Company in two accounts: "P. T. Gibb in trust," $2,700.00; and "Estate Gibb." $1,300.00.

Respondent was appointed Managing Director of the Company, which position he held from its formation till after the transfers.

On the 20th February, 1885, Gibb transferred three shares of this stock to respondent, and on the 16th March, 1885, he transferred to respondent the remaining thirty-seven shares, as follows:

"THE MAJOR MANUFACTURING CO., (LIMITED).

"Transfer No. 6.

"For value received from James McFarlane, I, P. T. Gibb, of Montreal, do hereby assign and transfer unto the said James McFarlane, three shares, amounting to the sum of three hundred dollars, in the capital stock of the Major Manufacturing Company (Limited), subject to the rules and regulations of the said Company.

"Witness my hand, at the Company's Office this twentieth day of February, eighteen hundred and eighty-five."

"Witness:" (Signed) "P. THOS. GIBB, in trust."
(Signed) "C. F. BINGHAM."

"I do hereby accept the foregoing transfer, this 20th day of February, 1885.

"Witness:" (Signed) "JAMES MCFARLANE."
(Signed) "C. F. BINGHAM."

"THE MAJOR MANUFACTURING CO. (LIMITED.)

"Transfer No. 7.

"For value received from James McFarlane, I, P. Thos.

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Gibb, of Montreal, do hereby assign and transfer unto the said James McFarlane, thirty-seven shares, amounting to the sum of three thousand seven hundred dollars, in the capital stock of the Major Manufacturing Company (Limited), subject to the rules and regulations of the said Company.

"Witness my hand, at the Company's Office, this 16th day of March, 1885."

"Witness:" (Signed) "P. THOS. GIBB, in trust."
(Signed) "C. F. BINGHAM."

"I do hereby accept the foregoing transfer this 16th day of March, 1885."

"Witness:" (Signed) "JAMES MCFARLANE."
(Signed) "C. F. BINGHAM."

The words "in trust" in the foregoing transfers were added by P. T. Gibb in answer to the following letter written by Mr. Macfarlane to Mr. Gibb.:—

Montreal, March 23rd, 1885.

To Mr. P. T. GIBB,

Care 646 Craig Street.

DEAR SIR,

We beg to call your attention to the fact that your transfers of forty shares of this Company's Capital Stock, recently made to James McFarlane, are slightly irregular, and in your interest it is well that you should call at as early an hour as convenient and make the necessary corrections to same.

Yours truly,

THE MAJOR MANUFACTURING COMPANY,
(Signed). JAMES MCFARLANE,
Man. Dir.

There was evidence given at the trial that the respondent, Vice-President and Manager of the Major Manufacturing Company inspected the books, and that he was aware that P. T. Gibb held the shares in trust for his child, and that the words "in trust" in 2nd

and 3rd allotments of stock had been added subsequently by Gibb, in order to protect the interest of his minor child.

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Davidson, Q. C., *& MacLellan* for the appellants.

Geoffrion Q. C., *and Smith* for the respondents.

Ritchie C.J.

SIR W. J. RITCHIE C. J.—It is clear that under art. 297, C.C., a tutor without authorization of the judge or prothonotary, granted on the advice of a family council, is not allowed to alienate or hypothecate the immoveable property of a minor, nor is he allowed to make over or transfer any capital sum belonging to the minor or his share and interest in any financial, commercial or manufacturing joint stock company. See also arts. 298 and 299 C. C.

The sale or transfer in this case was made without any such authorization. This brings the matter down to the simple question: Were the shares or any of them the property of the minor? I think there can be no doubt that the thirteen shares subscribed "in trust" were the property of the minor held by her tutor in trust for her. Although the words "in trust" were not added at the time of the subscription of the 37 shares, they were subsequently added in the books of the company, and stood, at the time of the transfer to defendants in such books, in the name of Patrick Thomas Gibb in trust. The transfer of the 16th of March, appears to have been made to plaintiff by the signature of Gibb without the addition of these words. On the 23rd, the defendant discovering this irregularity and necessarily knowing from the books and his position in the company that the shares were not held by Gibb in his own name, but in trust, addressed the following letter to Gibb:—

MONTREAL, 23rd March, 1885.

To MR. P. T. GIBB,

Care 646 Graig Street.

DEAR SIR,—We beg to call your attention to the fact that your

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transfers of forty shares of this company's capital stock, recently made to James McFarlane, are slightly irregular, and in your interest, it is well that you should call at as early an hour as convenient and make the necessary corrections to same.

Yours truly,
THE MAJOR MANUFACTURING CO.,
(Signed) JAMES MCFARLANE.
Man. Dir.

and the words "in trust" were accordingly added.

I think it is sufficiently clear that the amount of these shares was received by Gibb as part of the property belonging to the minor, and if it was, his adding the words "in trust" in the books of the company was just what he should have done, for it would have been most unjust that the property of the minor should have been taken by him to meet his individual liability.

Inasmuch, then, as I think it was sufficiently shown that this stock represented the property of the minor and was held by Gibb in trust for her and that the defendants took the transfer of it with knowledge that it was not held by Gibb as his own property, but "in trust," therefore the transfer was void, and the defendant must account for the shares to the plaintiff, the present tutor. I cannot distinguish this case from that of *Sweeny* v. *The Bank of Montreal* (1) decided in this court, and subsequently approved by the Privy Council (2).

I therefore think the appeal should be allowed.

FOURNIER J.—The present appellant (plaintiff in the court below) in his capacity of tutor to Helen Raphael Gibb, daughter of Patrick Thomas Gibb, one of the defendants in the court of first instance, brought an action against the respondent and the said Patrick Thomas Gibb for a decree to set aside and annul a transfer, made by the said defendant Patrick Thomas

(1) 12 Can. S. C. R. 661. (2) 12 App. Cas. 617.

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Gibb, to said respondent, Macfarlane, of forty shares in the capital stock of the joint stock company known as the "Major Manufacturing Company," and obtain the said shares for the said minor.

In January, 1880, Patrick Thomas Gibb married Helen Raphael, and by his contract of marriage he made over to her and her heirs *inter alia* a gift of ten thousand dollars, household furniture and all moneys coming to him as one of the residuary legatees of the estate of the late Beniah Gibb.

At the time of his marriage he received certain moneys from his wife, which he invested in the partnership firm of Major & Gibb, composed of himself and Edward J. Major. Subsequent to his marriage, he received certain other sums from the estate Beniah Gibb, as is evidenced by the receipts signed by him, and to be found in the case at pp. 76, 78 and 80, and which moneys were also invested in the firm of Major & Gibb.

In November, 1880, Helen Raphael died intestate, leaving the minor child, Helen Raphael Gibb, her sole heir-at-law.

In the books of the firm of Major & Gibb, a portion of the money therein invested ($1,315.67) was credited to Estate Gibb. This did not include the money Gibb had received from the Estate Beniah Gibb subsequent to his marriage.

After his wife's death Gibb did not take any steps to have a tutor appointed to his minor child, or to have an inventory made of his late wife's estate.

In February, 1884, the business of Major & Gibb was amalgamated with the business of the respondent, and formed into a joint stock company, under the name of the Major Manufacturing Company, the partners of the old firm receiving an equivalent in stock for their capital. To effect this, Gibb subscribed for three allotments of stock.

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1st. Thirteen shares in his own name "in trust," representing $1,300.

2nd. Twenty-four shares in his own name representing $2,400.

3rd. Three shares in his own name representing $300.

The thirteen shares were subscribed for "in trust." The subscription list and books of the company show that the twenty-four shares were also held "in trust," but whether the words "in trust" were added on subscribing or at a subsequent date is not very clearly proved. The subscription for the three shares never had the words "in trust" appended.

But in the ledger book of the company this stock was credited at the formation of the company in two accounts, "P. T. Gibb, in trust, $2,700," and "Estate Gibb, $1,300."

On the 20th February, 1885, one year after the respondent had commenced to act as Managing Director, Gibb transferred three shares of this stock to respondent, and on the 16th March, 1885, he transferred to respondent the remaining thirty-seven shares. Appellant contends that the shares which he claims by his action are the property of his pupil, and that they were held "in trust" for her by her father, who had no right or authority to sell the said shares, and that the sale of these shares was fraudulent and collusive.

The respondent alone contested the action, alleging in his pleas that the stock was acquired by him in good faith, that no trust attached to the stock, that the words "in trust" were added by Gibb to the subscription list after the allotment of the stock, for the purpose of preventing Gibb's creditors from attaching the stock as private stock, and that Gibb was the sole and absolute owner of the shares.

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The appellant in answer to respondent's pleas said that the stock was always held "in trust" and that the shares were so entered in the Company's books, and in the books of the firm of Major & Gibb ; that it was known to respondent that Gibb was not the owner, and that Gibb had no power or authority to sell the stock. Respondent filed no answer or replication to appellant's answers to pleas.

There is evidence that in her lifetime Mrs. Gibb loaned to her husband the sum of $1,315.67, which sum was credited to her in the books of the firm of Major & Gibb. Upon her death, there being no will, the property in that account belonged to her child, and it was credited in consequence in the books to "Estate Gibb." This same amount, less $15.67, was carried forward into the books of the Major Manufacturing Company. It is clear, therefore, that it was with these moneys that Gibb subscribed for the first thirteen shares, amounting to $1,300, moneys which he had received from his wife and which belonged to his child. The twenty-seven shares were also subscribed for with moneys received from the estate of Beniah Gibb, and these moneys having been transferred to Helen Raphael by Gibb's marriage contract, they became the property of the minor, the sole heir of Mrs. Helen Raphael Gibb. Having no right or property in the moneys, he invested them in this way for the benefit of his child. It is true he was not regularly appointed tutor to his daughter, but his management of the business of the minor assimilates his position to that of a quasi-tutor, or least to that of a *negotiorum gestor* (1). He had sufficient control over these moneys to administer and take charge of them and invest them in such a way as not to mix them with his own private funds. By placing them "in

(1) Art. 1043 C. C.

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trust" without disclosing the name of his *cestui que trust*, he nevertheless gave positive notice to all persons interested that these shares were not his property. He, himself, states in his evidence that he did so in order to protect the interest of his minor child. The statute authorizing "trusts" does not enact any special form in which it should be written in order to create a trust, it is sufficient that the intention of creating a trust is made manifest and clear. Upon this point of the case there can be no doubt, for we have the positive statement made by Gibb that he added the words "in trust" because, knowing he had private debts, he wanted these moneys to be free from seizure, as a portion of them did not belong to him. As to the portion belonging to the minor (and she was the real owner of the greater portion), nobody can reproach Gibb for having done his duty by placing them "in trust," for his object in doing so was both legal and honest. There can be no doubt, therefore, that his intention was clearly to create a trust, for of the three subscriptions he made, there is only one in his name without the addition of the words "in trust," and in the transfer he made, he gave notice that they were all held "in trust." When therefore he added the words "in trust" as he did when he subscribed for the thirteen shares ($1,300), it is clear he wanted to create a "trust," and by doing so, he did not in any way alter his mode of dealing with these moneys which belonged to his child and formed part of his mother's estate; he thereby publicly made known the quality and capacity in which he had always held the shares. He was simply a trustee; that is what is meant by the words "in trust." *Taylor* v. *Benham* (1):

> The ordinary sense of the term "in trust" is descriptive of a fiduciary estate or technical trust; and this sense ought to be retained

(1) 5 How. 233.

until the other sense is clearly established to be that intended by the testator. Every person who receives money to be paid to another, or to be applied to a particular purpose to which he does not apply it, is a trustee.

In *King* v. *Mitchell* (1), Mr. Justice Story said:—

The ordinary sense of the term "in trust" is descriptive of a fiduciary estate or technical trust.

The fact that Gibb represented his child's interests in the Major Manufacturing Company clearly appeared by the entries in the company's books, for it described his interest as follows: "P. T. Gibb in trust" and "Estate Gibb," and by the general knowledge that the directors and officers of the company had that the trust was for his child or his wife's estate, as Mr. Charles Bingham positively swears in his deposition.

Gibb did not contract in his own personal name for these shares with the company, but as representing the minor, and that with the knowledge of the respondent and therefore the contract which was executed was one between the company and the representative of the minor. This investment of the minor's moneys made with notice to the respondent could not be displaced. Gibb had no doubt the power and authority to act on her behalf in getting the stock, but once he had it, he could no longer deal with it as he pleased, but he lost control of it and became immediately subject to the provisions contained in articles 297 and 298 of the Civil Code, which prevent a tutor from making or transferring any shares belonging to minor in any joint stock company without the authority of a judge or prothonotary.

Not only is the transfer null as being in direct contravention with the terms of article 297 of our Code, but also because the respondent knew perfectly well that the shares in question did not belong to

(1) 8 Peters 326.

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Gibb, that they were the absolute property of his minor child, they having been secured with moneys belonging to her mother, and for which moneys Mrs. Raphael Gibb had been credited in the books of the firm of Major & Gibb. As to the shares amounting to $2,700—they also being credited to the minor under the entry of "P. T. Gibb in trust,"—it is clearly and positively proved that respondent had full knowledge of the fact that this entry was made in those books in order to show that they belonged to the minor. Respondent had, prior to the formation of the Major Manufacturing Company, closely examined the accounts of the partnership firm of Major & Gibb. He had also on several occasions looked into the account books and examined the financial standing of the Major Manufacturing Company, of which he was vice-president and managing director. Not only was he in a position to ascertain to whom the shares belonged, but there is abundant evidence that he had personal knowledge of the fact that they belonged to the minor child of P. T. Gibb, and had been subscribed for with her moneys. With the full knowledge of this fact he could not be ignorant of the provisions of the law which prohibit the transfer or alienation of shares belonging to a minor without the previous authorization of a judge, and therefore that the transfer he obtained without complying with this formality was absolutely null and void.

I do not think it is necessary for me to give here extracts from the evidence to show that respondent was well aware of the minor's rights and interests in these shares, for it is uncontroverted and positive. But there is one fact of record which dispels any doubt which might arise on this question, it is that respondent, having got a transfer of these shares signed by Gibb in his own name, without the words

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"in trust," got Gibb, on the 23rd March, 1885, to add the words "in trust" in order to show that it was *trust* property he was alienating. How can he now contend for a moment that these shares were not shares *in trust?* It would be acting in *bad faith* and claiming contrary to his own title.

It is evident that having full knowledge that the shares were the minor's property, he should not have accepted a transfer of them unless Gibb had previously got authority from a judge to sell them. In any event there was sufficient to show by the words "in trust" that Gibb's title was not absolute and it was for respondent to inquire whether he had authority to sell as it was decided by this court in the case of *Sweeny* v. *Bank of Montreal.* (1.)

Notwithstanding the contrary opinion which has been expressed, I think the principles of law applicable to the facts of this case are the principles of law which we thought should be applied in the case *Sweeny* v. *The Bank of Montreal* (1).

It has been attempted to distinguish the two cases by stating that in the Sweeny case the *cestui que trust* had approved of and accepted the investment made of the moneys whilst the minor in this case could not accept the investment. The plea of minority cannot avail the respondent. It is true, that Gibb, the father of the minor child, was not her tutor; but the evidence clearly establishes the fact that he had assumed the functions of tutor and had during the whole of this transaction acted for and on behalf of his minor child. In such a case the law imposes on the party who assumes the functions of a tutor, the same responsibility as if he were duly appointed. He is what we call a quasi-tutor or protutor. Having acted as such and done an act to which the law imposes the same re-

(1) 12 Can. S.C.R. 661.

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sponsibilities as if it had been done by a tutor, he cannot afterwards act otherwise than as a tutor would, *i. e.*, it is impossible for him to dispose of these shares once acquired otherwise than by conforming to the formalities imposed on a tutor by articles 297-298, Civil Code.

In any case Gibb acted as the *negotiorum gestor* of his minor child, and by Art. 1043 C.C. he is responsible for his administration. It is true that at her majority the child might repudiate the investment and make her father responsible for any loss the investment might cause to her. But until then there is a subsisting contract which must have its whole effect.

These formalities not having been complied with the sale and transfer of these shares is null, and the appellant should be condemned to pay their value to the appellant in his capacity of tutor.

I am of opinion that the appeal should be allowed with costs.

TASCHEREAU J.—I would dismiss this appeal. There is no trust whatever disclosed by the evidence in this case, and I fully agree in the finding of the two courts below on that question of fact. As to the three shares, there is no room for controversy. They were subscribed for, and always remained in Gibb's own name. The twenty-four shares were also only subscribed for in Gibb's own name. Subsequently, however, he added to them the words "in trust." His reason for doing so, he says, was to secure them from his creditors. Now, this fraudulent contrivance cannot have changed the ownership of these shares in favor of his child, or of any one else. The two courts as to these twenty-four shares and the three shares were unanimous in the dismissal of the action. There were, however, dissenting opinions in the Court

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of Appeal as to the other thirteen shares, but I think the majority were right. These shares were subscribed for in trust, it is true, but Gibb was never a trustee. He was simply a debtor of his wife first, and later of his child, and these shares so subscribed for could never be considered as a payment of his indebtedness. They were an offer of payment, a "pollicitation" which could always be withdrawn till acceptance. The company might have became altogether insolvent, and every cent on these shares a dead loss, and yet Gibb would have continued to remain his child's debtor. The loss would have been for him and for him alone. And this is so as to the other twenty-seven shares, as well as for these thirteen.

GWYNNE J.—I concurred with Fournier J.—that the appeal should be allowed.

PATTERSON J.—I am of opinion that we should allow the appeal, not only in respect of the thirteen shares for which the two dissenting judges in the court below thought the plaintiff entitled to succeed, but for the whole forty shares.

Gibb had borrowed from his wife $1,315.67. That I understand to have been in 1880, the year after the firm of Major & Gibb was formed. The money was credited in the books of the firm to Mrs. Gibb. She died in November 1880, and the account afterwards was headed "Estate Helen Gibb," the name being that of the infant daughter who became entitled in succession to her mother.

Gibb had another account in the ledger of his firm in his own name, which showed $2,700, or thereabouts at his credit as capital in the business.

By his marriage contract he convenanted to settle on his wife $10,000. She was to have the interest of

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that sum during her life and at her decease the principal was to belong to her child or children; and he also made over to her whatever amount should be received by him as one of the residuary legatees under the will of the late Beniah Gibb.

He did receive as residuary legatee certain sums, all or part of which he put into the business. Those sums he says were $1,583, and they together with other moneys of his own made up the $2,700. He did not pay over the $10,000 by any direct payment.

That was the position of things in 1884, when the defendant McFarlane united his business with that of Major & Gibb, and the joint stock company called the Major Manufacturing Company was formed.

The capital of the two partners in the firm of Major & Gibb was converted into shares in the capital stock of the new company.

The shares were $100 each.

Gibb subscribed for thirteen shares in the name "Estate Gibb," which represented the $1,315.67, at the credit of the minor, less $15.67, which was paid him in cash to make even money.

He also subscribed in his own name as P. T. Gibb, for two allotments of twenty-four shares and three shares, representing $2,400 and $300. I don't think his reason for separating those two subscriptions is explained.

Soon after the subscribing of these shares, and it would seem within a very few days, Gibb wrote the words "in trust" in the stock book after the $2,400 subscription, but not after that for $300, and he caused the same note "in trust" to be made in the ledger of the company against the whole twenty-seven shares.

His object in doing this is twice spoken of by him in his evidence. When examined on the 21st of October, 1887, he stated to counsel for the defendant

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that when the words "in trust" were added he had many private creditors, but was not afraid at that time that they might attach the stock for his debts, and that the money he owed was not more than he expected to be able to pay; and again on the 23rd of January, 1888, he said the words "in trust" were added in the following way: He was owing some money outside of his business, and he added the words so that in case any one came down on him they could not touch this money as a portion of it did not belong to him. From these references to creditors it seems to have been considered by Mr. Justice Bossé, and I suppose by the other learned judges in the Queen's Bench, that the transaction was fraudulent as against the creditors of Gibb. I think too much effect was given to what was said. No creditor is stated to have been interfered with. It is not at once apparent how the marking the shares in trust would have affected creditors more than selling them to the defendant. But the reason given by Gibb that the fund did not altogether belong to him was quite consistent with what we learn from the evidence. I think, however, that the plaintiff's right may be put on stronger ground, at all events as to the amount beyond the sum of $1,583 which came from the estate of Beniah Gibb.

Gibb was debtor to the minor in the sum just mentioned and in the further sum of $10,000. I do not understand why he was not at liberty to appropriate the twenty-seven shares towards payment of his debt. It is true that he did not express in the books the name of the person interested in the trust, but he tells us that he had the protection of the plaintiff in view. He may have thought in the first place of protecting her in respect of the Beniah Gibb money, if that is the proper understanding of the answers to which I have adverted, but he was her debtor in respect of the

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$10,000 to the same extent. Her claim to the whole stood on the same footing under the marriage contract of her mother.

Nor do I perceive the importance, under all the circumstances of the omission to note in the stock list when the subscription for the twenty-four shares took place, the word "in trust" which were afterwards inserted in the list as well as in the ledger, or the insertion of those words against the three shares in the ledger alone and not in the stock-list.

If the view I have intimated as to the right to designate those twenty-seven shares as held in trust for the minor who was creditor of her father is correct, the time when they were so designated cannot be material so long as it was before the shares were dealt with.

The use of his individual name in the subscription could not disable Gibb from afterwards devoting the shares to the payment of his creditor.

A very important fact in the discussion is of course the fact of notice to the purchaser of the designation of the shares *in trust*. On that point the evidence was regarded as defective in the court of first instance with regard to all the shares, and I think, by all the learned judges who heard the case in the Queen's Bench with regard to the twenty-seven shares.

It is with diffidence that I venture to express a different apprehension of the effect of the evidence, but having regard to the facts that the purchaser was managing director of the company; that the evidence of his acquaintance with the contents of the books is as direct as it well could be, short of actual demonstration, and agrees with what was his duty as managing director; and that he wrote at the suggestion of the book-keeper asking Gibb to come and correct an irregularity in the transfer book of the forty shares, the irregularity being the omission, which Gibb promptly

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supplied, of the words " in trust "; the inference of fact that he had full knowledge, seems to me, to be irresistible.

Mr. Justice Cross discussed this question of notice in reference to the thirteen shares, but otherwise it does not seem to have been dealt with in the Court of Queen's Bench, where the opinion of Mr. Justice Tait was probably adopted. The point made in the Queen's Bench was principally that the minor could not become the owner of the shares unless they were accepted in her name by some one authorised to act for her. As expressed by Mr. Justice Bossé:—

> Or cette créance de la fille contre la société Major & Gibb n'a pu par la seule volonté du père, même s'il était à cette date tuteur de son enfant, être convertie en la propriété d'actions dans la nouvelle compagnie par actions. Il fallait quelqu'un d'autorisé pour agir ainsi au nom de la mineure, et disposer ainsi de son bien. Le père ne l'était pas, et si nous prenons ce qu'il nous dit pour vrai et que nous admettions qu'en réalité ces treize actions étaient souscrites pour sa fille, il n'y avait pas là contrat entre lui et elle. Il y avait bien offre de sa part, mais la mineure n'avait pas accepté et personne ne l'avait fait pour elle. C'était tout au plus une simple manifestation de la volonté du débiteur telle qu'elle existait alors, mais qui pouvait être révoquée ou retirée par lui en tout temps avant acceptation par l'enfant. Le contrat ne devenait parfait que si l'enfant devenue majeure, ou son tuteur pour elle durant sa minorité, trouvait la transaction avantageuse et l'acceptait. Dans le cas contraire ils pouvaient la répudier, et avant l'acceptation le *trust* n'était pas complet.

This is said with special reference to the thirteen shares, but applies to all the others.

The proposition seems to me to be fallacious and opposed to the doctrine acted on in this court in *Bank of Montreal* v. *Sweeny* (1).

It may be that the daughter was not bound to accept the shares, and could have insisted, as against her father, on payment of her money, but she was at liberty to adopt the transaction and accept the shares. Gifts

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inter vivos, by article 787 of the Civil Code, do not bind the donor nor produce any effect until after they are accepted, but I do not understand the principles which govern gifts to apply to this transaction. It was not a gift that Gibb was making. His object was to apply the property in satisfaction, *pro tanto*, of a debt. For that purpose he earmarked the shares as the property of his daughter and creditor. That had always been so with regard to the $1,300 and it was so also with regard to the $2,700 from a date earlier than the transaction with the defendant. The defendant took the shares thus earmarked, and if not absolutely the property of the minor, at least designated for her acceptance in case she elected to accept them. I attach much significance in support of this view, to the action of the defendant in requiring the words "in trust" to appear in the transfer to him. That was not the declaration of a new trust on which the defendant was to hold the shares. For that purpose he would not have required the intervention of Gibb. The addition of the words was made because the book-keeper called attention to the fact that the transfer, as first executed, did not recognise the title of Gibb as being merely the limited ownership of a trustee.

On these general grounds and on the authority of *The Bank of Montreal* v. *Sweeny* (1), I concur in allowing the appeal.

Appeal allowed with costs

Solicitors for appellant: *MacMaster & McGibbon.*

Solicitors for respondent: *MacLaren, Leet, Smith & Smith.*

(1) 12 Can. S. C. R. 661.

WILLIAM MACDOUGALL.....APPELLANT; 1890

AND

*June 2.
*Nov. 10.

THE LAW SOCIETY OF UPPER CANADA ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Solicitor practising without certificate—Allowing name to appear as a member of firm—Estoppel.

M., a solicitor who had not taken out the certificate entitling him to practice in the Ontario courts, allowed his name to appear in newspaper advertisements and on professional cards and letter heads as a member of a firm in active practice; he was not, in fact, a member of the firm, receiving none of its profits and paying none of its expenses, and the firm did not appear as solicitors of record in any of the proceedings in their professional business. The Law Society took proceedings against M. to recover the penalties imposed on solicitors practising without certificate, in which it was shown that the name of the firm was indorsed on certain papers filed of record in suits carried on by the firm.

Held, reversing the judgment of the court below, that M. did not "practise as a solicitor" within the meaning of the act imposing the penalties (R. S. O. (1877) c. 140) and that he was not estopped, by permitting his name to appear as a member of a firm of practising solicitors, from showing that he was not such a member in fact.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) which suspended the appellant from practice as a solicitor and imposed a penalty of $40 for practising without a certificate.

The solicitor of the Law Society moved the Queen's Bench Division of the Divisional Court for an order

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

(1) 15 Ont. App. R 150. (2) 13 O. R. 204.

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suspending the appellant from practice as a solicitor until he paid the fees due to the society and a penalty of $40. The affidavit read in support of the motion stated that appellant practised during the year 1885 as senior member of the firm of Macdougall, Macdougall & Belcourt, and returns were produced from officers of the court in Ottawa and L'Orignal showing the appellant's name among the solicitors practising in those courts for the said year.

The affidavit of the appellant in opposing the motion, and the evidence of J. M. Macdougall, were to the effect that while appellant's name appeared on the professional card of the firm, on the office sign, and in the advertisements, appellant had nothing to do with the firm business, received no share of its profits, and that his name was not used in any process issued or proceedings in suits carried on by the firm, all of which was done in the name of N. A. Belcourt; that the appellant had his own business as consulting barrister with which the firm had nothing to do; and that any solicitor's business offered to appellant was handed over to the other parties, who took all the profits resulting therefrom.

The professional card of Macdougall, Macdougall & Belcourt was put in evidence and was as follows:—

"Macdougall, Macdougall & Belcourt, Avocats, Procureurs, &c., Scottish Ontario Chambers, Ottawa, Ontario.

HON. WM. MACDOUGALL, C. R.,
FRANK M. MACDOUGALL,
N. A. BELCOURT, L. L. M.,
Notaries Public.

Agents pour les affaires de la Cour Suprême, du Parlement et des Départements du Canada, &c.

Les affaires de la Province de Québec recevront l'attention personnelle de Mr. Belcourt, membre du

Barreau d'Ontario et de celui de Québec, et Commissaire pour cette dernière Province."

The Queen's Bench Division held, and its decision was affirmed by the Court of Appeal, that the appellant was practising as a solicitor within the meaning of section 21 of "The Act respecting Solicitors," R. S. O. (1877) ch. 140, which section is as follows :—

Sec. 21 : "If any attorney or solicitor practises in any of the said courts, or in the county courts, without such certificate in each and any year of his practice, he shall be liable to be suspended from practice for any such offence in all of such courts for a period of not less than three nor more than six months, and to continue so suspended until his fee upon the certificate for the year in which he so practised without certificate is, together with the penalty of $40, paid to the treasurer of the Law Society, and the proceedings for such suspension may be taken in any of the said Superior Courts."

Belcourt for the appellant. The statute is not violated by an uncertificated person advertising himself as a solicitor ; he must practise as a solicitor in the High Court or in a County Court.

Practising as a solicitor in this section means doing some act, as issuing a writ, entering an appearance or doing some other act in one's own name usually performed by a solicitor. See *Law Society* v. *Waterloo* (1) ; *Barnard* v. *Gostling* (2) ; *Davis* v. *Edmonson* (3).

One act of practice would not be sufficient. *Re Horton* (4).

On the construction of the statute, the fees being for revenue purposes only it should be stringently construed. *Graff* v. *Evans* (5), *Ex parte Swift* (6),

(1) 8 App. Cas. 407.
(2) 1 B. & P. (N. R.) 245.
(3) 3 B. & P. 382.
(4) 8 Q. B. D. 434.
(5) 8 Q. B. D. 377.
(6) 3 Dowl. 636.

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Gordon v. *Dalzell* (1), *Ford* v. *Webb* (2), *Stephenson* v. *Higginson* (3).

Marsh Q. C. for the respondents. If the partnership had been a true one the appellant would, clearly, have come within the terms of sec. 20 of the act. But the fact that there was no real partnership is immaterial. Our statute prohibits practising by uncertificated persons without the qualification in the English Act by the words "for fee or reward."

The statute is disciplinary as well as for purposes of revenue, and looks to the protection of the public.

Edmonson v. *Davis* (4), and *Dockings* v. *Vickery* (5), were cited.

SIR W. J. RITCHIE C.J.—Mr. Macdougall swears that:

In or about the month of November, A.D. 1884, my son, F. M. Macdougall, a barrister and solicitor in the Province of Ontario, entered into partnership with N. A. Belcourt, a barrister and solicitor in the said Province, and the said partnership or firm have since practised and are now practising as barristers and solicitors in the city of Ottawa.

That I have never read, or been made aware of the particular terms or stipulations of the said partnership agreement and have not now, and never had any pecuniary or other interest in the same.

I have not for many years past practised as an attorney or solicitor in the courts of Ontario and have no desire or intention to do so.

Mr. Frank Macdougall is the only witness called on behalf of the Law Society. He positively swears that the firm of Macdougall, Macdougall & Belcourt consisted of Frank Macdougall & Napoleon Belcourt; that the Hon. William MacDougall had nothing whatever to do with the firm; that he had nothing to to with the firm's business at all; that the profits of the business are shared between Mr. Belcourt and himself; that William Macdougall's name appeared on the business card of

(1) 15 Beav. 351.
(2) 7 Moore 54.
(3) 3 H. L. Cas. 638.
(4) 4 Esp. 14.
(5) 46 L.T.N.S. 139.

the firm and on the letter headings, but he did not practice at all; that when they required counsel they give him a preference. And he also testifies as follows :

Q.—Does it (appellant's name) appear in any advertisement? A.—Yes, I think so.

Q.—And on some papers filed in the courts? A.—I think not. I am prepared to say that no writ has ever been issued by the firm of Macdougall, Macdougall & Belcourt. The writs are issued, and have always been issued in the name of Belcourt, so far as it is possible for me to say. That is the usual course of procedure.

Q.—I suppose the papers are endorsed in the firm's name? A.—Yes, on the outside of the papers the firm style is used in endorsation.

Q.—And that is the way in which the business is carried on? A.—Yes.

Q.—Have you William Macdougall's permission to use it in this way? A.—In this instance, no.

Q.—It was ratified by him? A.—Acquiesced by him.

Q.—He has always been aware of it? A.—Undoubtedly; it is painted on the windows.

Q.—Stuck on the sign? A.—His name personally doesn't appear; but the style of the firm does; there is a sign at the front of the office with the firm name, and Mr. Macdougall's own name appears in that with that of myself and Belcourt.

Mr. Frank Macdougall made the following statement.

At the time of the partnership there was no intention that he should have any interest or any connection good, bad or indifferent with the firm; Mr. Macdougall has never done any business for the firm except as counsel, and has nothing whatever to do with the ordinary work of the office even when present; he has a business of his own in which the firm has no interest or connection whatever.

BY MR. READ :—

Q.—What is that business of his own? A.—Advisory counsel for the Northwest Telegraph Company, counsel business exclusively; he has a separate business as advising counsel, and otherwise with which we have no connection; and furthermore we have received from him business to be done by our firm which he, as a barrister, could not do —acting as a solicitor.

Q.—How much business? A.—In two years past three or four cases.

Q.—And did you give him any share in the profits of that business? A.—No.

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The writs having been issued in the name of Belcourt the subsequent proceedings would necessarily be carried on in his name. I think the mere endorsement of the name of the firm on the back of papers is no part of the proceedings in a cause, and consequently such an endorsement cannot be considered a practising in the courts. The appellant's name was not used in issuing the writs, and except this endorsement I cannot discover that his name was used in any proceedings in any court. So far as there is any evidence all the proceedings in the courts were in the name of Mr. Belcourt, a duly qualified solicitor; therefore, I think that the evidence that the appellant practised entirely fails.

This being clearly a penal enactment no penalty should be inflicted under it unless the case is clearly within the spirit and letter of the statute imposing the penalty. I think the penal clauses of the act, R.S.O., (1877) ch. 140, do not apply to the appellant; that he is brought neither within the letter nor the spirit of the act and, therefore, no penalty has been incurred.

I entirely agree with Chief Justice Armour and Mr. Justice Burton in the views they have taken of this case, and do not think it necessary to add any thing to what they have so clearly expressed.

I think this appeal should be allowed with costs in this court and in the courts below.

STRONG J.—This was originally an application to the Queen's Bench Division on behalf of the Law Society for an order that the present appellant, the Hon. William Macdougall, a solicitor of the Supreme Court of Ontario, should be suspended from practice for a period of three months and continue suspended until the fees due by him to the Law Society and a penalty of $40 should be paid.

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In support of the motion an affidavit of Mr. Walter Read, the solicitor of the Law Society, was filed as well as the deposition of Mr. Frank Macdougall, taken before an examiner, and in answer to the motion the appellant's own affidavit was read. The undisputed facts appearing from this evidence are as follows:

In or about the month of November, 1884, the appellant's son, Mr. Frank Macdougall, a barrister and solicitor, duly called to the bar and admitted to practise in the Province of Ontario, entered into partnership with Mr. N. A. Belcourt, also a barrister and solicitor for the same province.

There were no written articles of partnership but, as Mr. Frank Macdougall states in his deposition, there was a distinct verbal agreement of which an unsigned written memorandum was made. By the terms of this agreement the partnership business was to be carried on by, and the profits divided exclusively between, Mr. Frank Macdougall and Mr. Belcourt.

The name and style adopted by this firm was "Macdougall, Macdougall & Belcourt," and it is admitted that by the first name of Macdougall the present appellant was meant to be indicated. A printed business card in the French language used by the firm was produced, and upon it the following names appear, viz.: Hon. Wm. Macdougall, C. R., Frank M. Macdougall and N. A. Belcourt, L. L. M. The before-mentioned style of the firm was also painted upon the office window and on a sign affixed in front of the office, and appeared in newspaper advertisements. It is sworn that the appellant never interfered in or took any part in the business of the firm, and never derived any benefit from it, and it is not pretended that he in any way contributed to its expenses and disbursements. The appellant used for his own private business affairs a room in the offices of the firm, which

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was assigned to him by the partners in consideration of certain telephone accommodation which he enjoyed as counsel for a telegraph company, and which he permitted the firm to use for their own convenience. Mr. Frank Macdougall says he had no express consent or permission from his father to use his name in the style of the firm, but he says the appellant knew it was used in the way mentioned and acquiesced in it.

It is distinctly stated by Mr. Frank Macdougall in his deposition that the appellant's name in no way appeared in any of the legal proceedings carried on by the firm, save in so far as that "on the outside of the papers the firm's style was used in endorsation." Further, Mr. F. Macdougall says he thinks the firm's name was not used in papers filed in the courts, and he adds :

I am prepared to say that no writ has ever been issued by the firm of Macdougall, Macdougall & Belcourt. The writs are issued and have always been issued in the name of Belcourt so far as it is possible for me to say. That is the usual course of procedure.

Mr. Frank Macdougall also in the course of his examination made the following voluntary statement :

At the close of the partnership there was no intention that he (the appellant) should have any interest or any connection, good, bad or indifferent, with the firm. Mr. Macdougall has never done any business for the firm except as counsel, and has nothing whatever to do with the ordinary work of the office even when present ; he has a business of his own in which the firm has no interest or connection whatever.

It is admitted that the appellant did not take out any certificate as a solicitor and attorney for the year 1885.

The statutory provisions applicable are contained in the Revised Statutes of Ontario, (1877,) cap. 140, and are as follows :

Section 16, sub-section 1. Each practising attorney and solicitor shall obtain from the Secretary of the Law Society annually, before the

last day of Michaelmas Term, a certificate under the seal of said Society, stating the Superior Courts in which he is practising attorney or solicitor.

Sub-section 4. The Law Society shall determine what fees shall be payable for such certificates.

Section 20. If any attorney or solicitor, or any member of any firm of attorneys or solicitors, either in his own name or in the name of any member of his firm, practises in any courts of Queen's Bench, Chancery, or Common Pleas, without such certificate being taken out by such attorney or solicitor, and by each member of his firm, he shall forfeit the sum of $40, which forfeiture shall be paid to the Treasurer of the Law Society for the uses thereof, and may be recovered in any of the said courts.

Sec. 21. If any attorney or solicitor practises in any of the said courts, or in the county courts, without such certificate in each year of his practice he shall be liable to be suspended from practice for any such offence in all of such courts for a period of not less than three nor more than six months, and to continue so suspended until his fee upon the certificate for the year in which he so practised without certificate is, together with the penalty of $40, paid to the treasurer of the Law Society, and the proceedings for such suspension may be taken in any of the said Superior Courts.

The certificate required by the 16th section is clearly for revenue purposes ; in other words, it is a tax imposed upon solicitors who practise in the courts for the benefit of the Law Society by which the funds so raised are to be devoted to purposes which are no doubt highly beneficial to the profession of the law, and in which the public also are indirectly interested. These clauses are, therefore, to be construed strictly for the double reason that they are enactments for fiscal purposes, and also because they impose penalties and forfeitures.

The inquiry upon which the decision of this appeal must depend is, therefore, whether the evidence establishes that the Honorable William Macdougall practised in any of the courts without having taken out a certificate.

What the effect of an uncertificated solicitor sharing profits with one duly qualified might be, under this

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statute, is a case we are not called upon to consider, inasmuch as it is distinctly proved and not disputed that the appellant received no part of the profits or emoluments of the firm or pecuniary advantage of any kind from its practice. It would, however, be impossible to hold such an arrangement by itself to be illegal practising by the unqualified person in the face of decisions by which it has been held perfectly legal to agree that a share of profits shall be paid to the widow of a deceased partner, or even to an unqualified solicitor, provided such person does not participate in the profits in consideration of his acting or taking proceedings as a solicitor. *Scott* v. *Miller* (1); *Candler* v. *Candler* (2); *Sterry* v. *Clifton* (3); Lindley on Partnership.

The only way in which I can conceive a solicitor can be said to practise as such in the courts is by exercising the functions of a solicitor, by taking on behalf of a client some of the regular steps of procedure in an action or some other judicial proceeding.

Can it then be said that Mr. Macdougall, by permitting his name to be used in the manner disclosed by the evidence, practised in either of the courts (or divisions) of Queen's Bench, Common Pleas or Chancery?

I am of opinion that allowing his name to be used in the business card, in newspaper advertisements and on the office signs did not, upon any reasonable principle of construction which can be applied to the statute, constitute a practising. As I have before said the English cases show that sharing the profits of a solicitor's business with a disqualified person is not illegal when that person does not so share the profits in consideration of his acting as a solicitor. Then the use of the

(1) Johns. 220.
(2) Jac. 225.
(3) 9 C. B. 110.
(4) 5th Ed. p. 100.

name of a disqualified person in the style of the firm, as in the case of a former partner who has retired from the practice of the profession, cannot possibly be considered by itself as a practising as a solicitor; that practice is common in England, and prevails not merely in the case of a retired partner but in the case of deceased partners as well. The new business is carried on in the name of the old firm for the sake of the goodwill associated with it. In short the name of the firm is nothing; the real question is: Did the disqualified person perform functions which the law says he shall not perform without having taken out a certificate? In the case reported in 4 Esp. relied on in both the Queen's Bench Division and the Court of Appeal, it is not for a moment pretended that the use of the name of the defendant in the style of the firm, nor the holding himself out generally as a practitioner by announcing himself as a partner, amounted to practising, but what was held to constitute the illegal act was that he had held himself out to the world as the attorney in a particular cause. In the present case the firm might never for the whole year which would have been covered by the certificate, the want of which is complained of, though carrying on a large business in other respects, have been once called upon to act as solicitors in any of the courts; how, in that case, would it have been possible to say they practised in the courts within the meaning of the 20th section of this act?

That there is nothing wrong in itself in qualified solicitors adopting as the name of their firms a style not exclusively composed of the proper names of actual acting partners is so apparent from the common practice which prevails as to it that no one would think of impugning the practice. An instance of it referred to in the judgment of Mr. Justice Burton is

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familiar to all of us who come from the Ontario Bar. The late Hon. Robert Baldwin, a distinguished attorney general of that province who also for a long time filled the office of treasurer of the Law Society, and who was a scrupulous observer of professional propriety, for years carried on practice under the name of Baldwin & Son, long after the death of his father Dr. Baldwin who was indicated by the first name in the style of the firm; and if I do not mistake, the late learned Chief Justice of the Queen's Bench Division, Sir Adam Wilson, together with his partners, also for some years practised under the same name and style of Baldwin & Son.

These instances do not of course amount to anything like authority, but they do show very strongly what the opinion of men of high honor and eminent members of the profession as to the proper construction of the statute has been. I can see nothing, therefore, in the advertising and public announcement of the firm's name which amounts to practising within the meaning of the statute.

It remains to consider whether the endorsement of the partnership name on papers in actions actually instituted, and in other proceedings taken in the courts, is to be deemed a practising by the appellant. Assuming for the moment that this is the case I should, if we were driven to decide the point, feel bound to hold that the evidence before us was insufficient to warrant an order for suspension or a conviction for the penalty. We have no proof of any actual instance in which papers were so endorsed, but we have only the general statement of Mr. Frank Macdougall which ought not, I think, to be considered sufficient in a penal proceeding like the present; however, as it appears that the case can be disposed of on a broader ground, one which will afford a more

complete vindication of the appellant, it is fairer to him not to rest the judgment on this point.

Had it appeared that the actual proceedings in the courts had been taken in the name of the firm I should have had grave doubts if this would not have brought the appellant within the statute, though even in that case much might, I think, have been said, which we need not now discuss, in his favor. It is, however, stated by Mr. Frank Macdougall that in the formal proceedings in the courts Mr. Belcourt's name has always been used as the attorney of record, and not that of the firm. It is true that he only speaks of cases in which the firm have acted for plaintiffs and does not, in terms, allude to cases in which they have appeared as attorneys for the defence, but I understand him to speak generally, and at all events no instance was adduced by the respondents in which the firm appeared or took any proceedings as attorney of record for defendants.

This being so, are we to consider the mere endorsement of the writ with the style of the firm to amount to a practising as a solicitor by the appellant? I can see in such an endorsement nothing more than an announcement that a firm, carrying on its business with this name, were acting for the party on whose papers the announcement appeared, and nothing implying that every person whose name appeared in the style of the firm was personally engaged in conducting the proceedings. If the firm's name had been used in the formal proceedings, as for instance, if the præcipe for a writ had been signed, or an appearance entered, in the name of the firm that might possibly have been regarded as an actual exercise of professional functions by every one of the members whose names thus appeared on the files of the court.

As regards authority I entirely agree with Chief

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Justice Armour and Mr. Justice Burton that *Edmunson* v. *Davis* (1) is distinguishable. There the language of the statute was different and, as far as we can gather from the somewhat vague report, the defendant in that case, the unqualified attorney, actually appeared as one of the attorneys of record in the action in which it was alleged he had acted as an attorney. But even if the language of the statute applicable in that case had been identical with that of the 20th and 21st sections of the present statute, and even though the acts relied on as being in breach of the statute had been precisely similar to those here, I should, considering that the decision was a mere *nisi prius* ruling, reported in a book of so little authority as Espinasse, (2) have declined to follow that case, and I should have persisted in what I have already declared to be my own opinion of the proper construction and application of this statute.

For the foregoing reasons, which are the same as those stated in the judgments of Mr. Justice Burton and Chief Justice Armour, I am of opinion that this appeal should be allowed and that an order refusing the motion should be substituted for that made by the Queen's Bench Division, with costs to the appellant in all the courts.

GWYNNE J.—The question raised by this appeal is whether the appellant is or is not, under the circumstances of the case, a person who is subjected to the penalties of ch. 140 of the Revised Statutes of Ontario, 1877, intituled "An Act respecting Attorneys at Law." By the 1st section of the act it is enacted that—

Unless admitted, and enrolled, and duly qualified to act as an

(1) 4 Esp. 14.

(2) See as to this Lord Denman in *Small* v. *Nairne*, 13 Q. B. 844, and *Lady Wenman* v. *Mackenzie*, 5 E. and B. 453 per Coleridge J. approving what Lord Denman had said.

attorney or solicitor, no person shall act as attorney or solicitor in any superior or inferior court of civil or criminal jurisdiction in law or equity, or before any justice of the peace, or as such sue out any writ or process, or commence, carry on, solicit or defend, any action, suit or proceedings, in the name of any other person, or in his own name.

By the 16th section—

Each *practising* attorney and solicitor shall obtain from the Secretary of the Law Society annually before the last day of Michaelmas Term, a certificate under the seal of the said Society, stating the Superior Courts in which he is a *practising* attorney or solicitor.

By the 20th section—

If any attorney or solicitor, or any member of any firm of attorneys or solicitors, either in his own name, or in the name of any member of his firm, practises in any of the courts of the Queen's Bench, Chancery, or Common Pleas, without such certificate being taken out by such attorney or solicitor, and by each member of his firm, he shall forfeit the sum of forty dollars, which forfeiture shall be paid to the Treasurer of the Law Society, and may be recovered in any of the said courts.

By the 21st section—

If any attorney or solicitor *practises* in *any* of the *said courts*, of Queen's Bench, Chancery, or Common Pleas, or in the County Courts, respectively, without such certificate, in each or any year of his practice, he shall be liable to be suspended from practice for any such offence in all of such courts for a period of not less than three nor more than six months, and to continue so suspended until the fee upon his certificate for the year in which he so practised without certificate is together with a penalty of forty dollars paid to the Treasurer of the Law Society, and the proceedings for such suspension may be taken in any of the said Superior Courts, and upon the vote being made absolute for such suspension in any of the said Superior Courts, such attorney or solicitor shall be suspended from practice in the other courts in the same manner and for the same period as if the rule had been made absolute also in each of the said courts.

The question before us arises under this 21st section of the act. Upon a motion by the respondents to the Divisional Court of Queen's Bench for Ontario that the appellant should be suspended from practice for a period of three months and continue suspended until

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certain fees claimed by the society to be due by the appellant to them and a penalty of forty dollars should be paid, that court, Mr. Justice Armour dissenting, made an order whereby it was ordered that the said appellant be suspended from practice for a period of three months, and continue so suspended until the fees due by him to the Law Society, together with a fine of forty dollars, be paid, and that the appellant should also pay the costs of the said application to be taxed.

Upon appeal from this order by the appellant his appeal was dismissed and the order affirmed by the Court of Appeal for Ontario, Mr. Justice Burton dissenting.

There is no dispute as to the facts of the case which briefly are as follows: The appellant had been a duly qualified attorney and solicitor and barrister, practising in the Ontario courts, but prior to the year 1885 he wholly ceased practising as an attorney and solicitor, and confined his practice to the profession of barrister and counsel only, and for this reason he did not take out any certificate as a practising attorney and solicitor for the year 1885, and it is for his not having taken out a certificate in that year that the order under consideration was made. In that year a son of the appellant, being a duly qualified attorney and solicitor, and who had duly taken out his certificate as such for the year 1885, entered into partnership with a Mr. Belcourt, also a duly qualified and certificated attorney and solicitor, practising in the same courts of Ontario. The appellant's son and Mr. Belcourt having thus formed a partnership between themselves in the business of attorneys and solicitors, without any prior application to the appellant for his leave and without his authority, styled the name of their firm—"Macdougall

Macdougall & Belcourt," and published cards stating the firm to consist of the appellant, his said son and Mr. Belcourt. The appellant became aware of this having been done and did not make any objection to his son and Mr. Belcourt so using his name, but in point of fact he was not, nor was it ever intended that he should be, a member of the firm, nor had he, nor was it ever intended that he should have, any interest therein or in the profits thereof. All the business of every description carried on in the courts was conducted personally by, and in the name of, Mr. Belcourt. The appellant never in any way took any part in any business conducted by the firm or personally interfered in any such business. His name simply appeared in connection with the advertisements published by his son and Mr. Belcourt of the style of the firm in the names of Macdougall, Macdougall & Belcourt. The learned counsel for the respondents in his argument before us admitted that the appellant had not *practised* as an attorney or solicitor in the year 1885, in the *popular* sense of the word, but he nevertheless contended that he had within the meaning of the act; but there is nothing whatever in the act which indicates that the word *practises* as used therein is used in any other sense than the ordinary or popular sense of the word. It is the popular sense which is to attributed to all words in an act of Parliament, unless the contrary plainly appears upon the face of the act.

He contended that the appellant having permitted without complaint his name to be published as a member of the firm he would be liable to a client of the firm, who should have a good cause of action against the firm, and that in like manner and for the like reason he would be liable to the penalties by the act attached to his not taking out a certificate; but the liability to a person who, having employed the firm

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upon the faith of the appellant being a member of it as he was published to be, was damnified by any act or default of the firm, would arise by reason of the estoppel which under the circumstances the law would impose upon him preventing him from setting up the truth that in point of fact he was not a member of the firm. No case has been cited, and if one had been found no doubt the learned counsel for the respondents would have cited it, wherein it has been held that the doctrine of estoppel applies to prevent a person, against whom proceedings are taken under a penal statute to recover or inflict penalties, from shewing the truth, namely, that in point of fact and truth the thing had never been done to the doing of which the penalties sought to be recovered or inflicted were attached.

It was admitted that, in point of fact, all the acts of *practising*, with the doing of which the appellant is sought to be connected, were personally and directly done by Mr. Belcourt who was duly licensed to practice, but it was contended that Mr. Belcourt's acts were the acts of the appellant because of the latter having suffered his name to be used as it was. This is but another mode of insisting that having suffered his name to be so used he is, even in penal proceedings, estopped from shewing the truth. It was also argued that although Mr. Belcourt was the person who himself personally did each and every one of the acts relied upon as the acts of a practising attorney or solicitor yet that he, and every member of his firm how many soever they should be, are severally liable to the penalty imposed by the 20th section, and from that premise it was contended that he was liable under the 21st section. Whether Mr. Belcourt himself would be liable under the 20th section may possibly depend upon the true determination of the question whether or not *he* would be estopped

from showing what is now admitted to be the truth, namely, that in point of fact the appellant was not nor was ever intended to be a member of the firm, but we are not dealing with the 20th section nor does it throw any light upon the true construction of the 21st that does not appear in the 21st itself, the language of which is, in my opinion, sufficiently clear, and deals with persons who, in the ordinary and popular sense of the word, do *actually practise* as attorneys or solicitors either alone or in partnership with others. All that the facts, in my judgment, warrant us in concluding that the appellant did was, not that he practised at all as an attorney or solicitor in the year 1885, but that he suffered his son and Mr. Belcourt, who did practice in partnership together as attorneys and solicitors, to publish his name as if he was a member of their firm, although in point of fact he was not nor was ever intended to be; that was not, in my opinion, an act to which the statute has annexed any penalty. The appeal must, therefore, be allowed with costs and the order of the Divisional Court of Queen's Bench discharged and in lieu thereof an order be ordered to be issued from the said court dismissing the application made to it with costs.

Appeal allowed with costs.

Solicitor for appellants: *N. A. Belcourt.*

Solicitor for respondent: *Walter Read.*

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*Mar. 4, 5.

*Dec. 9.

OCTAVE COSSETTE (PLAINTIFF).....APPELLANT;

AND

ROBERT G. DUN ET AL. (DEFENDANTS) ..... } RESPONDENTS.

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

Appeal—Jurisdiction—Amount in controversy—Supreme and Exchequer Courts Act, ch. 135, *sec.* 29—*Slander and libel—Mercantile Agency—Responsibility for incorrect report—Arts.* 1053, 1054 *and* 1727 *C. C.—Damages—Discretion of the court of first instance as to amount.*

Where the plaintiff in an action for $10,000 for damages obtains a judgment in the Superior Court for Lower Canada for $2,000, and the defendant appeals to the Court of Queen's Bench, where the judgment is reduced below said amount of $2,000, the case is appealable by the plaintiff to the Supreme Court, the value of the matter in controversy as regards him being the amount of the judgment of the Superior Court. (Taschereau and Patterson JJ. dissenting.)

Persons carrying on a mercantile agency are responsible for the damages caused to a person in business when by culpable negligence, imprudence or want of skill, false information is supplied concerning his standing, though the information be communicated confidentially to a subscriber to the agency on his application therefor.

The amount of damages awarded by the judge who tries the case in his discretion in the court of first instance, should not be interfered with by a court of appeal, unless clearly unreasonable and unsupported by the evidence, or there be some error in law or fact, or partiality on the part of the judge. *Levi* v. *Reed*, 6 Can. S.C.R. 482, and *Gingras* v. *Desilets*, Cassels's Digest 117, followed. (Taschereau J. expressing no opinion on the merits.)

APPEAL and cross-appeal from a judgment of the Court of Queen's Bench for Lower Canada (Appeal

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

Side) partly confirming a judgment of the Superior Court and reducing the amount awarded by the Superior Court from $2,000 to $500.

This was an action for slander and libel against Dun, Wiman & Co, who carry on in this country a mercantile agency for collecting information concerning persons in trade and commerce. The appellant complained that through false and incorrect reports made by the respondents to the firm of Hurteau & Brother, one of their subscribers, as to his commercial standing and especially as regards hypothecs on his real estate, he suffered heavy loss and was brought almost to the verge of bankruptcy and ruin. He claimed $10,000 damages. The respondents pleaded that the communication was privileged; that they were merely the agents of their subscribers for obtaining the information which they communicated to them—also that they sent a report correcting the preceding false reports. The material facts are as follows (1):

Cossette the appellant, was the owner of a saw and planing mill at Valleyfield, was doing a large business and was a contractor of large buildings, such as churches, market halls, &c., and to carry on his business and contracts he required a large credit in business circles, especially amongst the lumber merchants.

His credit was perfect up to February 1886, and all his circumstances of the most favourable character.

Amongst other contracts, he had one for erecting a church at Longueuil, the cost of which was about one hundred and fifty thousand dollars.

About the middle of February, 1886, Hurteau & Brother, lumber merchants of Montreal, and the main suppliers of the appellant, seeing that the requirements

(1) See also report of this case in M.L.R. 3 S.C. 345.

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of his affairs had caused the appellant to augment lately his purchases on credit by about five thousand, ($5,000.00) whilst his ordinary credit was already about twenty thousand dollars ($20,000.00), and that new orders from him were coming in more frequently, applied to the agency of respondents, of which they were subscribers, in order to obtain additional information as to appellant's exact position as far as his real estate was concerned.

The appellant Cossette had always represented to them that his immovables were clear of mortgages and encumbrances. But they wanted to ascertain the fact in such a way as to leave no room for any doubt or anxiety.

It being customary to add a fee to their annual subscription to obtain a certificate from the registry office, they applied to the respondents for "a special report from the Registry Office," offering to pay whatever additional cost might be required.

In conformity with that demand, the respondents provided them with a report which read as follows:

"February 27th, 1886.—Find by the valuation roll "of Valleyfield that he has three lots in Valleyfield. "No. 1, Cadastral No. 589, valued at $700. At Registry "office find sale by licitation, to Elizabeth Anderson, "of this lot and several other; mortgages for $4,000 "payable to Antoine Leduc. Another for $6,000 to "the corporation of St. Anicet, sale dated 1st April "1885, so that there is an encumbrance of $10,000 not "discharged. This amount was due by the late Alex. "Anderson.

"No. 2. Cadastral 788, on which is the mill, valued "at $3,200 by valuation roll, mortgaged for $160. "Two dollars per year rent, *rente foncière non rachetable*.

"No. 3. Cadastral 851, valued at $1,200 clear.

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"His stock on lot 788 is valued by the corporation "at $10,000.—3,400,500, N.Y."

In consequence of that report Hurteau & Brother began to curtail Cossette's credit, but applied again to the respondents assuring them that the report could not be correct, and asking for an additional and more minute inquiry.

The respondents then applied to Mr. Joron, a notary public, their local agent at Valleyfield, for information, and on the 18th March, 1886, he reported as follows:

"He owns personally and alone a large mill and all the property for his woodyard; would say that that property, taking its location, should be worth from $15,000 to $20,000, *on which we are sure there was no mortgage a year and a half ago.* This gentleman has been doing a fine business, and the following statement, which is altogether true, will show it: In 1883, a gentleman by the name of Emile Prevost, who is now the proprietor of the Loudon Bros.' mill in this town, went into partnership with Mr. Cossette with a capital of $1,500. During twenty-two months that he was with him he increased his capital to $200 or $300 more. At the end of twenty-two months they separated, and though he had to pay interest on the surplus and capital put in by Mr. Cossette he got, when retiring, $6,000 cash from Mr. Cossette for his share in the partnership. Mr. Cossette has been continuing to do a good, a very good business, since, and if we understand well he has been particularly lucky in a contract which he has made for wood last summer at some place near Three Rivers. Mr. Cossette owns some property beside that; he has his private house, worth about $2,500, and some other vacant lots; would think that, should he get out of business at the present time, he could realize a sum varying from $15,000 or $20,000, or perhaps $25,000.

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He is one of the joint contractors of the Longueuil church; he has built the market hall here and has done good work; also the Roman Catholic church, in partnership with Mr. E. Prevost, and there also they have succeeded in doing splendid work. He is an active young man, married, about 32 or 35 years of age, of regular habits, honest and attentive to business. We understand that he has always kept his mill and wood insured."

The respondents did not act on this but on the 29th March, 1886, persisting in their report, as far as appellant's real estate was concerned, they added, gratuitously, the following report:

"March 29, 1886.—The valuation given in last report is considered about correct. He is not considered worth much over and above liabilities. He is a Pontifical Zouave. Began with no capital. Had to compromise in 1877 or 1878 with Ross, Ritchie & Co., lumber dealers, Three Rivers. Started manufacturing at Valleyfield with Emile Prevost. They made some money, but last year separated, and he paid Prevost $6,000 cash. Prevost, who is a smart fellow, then bought Loudon Bros.' saw mill, and since then they have been at loggerheads. Last year Cossette bought a large amount of lumber, without capital, and has now most of it and cannot dispose of it. Looks for public honors. Has tried for the mayoralty several times. His business manager is not considered capable, is said to be extravagant, and has failed when in business for himself. The impression is considerable care should be exercised in credit transactions.—3400-500-N. Y."

The consequence of this report was that Hurteau & Brother closed down upon Cossette. An order which he had received for lumber was not executed. Without assigning any reason, they refused to give him

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any further credit, and notified him that he would have to pay up the whole of his indebtedness. He wrote asking for the renewals which he had been in the habit of getting. They refused, and forced him to pay $12,000. To meet this sudden call upon him he was obliged to realise at once and to sacrifice a portion of his property. His mill at Valleyfield was burned down about this time ; but it appeared that he had a very small amount of insurance, and the defendants hastened to apprise Hurteau & Brother of this fact. Hurteau & Brother then investigated Cossette's affairs and found that the report made by the defendants was untrue ; that he had had no mortgage upon his property. It appeared that the agent of the defendants had made a mistake as to the numbers of the properties, the three properties indicated as belonging to him were in reality not situated near his mill but at the other end of the town, and did not belong to Cossette at all, nor were they entered in his name, and the mistake could only arise from gross carelessness. Hurteau & Brother then found that they had done an injustice to Cossette, and offered him all the money necessary to rebuild his mill. The Town of Valleyfield, however, came to his relief, and advanced money for the purpose of re-building the mill.

Twelve days after the institution of the action the respondents, having heard of the falsity of their reports, informed Messrs. Hurteau & Brother of their mistake.

Evidence having been taken as to damages suffered the Superior Court awarded the appellant $2,000 damages, but on appeal to the Court of Queen's Bench the damages were reduced to $500.

In the Supreme Court, when the case came up for argument, Mr. Justice Taschereau stated that he thought a question of jurisdiction arose as to the amount in controversy. Counsel for the appellant and

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respondents, being desirous to obtain a final decision on the merits of the appeal, agreed to argue the case subject to the objection taken by the Court as to the jurisdiction.

Belcourt for appellant:

The jurisprudence of the Province of Quebec and of France, as a matter of principle, admits of no distinction as to the responsibility that mercantile agencies incur by giving inaccurate information, no matter whether this information be given to all their customers or to only one or two subscribers (1).

Information furnished for pay, as a business matter, and not gratuitously, cannot be confidential.

In the present case the communications were not confidential even from the point of view of American and English jurisprudence, because: 1. The character of a communication is to be determined by its nature and object, and not by the purely accidental fact of its being made to only one or a few persons. Each and every one of the subscribers could have obtained it. It was not information collected for the exclusive use of Hurtean & Brother, but for the use of the subscribing public. 2. Inaccurate and libelous facts were given that had not been asked for. 3. It was very easy to verify the information given. 4. It cannot be shown how these reports could have been made in good faith.

From this tissue of falsehoods it is evident that there was malice, either on the part of the respondents' employees at Montreal, or on the part of their correspondent at Beauharnois.

Cossette might have been ruined had not an accidental circumstance (a fire) brought about the discovery of the untruthfulness of these reports.

(1) *Carsley* v. *Bradstreet*, M.L.R., 2 S.C. 35. Arts. 1053, 1054. C. C. *Girard* v. *Bradstreet*, M. L.R. 3 Q. B. 69. Journal des tribunaux de commerce, Vol. 32, p. 541, Vol. 33, p. 488 and Vol. 34, p. 202.

The amount of damages granted by the Superior Court ($2,000) not being excessive the Court of Appeal should not have changed it. *Levi* v. *Reed* (1); *Gingras* v. *Desilets* (2).

By condemning Cossette to pay all the costs of the appeal the Court of Appeal decided that Cossette should have nothing at all.

Lash Q.C. and *Girouard* Q.C. for the respondents.

Under the circumstances the communications complained of were privileged. *Todd* v. *Dun, Wiman & Co.* (3); *Waller* v. *Lock* (4); Paterson on "The Liberty of the Press (5)"; and the occasion being privileged, to use that term, the onus of showing express malice and absence of good faith rested on the plaintiff. *Clark* v. *Molyneux* (6); *McIntee* v. *McCullough* (7); *Spill* v. *Maule* (8); *Fountain* v. *Boodle* (9).

This case should be decided according to the principles of the English Law, and a privileged communication according to the law of England is stated in Starkie on Slander (10), and cases quoted. These principles have been generally adopted by the courts of the Province of Quebec, which shows most conclusively that in matters of this kind the English law must prevail; *Ferguson* v. *Gilmour* (11); *Poitevin* v. *Morgan* (12); *Durette* v. *Cardinal* (13); *Pacific Mutual Insurance Co.* v. *Butters* (14); see also *Dewe* v. *Waterbury* (15); *Carsley* v. *Bradstreet* (16).

As to the French jurisprudence the last decision is that of *Wallaerd* v. *Wys* (17) in 1884 referred to by the appellants.

(1) 6 Can. S.C.R. 482.
(2) Cassels's Digest 116.
(3) 15 Ont. App. R. 87.
(4) 7 Q. B. D. 619.
(5) P. 191.
(6) 3 Q. B.D. 237.
(7) 2 E. & A. (Ont.) 390.
(8) L. R. 4 Ex. 232.
(9) 3 Q. B. 5.
(10) See Wendell's ed. 1843. Vol. 1, p. 292.
(11) 5 L.C.R. 145.
(12) 10 L. C. J. 93.
(13) 4 R. L. 232.
(14) 17 L.C.J. 309.
(15) 6 Can. S.C.R. 143.
(16) M.L.R. 3 Q.B. at p. 83.
(17) 34 Journal des Tribunaux de Commerce 302.

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But it can hardly be cited as favorable to his pretention. Here is the *Jugé :* " Lorsqu'il est démontré que les reseignements fournis sur la situation ou le crédit des négociants, par une agence de renseignements commerciaux, ont été donnés et libellés par l'agence *confidentiellement*, dans les limites d'informations permises, et sans intention de nuire aux négociants sur le compte desquels les correspondants de l'agence prenaient des informations, *il n'y a faute et responsabilité* encourue à l'égard des négociants qui se plaignent des reseignments fournis, *que si ces renseignements sont notoirement inexacts.*"

If we compare this last decision with the one given in 1862, we can safely conclude that the jurisprudence of the *Tribunaux de Commerce* is in a fair way of reform and progress. As in England, they are slowly but surely bending the law to the usages of society.

It is perfectly evident that there is not much difference between the French and the English law on the subject of mercantile agencies and of its privileges and immunities. As remarked by Mr. Justice Cross in *Carsley* v. *Bradstreet*, " the difference will be found more in the practical application of the law than the principles themselves." The French jurisprudence is perhaps more favorable to the agency acting, as the appellants did in this instance, upon a special request from an interested subscriber, and in a private and confidential manner. The communication being then confidential no action for damages is possible under the French law unless actual malice be proved. So says Mr. Justice Cross, quoting Gareau *des Injures* (1) : " What in France would be considered a confidential communication would not give a title to a claim for reparation unless dictated by actual malice, while in England the same idea has given rise to a multitude of

(1) Vol. 1, p. 120.

fine distinctions elaborated by the judges under the term of privileged communications."

One word as to the measure of damages. The report of the 29th of March could not have caused any damage, as it only reached M. M. Hurteau & Frère on the very day they discovered the mistake it contained. The report of the 27th of February, no doubt, caused some inconvenience to the appellant, but no serious injury as its confirmation had not been obtained. The books of the appellant were produced in court, and they showed that the appellant, who at the time was doing a business of about $35,000 a year, was sustained by means of renewals of his paper; and judging from the books it does not seem that he was specially harassed in February and March, 1886, in consequence of the report of the 27th of February. The appellant had made heavy purchases in November and December for the Longueil church from Hurteau & Frère, all on time. Three notes to Hurteau & Frère became due between the 27th of February and the day of the fire, one for $1,317.61, dated the 24th November, 1885, at 3 months; another for $1,950, and a third one $2,000, given in December, at 2 and 3 months and due in February and March, which were all renewed. From the books, no note was paid to these parties during that time. Judging from the statement of his monthly sales, as given by Emond, the appellant does not seem to have suffered in that particular; indeed, his cash sales amounting to less than a couple of hundred dollars a month is a sure indication of a small general business. The judge in the court below seemed to have taken into consideration the damage done to the appellant as the partner of one Préfontaine for the construction of the Longueuil church. But it is evident that the court cannot consider the damage, if any, suffered by " Cossette & Pré-

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fontaine." When we consider that Mr. Carsley, with immense interests at stake amounting to millions of dollars, was only awarded $2,000 for a false and damaging communication published to the entire mercantile community, not only by means of their printed circular, but also by the medium of newspapers to which it had been given, it is almost impossible to resist the conclusion that the amount awarded is excessive. When examined *sur faits et articles*, appellant was unable to make a statement of his loss. To the question : "Pouvez-vous chiffrer le montant des dommages que vous avez soufferts par suite de ces rapports," he answers : "Le montant des dommages sera prouvé dans la cause. Je considère que ce ne serait pas cinquante mille piastres qui m'indemniseraient de tout ce que j'ai en à souffrir. Quant aux détails, je ne puis pas les donner à présent." These details were never given and no special damage has been proved. The case was investigated according to the old system of *enquête*, and the judge of the court below was not in a better position than the judges of this court to appreciate this question of damages.

SIR W. J. RITCHIE C. J.—The action in the present case is one of damages against a mercantile agency for slander, libel and defamation contained in false and malicious reports.

The judgment appealed from to the Supreme Court has been rendered by the Court of Queen's Bench, Montreal, on the 26th of March, 1889, partly confirming a judgment of the Superior Court of Montreal, dated the 12th November, 1887, and partly reducing the amount awarded by the court of first resort.

The Court of Queen's Bench having reduced the amount of the judgment of the Superior Court to $500 the question has now been raised whether this court

has jurisdiction to entertain this appeal. I think it certainly has, because it appears to me that the question before us is not as to $1,500 but simply whether the plaintiff has a right to have the judgment obtained by him in the Superior Court for $2,000 restored. Therefore the question we have to determine is: Did the Court of Queen's Bench do right in interfering with the judgment of the Superior Court, which awarded the plaintiff $2,000 damages? As I think they did wrong we should now reverse that judgment and give the judgment the Court of Queen's Bench should have given, that is to say, instead of varying we should affirm the judgment of the Superior Court; and therefore the right of the plaintiff to hold his judgment in the Superior Court for $2,000 was the question before the Court of Queen's Bench and is the matter now in controversy before us in this court. Under these circumstances the case, to my mind, is clearly appealable.

The agreement under which the information complained of was furnished to Hurteau & Brother is as follows:

TERMS OF SUBSCRIPTION TO THE MERCANTILE AGENCY.

Memorandum of the agreeement between Dun, Wiman & Co., proprietors of the mercantile agency on the one part, and the undersigned, subscribers to the said agency, on the other part, viz:—

The said proprietors are to communicate to us, on request for our use in our business, as an aid to us in determining the propriety of giving credit, such information as they may possess concerning the mercantile standing and credit of merchants, traders, manufacturers, &c., throughout the United States and the Dominion of Canada. It is agreed that such information has mainly been, and shall mainly be obtained and communicated by servants, clerks, attorneys and employees, appointed as our sub-agents, in our behalf, by the said Dun, Wiman & Co. The said information to be communicated by the said Dun, Wiman & Co., in accordance with the following rules and stipulations, with which we, subscribers to the agency aforesaid, agree to comply faithfully, to wit:

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1. All verbal, written or printed information communicated to us, or to such confidential clerk as may be authorized by us to receive the same, and all use of the Reference Book hereinafter named, and the notification sheet of corrections of said book, shall be strictly confidential, and shall never, under any circumstances, be communicated to the persons reported, but shall be exclusively confined to the business of our establishment.

2. The said Dun, Wiman & Co. shall not be responsible for any loss caused by the neglect of any of the said servants, attorneys, clerks and employees in procuring, collecting and communicating the said information, and the actual verity of correctness of the said information is in no manner guaranteed by the said Dun, Wiman & Co. The action of said agency being of necessity almost entirely confidential in all its departments and details, the said Dun, Wiman & Co. shall never, under any circumstances, be required by the subscriber to disclose the name of any such servant, clerk, attorney or employee, or any fact whatever concerning him or her, or concerning the means or sources by or from which any information so possessed or communicated was obtained.

3. The said Dun, Wiman & Co., are hereby requested to place in our keeping for our exclusive use, a printed copy of a Reference Book, containing ratings or markings of estimated capital and relative credit standing of such business men, in such states as may be agreed upon, prepared by them or the servants, clerks, attorneys and employees aforesaid, together with notification sheet of corrections. We further agree that upon the delivery to us of any subsequent edition of the Beference Book, the one now placed in our hands shall be surrendered to them, and also upon the termination of our relations as subscribers, the copy then remaining in our hands shall be given up to the said Dun, Wiman & Co., it being clearly understood and agreed upon that the title to said Reference Book is vested and remains in said Dun, Wiman & Co.

4. We will pay in advance fifty dollars for one year's services, from date hereof, of said Dun, Wiman & Co, together with the use of said Reference Book, pursuant to the foregoing conditions ; and subject always to the conditions and obligations above mentioned, the same sum annually thereafter, in advance, unless within ten days after the commencement of any subscription year we notify Dun, Wiman & Co. in writing to the contrary.

5. Dun, Wiman & Co. are hereby permitted to reserve to themselves the right to terminate this subscription at any time, on the repayment of the amount for the unexpired portion thereof.

6. If the inquiries for detailed reports during the year shall exceed

150 in number, the excess we agree to pay for at the rate of thirty-three and one-third dollars per hundred.

7. The subscriber agrees to accept as the aforesaid Reference Book quarto edition issued in March and September.

23rd day of June, 1885.

(Signed) A. HURTEAU & FRERE,
92 Rue Sanguinet, Montreal

To extend to August, 1886.

To include Mercantile Test and Legal Record.

Les parties admettent que le document ci-haut est une vraie copie de la souscription signée par Messieurs A. Hurteau & Frère, à laquelle il est fait référence dans la déposition de M. Hurteau, pour les fins de la présente cause.

Montréal, 12 mars, 1887.

TRUDEL, CHARBONNEAU,
LAMOTHE & DE LORIMIER,
Avocats du Demandeur.
D. GIROUARD,
Avocat des Défendeurs.

The information asked for by Hurteau & Brother was in reference to the real estate of the plaintiff and to incumbrances or hypothecs thereon (if any) and to that alone. This by a proper and careful examination at the Record Office could easily have been obtained and of this Cossette would have had no cause to complain, and if a truthful answer had been returned to this enquiry by no possibility could Cossette have been damnified for two reasons; first, because the records are for the purpose of being examined; secondly, had they been examined with any degree of reasonable care, they would have shown that the plaintiff's property was unincumbered.

The following is the first report complained of:—

FIRST REPORT.

OCTAVE COSSETTE,
Sawmill, Valleyfield, Que.

February 27, 1886.—Find by the valuation roll of Valleyfield that he has three lots in Valleyfield; No. 1, cadastral No. 589, valued at $700. At Registry Office find sale by licitation, to Elizabeth Anderson, of this lot and several others; mortgages for $4,000,

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payable to Antoine Leduc. Another for $6,000 to the Corporation of St. Anicet, sale dated 1st April, 1885, so that there is an incumbrance of $10,000 not discharged. This amount was due by the late Alex. Anderson.

No. 2 Cadastral 788, on which is the mill, valued at $3,200 by valuation roll, mortgaged for $160. Two dollars per year rent: *rente foncière non rachetable.*

No. 3, Cadastral 851, valued at $1,200, clear.

His stock on lot 788 is valued by the Corporation at $10,000. 3,400—500—N.Y.

all of which is entirely false from beginning to end.

After attention had been called to this report, on the 29th March a second report was made as follows:

March 29th, 1886.—The valuation given in last report is considered about correct. He is not considered worth much over and above liabilities. He is a Pontifical Zouave. Began with no capital. Had to compromise in 1877 or 1878, with Ross, Ritchie & Co., lumber dealers, Three Rivers. Started manufacturing at Valleyfield with Emile Prévost. They made some money, but last year separated, and he paid Prévost $6,000 cash. Prévost, who is a smart fellow, then bought Loudon Bros.' sawmill, and since then they have been at loggerheads. Last year, Cossette bought a large amount of lumber, without capital, and has now most of it and cannot dispose of it. Looks for public honors. Has tried for the mayoralty several times. His business manager is not considered capable; is said to be extravagant, and has failed when in business for himself. The impression is considerable care should be exercised in credit transactions. 4400—500—N.Y.

On March 18th, the defendants had received, through Mr. Dawes, the chief clerk of their agency in Montreal, the following very favorable report:

March 18, 1886.—He owns personally and alone a large mill and all the property for his woodyard; would say that that property, taking its location, should be worth from $15,000 to $20,000, on which we are sure there was no mortgage a year and a half ago. This gentleman has been doing a fine business, and the following statement, which is altogether true, will show it: In 1883, a gentleman by the name of Emile Prévost, who is now the proprietor of the Loudon Bros.' mill in this town, went in partnership with Mr. Cossette with a capital of $1,500. During twenty-two months that he was with him he increased his capital to $200 or $300 more. At the end of twenty-

two months they separated, and though he had to pay interest on the surplus and capital put in by Mr. Cossette, he got, when retiring, $6,000 cash from Mr. Cossette for his share in the partnership. Mr. Cossette has been continuing to do a good—a very good—business since, and if we understand well, he has been particularly lucky in a contract which he has made for wood last summer at some place near Three Rivers. Mr. Cossette owns some property besides that; he has his private house, worth about $2,500, and some other vacant lots; would think that, should he get out of business at the present time, he could realize a sum varying from $15,000 to $20,000, or, perhaps, $25,000. He is one of the joint contractors of the Longueuil Church. He has built the market hall here, and has done good work; also, the Roman Catholic church, in partnership with Mr. E. Prévost, and there, also, they have succeeded to do splendid work. He is an active young man, married, about 32 or 35 years of age, of regular habits, honest and attentive to business. We understand that he has always kept his mill and wood insured.

Which, however, was not furnished to Hurteau & Brother, but which the defendant's clerk says was read to the book-keeper of Cossette, but which Cossette's book-keeper denies, claiming that only a portion of it was read, namely, to the $6,000 mentioned therein. On the 29th March, notwithstanding this favorable report of the 18th March, and notwithstanding that their attention had been called to the report of the 27th February, the report of the 29th March, above set out, was made; and on April 13, 1886, Cossette having called on the defendants, the following entry was made by them in their books:

Cossette, Octave—Saw-mill and lumber, Beauharnois Valleyfield, Que., Canada—J. E. L., April 13, '86—Calls and states that our report of Feb. '86, *in re* his property is incorrect, that he does not own the properties there mentioned; but his properties are cad. Nos. sub. div. 141-d, 141-e, 141-8, 141-10, 141-11, 141-12, 141-13, in parish of Ste. Cécile, which cost $2,400, and are mortgaged for $1,200; cad. Nos. 137, 138 and 141, in Valleyfield; bought from sheriff for $1,440, clear half of Nos. 507, 508, on which was his mill, lately burned, clear of incumbrance, and he shows us certificates from registry office, which carry out his statement as to properties. Denies also that he ever compromised with Ross, Ritchie & Co.; says he had bought two

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barges of lumber for them, which he instructed them to send him in charge of a tug, but they did not follow out his instructions, and allowed them to sail without the tug, the barges got caught in a gale of wind and foundered, the amount of the purchase was $1,600, and he paid Ross, Ritchie & Co. $800, which he considers was more than they were entitled to, as they had not carried out his instructions.

And it was not until a month after, namely, the 17th May, 1886, that they reported that

COSSETTE, OCTAVE.—Mill and Lumber, Valleyfield. Beauharnois County, Quebec, Canada.

W. W. J., May 17, 1886.—Having sent for a special inquiry by messenger to the Registry Office at Beauharnois, we have learned that our report of his real estate position in February last was a mistake and altogether erroneous, the wrong cadastral numbers having been taken. Mr. Cossette's statement of April 13, in correction of our report, seems to be a statement of facts apparently. We have also written Ross, Ritchie & Co., of Three Rivers, who confirm Mr. Cossette's statement as to the settlement of the barge load matter referred to in previous reports, and by enquiry at the Insurance Companies, we learn that the loss sustained through his fire in April was between 15 and $20,000, and on this he received an insurance of about $3,200, the Royal and the Insurance Association being the only two companies interested. Mr. Cossette has been granted a bonus of several thousand dollars from the town and stands well among fair judging men. He is a good energetic business man and doing quite well. 3400—500—N.Y.

It may be that as between Hurteau & Bro. and the agency that they were not authorised to communicate to Cossette the information furnished, and there may have been a breach of contract on the part of Hurteau & Bro., but this is a question the agency and the employer must, I think, settle between themselves. It is clear, however, that the information was given to be acted upon, and was acted upon to Cossette's detriment, and but for his mill being burnt would, if not contradicted, have resulted in his utter ruin. It is difficult to understand, if acted upon, how it could be kept from the knowledge of the party injured; he would necessarily require to know why confidence had been lost in him, and if not informed of the reason how

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could he correct the information, if erroneous, and withheld from him? I am unable to understand what duty the agency was under to supply information to their customers except in virtue of the contract between them by which, for a valuable consideration, they undertook to do so. But even as between themselves, could it have been contemplated that false information should be supplied?

But apart from this contract in reference to the plaintiff in this case with other third parties what duty was there on the part of the agency to intermeddle with the plaintiff's property, affairs or business? And if they did so intermeddle, was there not a higher duty due to the party inquired of that the information supplied in reference to him should be true? Whenever, by culpable negligence or the want of proper precaution, not truthful but false information is supplied, whereby a third party is damnified in his business, property or credit, why should the party so injured by the wrongful act of the agency not be indemnified for the loss he has sustained by the injury done him by the agency who by their act caused the damage?

In this case no proper precautions appear to have been exercised. Surely no man has a right to propagate a false statement, injurious to the credit of another, without having satisfied himself of its truth or falsity before adopting and promulgating it as truthful and useful information. Would it not be a most dangerous and unreasonable doctrine to hold that a man's reputation and credit could be destroyed by secret false information, furnished, as it were, behind his back, and the knowledge of which is withheld from him, and the truth of which the agency is under no obligation to guarantee? Cossette does not appear to have had any connection or contract

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with the agency. They had no interest in his business, but appear to have intermeddled with it for certain reward, paid them without his authority, and made statements, unfounded in fact, in reference thereto, with a view to such statements being acted upon and which were acted upon to his injury. There was no duty, as I have said, cast on the agency to furnish this information except their contract to do so, to which Cossette was no party. They furnished it voluntarily for pure gain. I cannot conceive that if a man who for gain and reward voluntarily intermeddles with another man's business, and issues false reports in reference thereto to be acted upon by the party receiving it, is in any way privileged so to do ; if he does it I think he does it at his peril. I by no means intend to dispute the proposition in English law, that " a communication made *bonâ fide* on any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege, would be slanderous and actionable (1)." This company may be and probably is useful to the mercantile world, but it is clear its usefulness must depend on the care they take to promulgate only truthful information. I think, therefore, the damage in this case was caused solely by the fault of the agency ; that there was on their part and on the part of those whom they employed the greatest and most culpable negligence, carelessness and impropriety without taking any reasonable or proper precautions to ascertain the truth of the statements.

But apart from discussing this question on general principles or principles applicable to English law, I

(1) 5 E. & B. 348. 2 C.B. 569.

think that this case, if ever a case did, clearly comes within Articles 1053 and 1054 of the Civil Code of Lower Canada which provide as follows :

1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

1054. He is responsible, not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care.

But in addition to all I have said the agency attempted to discredit Cossette entirely apart from the information asked for. Thus, on March 28, 1886, after they had in their possession the report of the 18th March, of their own mere motion they reported that Cossette was not considered worth much over and above liabilities, an unfounded and incorrect statement. "That he was a Pontifical Zouave." What that had to do with his credit it is difficult to discover, unless it was by way of disparagement, of the truth of which, however, there is no evidence. "That he began with no capital; that he had to compromise in 1877 or 1878 with Ross, Ritchie & Co., lumber dealers, in Three Rivers." A statement quite untrue and no attempt made to show that the agency had any grounds whatever to justify or excuse this statement. "That he last year bought a large amount of lumber without capital and has now the most of it and cannot dispose of it," of the truth of which likewise no evidence was offered. "That he looks for public honors," of which there was no evidence. "Has tried for the mayoralty several times," which is contradicted by the evidence, and is not sufficient to disparage the credit of Cossette. The report goes on to attack his credit through his business manager thus: "His business manager is not considered capable; is said to be extravagant and has failed when in business for himself," without show-

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ing in any way the truth of this or where or how this information was obtained, and winds up with "the impression is considerable care should be exercised in credit transactions."

Considering that the only information asked for was a report of the amount of mortgages or hypothecs affecting Cossette's real property, if evidence of malice was required in this case, which I do not think it was, I can scarcely conceive that stronger evidence of malice could be shown than these volunteered, unasked for and reckless statements, without a tittle of evidence to show that defendants even believed them to be true, or that they had any reason whatever for thinking or believing them to be true.

This leaves the case then a mere question as to the amount of damages to which Cossette is entitled. The court of first instance arrived at the conclusion that the plaintiff had established his claim to $2,000. I cannot say that this is a wrong conclusion. In a case of this kind we have no means of weighing in very nice scales the exact amount of damages the plaintiff may have sustained. A grievous wrong was clearly done him, calculated to wreck his business and utterly ruin his credit. He has conclusively shown that in fact for the time being it had that effect, and therefore he was entitled to very substantial damages. He has clearly shown, from his business being entirely disarranged, and his credit, for the time being, utterly destroyed, he was, for the purpose of raising money, compelled to sell his property below the ordinary rate. The general evidence shows he lost $1,500 to $2,000, though it is true that the specific items of this loss were not shown; that he also lost by reason of Hurteau & Bro.'s refusal to supply him with lumber, it is stated, four or five hundred dollars, and was otherwise, beyond all doubt, greatly damaged in his

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business and credit. If we were to allow the judgment now appealed from, which not only reduced his judgment of $2,000 to the comparativaly trifling sum of $500, and which judgment also has mulcted him in the costs of the appeal court, to stand, it is obvious that he will be, after paying those costs, practically without the slightest remuneration for the wrong done him, and this without any fault or wrong on his part.

I therefore think the appeal should be allowed, and the judgment of the Superior Court restored, and also that the cross-appeal be dismissed, with costs to the appellant in this court and in all the courts.

FOURNIER J.—L'appelant en cette cause était demandeur en Cour Supérieure dans une action en dommage de $10,000.00.

La cour rendit jugement en sa faveur pour la somme de $2,000.00. Les défendeurs Dun *et al.* ayant porté ce jugement en appel à la Cour du Banc de la Reine, cette dernière réduisit à $500.00, le montant de $2,000.00 accordé par la Cour Supérieure. De ce dernier jugement le demandeur Cossette s'est porté appelant devant cette cour. Ce jugement de $2,000.00 réduit à $500.00 est-il appelable pour le demandeur ? Les intimés prétendent que ce jugement n'est pas appelable parce que la matière en litige se trouve réduite à $1,500.00, montant de la déduction faite par la Cour du Banc de la Reine sur celui de la Cour Supérieure.

La cause de *McFarlane* v. *Leclaire* (1) décidé au Conseil Privé est invoquée au soutien de cette prétention. Il est vrai que dans cette cause, le Conseil Privé a déclaré que lorsqu'il s'agit de déterminer le montant d'appel :

The correct course to adopt is to look at the judgment as it affects the *interest* of the parties who are prejudiced by it and who seek to relieve themselves by an appeal.

(1) 15 Moo., P. C. 181.

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Cette règle n'est pas posée d'une manière absolue, car Lord Chelmsford fait l'observation suivante :

In order to ascertain the value of the matter in dispute it is necessary to advert to the nature of the proceedings.

La règle qu'il faut référer au jugement pour s'assurer comment les intérêts de la partie qui s'en plaint en sont affectés, résulte du cas particulier dans lequel se trouvait l'appelant McFarlane. Il était tiers saisi dans la cause de *Leclaire* v. *Delesderniers* dans laquelle le montant demandé n'était que de £417 0s. 8d. par conséquent au-dessous du montant, pour pouvoir appeler au Conseil Privé. Mais les effets dont il se trouvait en possession comme tiers saisi étaient estimés à £1642 14s. 5d. La cour du Banc de la Reine avait permis à McFarlane d'appeler du jugement sur la saisie-arrêt. Leclaire demanda par pétition au Conseil Privé d'annuler cette permission. C'est sur cette pétition que s'est élevé le débat de savoir quel était le jugement dont le montant devait servir de règle au droit d'appel. Etait-ce le jugement principal dont le montant n'était que £417 0s. 8d., ou celui sur la saisie-arrêt, de £1,642 14s. 5d. Dans le premier cas il n'y avait pas d'appel, dans le second le droit était évident. C'est dans ces circonstances que le conseil a déclaré :

The correct course to adopt is to look at the judgment as it affects the interest of the parties who are prejudiced by it, and who seek to relieve themselves from it by appeal.

C'est aussi ce qu'il faut faire dans le cas actuel pour apprécier l'intérêt de l'appelant. Il n'est pas intéressé seulement dans la différence entre les deux jugements. Il n'est pas correct de dire que l'appelant ne se plaint que de cette partie du jugement qui le prive de $1,500, différence entre les deux jugements.

Dans cette cause la demande était pour $10,000. Le jugement de première instance a accordé $2,000, montant suffisant pour l'appel à cette cour. Ce jugement

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a été ensuite réduit à $500 par la Cour du Banc de la Reine. L'intérêt de l'appelant a-t-il cessé d'être de $2,000 ? Non parce qu'il n'a fait aucun acquiescement à ce jugement, et que par son factum en appel il conclut à ce que le montant accordé par la Cour Supérieure soit rétabli à $2,000, à ce que le jugement de la Cour Supérieure lui accordant $2,000 soit confirmé. D'un autre côté les intimés qui prétendent que les faits portés à leur charge étaient des communications privilégiées ne pouvant donné lieu à aucune action en dommage, se sont portés contre-appelants du jugement qui les a condamnés à $500 et ils demandent à cette cour de les relever de cette condamnation et de renvoyer purement et simplement l'action de l'appelant. Ainsi la matière en litige d'un côté, c'est le montant du jugement de $2,000 et de l'autre, par le contre-appel, le droit d'action de l'appelant. Son action était de $10,000. Les intimés par contre-appel ont mis la question du montant d'appel hors de contestation en concluant par leur factum :

That the cross appeal should be maintained and the action for damages altogether dismissed.

Toute la matière en litige est de nouveau mise en contestation, à commencer même par le droit d'action. On sait qu'en faisant application de la règle posée par le Conseil Privé, de référer au jugement et aux procédures pour déterminer le montant d'appel, il est clair que dans ce cas il est de $2,000 pour l'appelant tandis qu'il est de $10,000 pour les intimés. Le montant d'appel peut être différent pour les deux parties comme le déclare ce jugement du juge du Conseil Privé. La cause d'*Allan* v. *Pratt* (1) est aussi invoqué contre le droit d'appel en cette cause. Le Conseil Privé a confirmé la règle qu'il avait adopté dans la cause de *McFarlane* et *Leclaire* et décidé que le droit d'appel du

(1) 13 App. Cas. 780.

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défendeur est déterminé par le montant accordé au demandeur. Cette decision n'est applicable qu'à un défendeur condamné à moins de $2,000. Elle n'est pas applicable à un demandeur qui a obtenu un jugement fixant ses dommages à $2,000 et qui demande à être réintégré dans les droits acquis par ce jugement. L'appel est ici pour $2,000. Pour prétendre que l'intérêt de l'appel est moins de $2,000, il faudrait prouver qu'il a acquiescé au jugement dont il se plaint. Il a fait précisement le contraire et son intérêt est en entier pour les $2,000. Peut-on présumer que le jugement qui n'accorde que $500, est plus correct que celui qui accorde $2,000. C'est évidemment le cas de regarder au jugement et à la procédure pour décider qu'il doit y avoir appel. En conséquence je suis d'avis qu'il y a appel.

Au mérite je suis du même avis que le juge en chef.

L'appelant, constructeur et propriétaire de moulin à scie, a poursuivi les intimés qui font affaires, en la cité de Montréal et ailleurs, comme agence commerciale et de renseignements concernant la position et la solvabilité des commerçants, pour la somme de $10,000, pour avoir fourni à MM. Hurteau et frère, avec lesquels il était en affaires pour un montant considérable, de faux renseignements au sujet de son crédit et des hypothèques grévant ses propriétés immobilières.

Les intimés ont plaidé que les renseignements fournis à Hurteau et frère, souscripteurs à leur agence ne l'ont été qu'en vertu d'une convention déclarant que ces renseignements sont considérés comme privés, confidentiels et donnés sans garantie quant à leur exactitude. Que ces renseignements ont été donnés de bonne foi par les intimés qui les croyaient corrects et forment en conséquence une communication privilégiée qui ne peut donner lieu à une action en dommage contre eux.

Cette action est fondée sur les articles 1053 et 1727 C.C.

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Toute personne capable de discerner le bien du mal, est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par imprudence, négligence ou inhabilité

Le mandant est responsable envers les tiers pour tous les actes de son mandataire faits dans l'exécution et les limites du mandat ; excepté dans le cas de l'article 1738, et dans le cas où par la convention ou les usages du commerce, le mandataire en est seul responsable.

Le mandant est aussi responsable des actes qui excèdent les limites du mandat, lorsqu'il les a ratifiés expressément ou tacitement.

L'exception mentionnée en cet article n'a aucun rapport quelconque aux faits de la présente cause. La question de savoir si c'est le droit français ou anglais qui doit servir de règle dans le cas présent est plus que oiseuse. Lorsque la loi s'explique aussi clairement qu'elle le fait dans les deux articles précités, le doute n'est pas permis. Dans la cause de *Carsley* v. *Bradstreet* (1).

L'honorable juge Loranger dont le jugement a été confirmé en appel dit :

It has been said by the plaintiff's counsel that the French Law must apply, and so do I rule.

Cette décision est aussi brève que juste.

En février et mars 1886, l'appelant avait des contrats importants pour la construction d'églises et autres grands édifices, et faisaient des affaires considérables et prospères pour lesquelles il avait besoin de tout son crédit. Ses relations d'affaires principales étaient avec la maison Hurteau et frère, marchand de bois envers lesquels il se trouvait alors endetté en la somme de $23,000. Ceux-ci ayant constaté que depuis quelque temps les besoins de fournitures de bois de l'appelant avait beaucoup augmenté, et que ses demandes devenaient plus fréquentes, jugèrent à propos de demander à l'agence mercantile des intimés dont ils étaient souscripteurs, des informations sur sa position et surtout au sujet de ses immeubles qu'il

(1) M. L. R. 2 S. C. p. 35.

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leur avait toujours représentés comme exempts d'hypothèque. Sur le rapport de leurs agents et employés ils informèrent faussement Messieurs Hurteau et frère, que les immeubles de l'appelant étaient grevés au montant de plus de $10,000 d'hypothèque, et leur firent rapport de plus qu'il avait dernièrement compromis avec un de ses créanciers, la société Ross, Ritchie et Cie, ce qui était aussi faux que l'existence des hypothèques rapportées comme affectant ses immeubles.

Le 29 mars 1886, les intimés persistant dans les assertions mensongères de leur rapport précédent, firent le suivant sans aucune demande ni sollicitation de la part de Hurteau et frère (1).

Chaque proposition contenue dans ce rapport est une fausseté manifeste. Au lieu de corriger leur premier rapport qui avait indiqué comme dues, par l'appelant des hypothèques affectant des propriétés qui ne lui avaient jamais appartenu, on dirait qu'animés d'un violent désir d'exercer quelque vengeance particulière, ils se plaisent à entasser les faussetés les unes sur les autres sur le compte de l'appelant afin de le ruiner; on le représente comme ne valant guère plus que le montant de ses dettes, ayant commencé les affaires sans capital et compromis en 1877 ou 1878 avec Messieurs Ross, Ritchie et Cie, marchands de bois de Trois-Rivières. On rapporte aussi de prétendues difficultés qu'il a eues avec un nommé Prevost qui avait été son associé, qu'il avait acheté l'année précédente une quantité de bois considérable dont il ne pouvait plus se défaire, qu'il recherchait les honneurs publics, et avait essayé plusieurs fois de se faire élire comme maire, que son gérant d'affaires manquait de capacités, était extravagant et avait failli en affaire pour son compte; qu'enfin on ne saurait être trop prudent avec lui

(1) See p. 226.

dans les affaires à crédit. Tous les faits de ce rapport sont faux et calomnieux. Rien n'était plus facile pour eux que de s'assurer de la vérité. En s'adressant au bureau d'enregistrement, ils auraient eu de suite un certificat correct des hypothèques qui pouvaient exister contre l'appelant. C'est précisément dans ce but qu'ils ont été institués, et c'est un acte impardonnable de négligence grossière et coupable de leur part que d'aller chercher leurs renseignements sur ce sujet ailleurs que dans ces bureaux. Mais il y a encore un fait plus inexplicable de leur part, c'est que pendant que les intimés communiquaient à MM. Hurteau et frère et à leurs bureaux d'agences, cet inconcevable rapport, ils étaient en possession de la preuve de toutes les fausseté qu'il contenait par le rapport de leur agent régulier à Valleyfield, le notaire Joron, en date du 18 mars 1886, déclarant les faits suivants :—

Ce rapport qui contredit directement et prouve la fausseté de toutes les assertions de celui du 29 mars était en la possession des intimés depuis onze jours, lorsqu'il donnait encore communication du rapport mensonger du 29 mars.

Les conséquences des faux rapports que les intimés soutenaient avec tant de persistance ne tardèrent pas à se produire ; Hurteau et frère qui étaient les principaux fournisseurs et avanceurs de fonds de l'appelant, décidèrent de lui refuser crédit et de le forcer de payer son compte. Pendant que l'appelant avait le plus besoin d'avances pour l'exécution de ses contrats et qu'il ordonne de nouveaux chargements de bois, il se voit refuser l'exécution de ses commandes ; les billets qui deviennent dus doivent être payés en entier et des renouvellements lui sont refusés. Et cela dans le temps de la construction de l'église de Longueuil, lorsque son crédit aurait dû être le double de ce qu'il

(1) See p. 225.

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était, il se voit réduit de $25,000 à $12,000 dans le mois d'avril. Il fut alors obligé de déployer toute son énergie et d'employer toutes ses ressources, réaliser à sacrifice afin de maintenir son crédit et éviter la ruine dont il ne fut sauvé que par un accident. Au milieu de toutes ses difficultés, son moulin et sa manufacture furent détruits par un incendie. Sur ses entrefaites Hurteau se rendit à Valleyfield pour s'enquèrir de la position de l'appelant qu'il trouva satisfaisante après examen des livres de compte, et après s'être enquis de faits rapportés contre lui, et dont il constata l'entière fausseté. Grâce au montant de ses assurances et à la confiance que MM. Hurteau reprenait en lui, l'appelant put éviter la déroute complète de ses affaires. Mais les intimés ne firent absolument rien pour réparer les torts qu'ils avaient commis à son égard; ils ne firent aucune contradiction de leurs faux rapports et ne donnèrent jamais à M. Hurteau communication du rapport de Mr. Joron, qu'après l'émanation de l'action en cette cause. A l'enquête le montant des dommages à été diversement évalué ; fixé à une somme considérable par quelques témoins et à beaucoup moins par d'autres, la cour faisant une appréciation modérée de la preuve a déterminé le montant de ces dommages à la somme de $2,000. Sur appel à la Cour du Banc de la Reine le montant de la condamnation a été réduit à la somme de $500. Cossette a appelé de ce jugement et demande à faire rétablir celui de la Cour Supérieure. La seule question à décider sur le présent appel est celle du montant des dommages qui devrait être accordé.

Les intimés ont invoqué leur prétendue bonne foi dans la communication des renseignements, mais outre que la bonne foi ne peut être une excuse des dommages causés par leur imprudence, négligence ou incapacité, il y a une preuve positive de la négligence grossière et coupable de leur agent dans la collection des renseigne-

ments. En prenant comme appartenant à l'appelant des lots qui ne lui appartenaient pas et en faisant rapport à Hurteau et frère qu'ils étaient grevés d'hypothèques, leur agent a nécessairement agi par malice, imprudence, négligence grossière ou incapacité, car il était facile d'obtenir du bureau d'enregistrement des renseignements certains. Ce fait seul suffirait pour rendre les intimés responsables du dommage causé. Mais indépendamment de cela il est prouvé qu'ils avaient en mains le rapport du notaire Joron, un de leurs agents, établissant la fausseté de toutes les informations qu'ils avaient communiquées à MM. Hurteau et frère et qu'ils n'en firent aucune communication qu'après avoir été poursuivis. Ceci forme une preuve de malice et d'intention de faire tort à l'appelant que rien ne contredit dans la preuve des intimés.

La prétention des intimés que leur communication à Hurteau et frère était confidentielle et que la nature d'une telle communication les exempte de responsabilité pour dommage, est inadmissible. Elle est contraire à la loi et à la jurisprudence établie.

Il est inutile d'aller chercher soit dans le droit anglais soit dans le droit américain la solution de cette question. Les principes de ces législations n'étendent pas la responsabilité aussi loin que les art. 1053, 1054 du code civil de la province de Québec. Ces articles ne font pas de la malice un des éléments de la responsabilité, ni de la bonne foi une exemption de cette responsabilité. Pour qu'il y ait responsabilité, il suffit qu'il y ait faute imprudence, négligence ou inhabillté.

Le quasi-délit,(dit Laurent) (1), existe dès qu'il y a faute la plus légère, la moindre imprudence suffit ; telle est la tradition, telle est la doctrine, telle est la jurisprudence. Pour qu'il en fût autrement dans le cas de renseignements inexacts, il faudrait une exemption écrite dans la loi, et il est inutile d'ajouter que la loi ne fait aucune exemption à la règle générale et absolue de l'art. 1382 (correspondant à notre article 1053).

(1) Vol. 20, p. 512.

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Sans doute la jurisprudence française considère comme privilégiée certaines confidences, telles que celles qui sont faites dans certains cas, comme par exemple les informations données par un maître au sujet du caractère d'un serviteur qu'il a eu à son service, par un marchand au sujet d'un commis. Mais ces informations sont données gratuitement à titre de service. De plus toutes les communications que l'on désire garder secrètes ou confidentielles ne peuvent pas être faites pour rémunération, Sirez Rev. Gen. (1), et non pas vendues comme une marchandise à tant par rapport ou souscription annuelle à des rapports fournissant régulièrement des renseignements sur les affaires des commerçants. C'est un genre d'affaire adopté par les agences commerciales qui font ce commerce de renseignement, moyennant considération pécuniaire. La jurisprudence française considère ces agences mercantiles, quant à la responsabilité civile, sur le même pied que tout autre commerce. Des décisions nombreuses ont été rendues par les tribunaux français sur cette question. Le factum de l'appelant en contient plusieurs auxquelles il serait facile d'en ajouter d'autres.

La Cour de Liége a rejeté cette théorie de prétendu privilège des lettres et rapports (2), des agences commerciales en se fondant sur le motif qu'elles faisaient profession de vendre des renseignement d'affaires aux marchands.

Journal des tribunaux de commerce pour l'année 1885, p. 302, pour l'année 1877, (Vol. 26,) p. 16.

Dans la province de Québec, il y a déjà plusieurs décisions à ce sujet. *Carsley* v. *Bradstreet* (3); and in Appeal (4): *Girard* v. *Bradstreet*, judgment of Justice

(1) 1. 1883, p. 457.

(2) Journal du Palais, jurisprudence étrangère 1885, p. 25.

(3) M.L.R. (2 S. C.), p. 35.

(4) M.L.R., 3 Q.B., p. 83.

McKay, confirmed in Appeal in 1875 (15 February) (1).

Le jugement de la Cour Supérieure avait condamné l'intimé à $2,000, mais la Cour du Banc de la Reine l'a réduit à $500. C'est sur ce point que repose principalement le présent appel. Lorsque l'on considère toutes les circonstances qui ont été rapportées plus haut, peut-on dire que la condamnation à $2,000 soit exagérée. Certainement non. D'abord la preuve testimoniale, non seulement justifie ce montant, mais la négligence grossière et coupable dans la collection des renseignements, la persistance malicieuse des intimés à en faire usage pendant qu'ils en connaissaient la fausseté d'après le rapport du notaire Joron, sont des circonstances qui auraient justifié un plus fort montant de dommages.

Pour réformer ce jugement quant au montant, il faudrait démontrer qu'il y a eu erreur de fait ou de droit, ou partialité de la part du juge. Il n'y a absolument rien de tel dans ce cas, comme la Cour du Banc de la Reine l'a reconnu en admettant la responsabilité des intimés et en les condamnant à $500 de dommages. Les deux cours n'ont différé que sur l'appréciation des dommages laissés à l'arbitrage des juges, c'est le cas de faire l'application de la règle qu'aucune erreur n'étant démontrée le jugement doit être confirmé.

Cette question de la différence d'appréciation des dommages par les cours Supérieure et d'Appel a été déjà soulevée devant cette cour, dans les causes de *Levi* v. *Reid* (2) et dans celle de *Désilets* v. *Gingras* (3). Dans ces deux causes la cour se fondant sur les autorités du droit français et pour les raisons contenues dans ces deux jugements auxquels je réfère, a rétabli le montant des dommages tels qu'ils avaient été fixés en premier lieu par la Cour Supérieure. Pour les mêmes raisons je suis d'avis que le jugement de la Cour du Banc de

(1) 3 M.L.R., Q.B., p 69. (2) 6 Can. S.C.R., p. 482.
(3) Cassels' Dig. 116.

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la Reine en cette cause doit être réformé et le montant de $2,000 de dommages accordé à l'appelant, en premier lieu, par la Cour Supérieure, soit rétabli. En conséquence, l'appel doit être alloué avec dépens.

TASCHEREAU J.—I am of opinion to quash this appeal. The case is not appealable. The plaintiff, now appellant, obtained a judgment for $2,000 in the Superior Court. The defendants thereupon brought an appeal to the Court of Queen's Bench, where they succeeded in getting the judgment reduced to $500. The plaintiff now appeals to this court from the Court of Queen's Bench. Upon this appeal, the only controversy clearly is as to the $1,500 which the Court of Queen's Bench reduced from the judgment of the Superior Court. Now it seems to me that we cannot entertain the appeal. The right principle on which to establish what is the amount in contestation, when the amount is the limit of the right of appeal, is, as laid down by the Privy Council in *Macfarlane* v. *Leclaire* (1) re-affirmed in *Allan* v. *Pratt* (2) that the judgment appealed from is to be looked at as it affects the interests of the party who thinks he is prejudiced by it, and who seeks to relieve himself from it by appeal. Here, the appellant only complains of that part of the judgment which deprived him of $1,500. This judgment clearly affects his interests as to $1,500 only and he only appeals from a judgment of $1,500. Upon his appeal there can be no contestation whatever as to the $500 for which the appellant succeeded in the court below.

GWYNNE J.—I entertain no doubt that this is an appealable case. The plaintiff recovered judgment in the Superior Court in the Province of Quebec for

(1) 15 Moo. P.C.C. 181. (2) 13 App. Cas. 780.

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$2,000 damages in an action for libel. The only defence offered to the action was that the matter complained of, although admitted to be false, was a privileged communication, as having been made in the course of their business by the defendants as commercial agents for the purpose of obtaining information concerning persons engaged in trade to a person who had employed them to obtain for him certain particular information as to the condition of and charges upon certain real property of the plaintiff. The defendants appealed from the judgment of the Superior Court to the Court of Queen's Bench at Montreal in appeal, insisting that no action lay against them upon the ground that the communication complained of was privileged and that although it was in point of fact untrue it was made in good faith and without actual malice. The falsehood of the matter complained of was, it may be observed, attributable to very gross carelessness upon the part of the persons employed by the defendants to obtain the information which they were asked to obtain for the person who had requested them to obtain the information. The Court of Appeal held the judgment of the Superior Court to be free from error upon the ground for which the appeal had been taken, namely, that the matter complained of as a libel was a privileged communication, made *bonâ fide* and without actual malice, but they reduced the damages to $500 and condemned the now appellant to pay the costs of the appeal, although he had succeeded upon the ground of error taken to the judgment of the Superior Court. From this judgment the plaintiff now appeals and the question before us is whether or not the Court of Appeal at Montreal did or did not err, in our opinion, in rendering that judgment. We are bound to give the judgment which, in our opinion, that court should have given, and to do so the same

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question must be before us as was before it, namely, whether the plaintiff was not entitled, and is not therefore still entitled, to retain the judgment which was rendered in his favor by the Superior Court for $2,000, and whether the Court of Appeal at Montreal has not erred in interfering to deprive him of that judgment and to substitute therefor a judgment for $500. This is, to my mind, clearly a question involving a sum of $2,000 as the amount in litigation.

Then upon the merits, while concurring with the Court of Appeals and the Superior Court that the action well lay, I am of opinion that the Court of Appeals did err in reducing the damages. Whatever privilege the defendants might have insisted upon if the information they had given to their client had been confined to the particular matter they were requested to obtain information upon (as to which, or as to the effect which their great negligence which occasioned that information to be false should have on the question of privilege I express no opinion) it is clear that the defendants wholly voluntarily communicated to their client matter which was not only absolutely without foundation in point of fact, and gravely and injuriously affecting the character and solvency of the plaintiff, but was altogether outside of the matter they were asked to obtain information upon, which was simply as to the charges upon a particular piece of property belonging to the plaintiff, a piece of information which could have been obtained by a search upon the piece of land in the Registry Office, and which by reason of the gross negligence of an agent employed by them was not done.

Upon the question of reduction of damages I am of opinion that the cases of *Gingras* v. *Desilets* (1) and of *Levi* v. *Reid* (2) in this court must be taken as establishing

(1) Cassels's Dig. 116. (2) 6 Can. S.C.R. 482.

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the principle which is well settled in England and conformable with sound sense, namely, that no court has any right to reduce the verdict of a jury as to damages where a jury is the tribunal, or of a judge adjudicating without a jury, on the ground of the damages being excessive in cases in which, like the present, the damages recoverable are not ascertainable by the application of any rule prescribing a measure of damages, or are not determinable by precise calculation, unless the damages awarded be so excessive, having regard to the evidence, as to shock the understanding of reasonable persons; to be so outrageous, in fact, that *no reasonable* twelve men, if the tribunal be a jury, could give; and that no judge, if a judge be the tribunal, could rationally give, that is without like shock to the understanding of reasonable persons. The question is not what damages the judge sitting in appeal thinks he would have given if he had tried the case, but whether the judge who did try the case can with propriety be said (as in the case of a jury) to have acted altogether beyond the bounds of reason in awarding the amount of damages which he has awarded. This cannot well be said in the present case, for some of my learned brothers think the damages given by the learned judge of the Superior Court to be reasonably moderate in their view of the evidence. Not having tried the case I cannot for my part precisely say what damages I should have given if I had tried it; I think it sufficient to say that in my opinion the Court of Queen's Bench in appeal should not set aside a judgment on the ground of excessive damages, or have reduced the amount awarded in the present case, unless upon the ground that the amount awarded by the Superior Court was altogether and palpably beyond the bounds of reason; and this cannot, I think,

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with any propriety be said in the present case, whether I should or should not have given the same amount myself if I had tried the case.

I think, therefore, that the appeal must be allowed with costs of this court and of the Court of Appeals in the Province of Quebec, and that the judgment of the Superior Court should be restored.

PATTERSON J.—It is not, and cannot be, disputed that, in construing the 29th section of the Supreme and Exchequer Courts Act., R.S.C., ch. 135, we are bound by the principles enunciated and acted on by the Judicial Committee of the Privy Council in *Macfarlane* v. *Leclaire* (1), in 1862, and in *Allan* v. *Pratt* (2), in 1888. That section declares that no appeal shall lie from any judgment rendered in the Province of Quebec in any action, &c., wherein the matter in controversy does not amount to the sum or value of $2,000, unless under circumstances which do not exist in this case. The decisions cited show that the controversy to be considered is that which is carried to this court, and which is not necessarily co-extensive with that originally entered upon. Whatever ambiguity there may seem to be in the section may be made to disappear, without doing any violence to the language, by simply bringing the word "wherein" into more direct connection with the word "appeal," as *e. g.*: "No appeal wherein the matter in controversy does not amount to the sum or value of $2,000 shall lie," &c.

It is very usual to find that the value in controversy on an appeal is less than that which was originally in contest, and we have in *Macfarlane* v. *Leclaire* an instance where the value to the appellant was much higher than it could have been to the respondent.

(1) 15 Moo. P.C.C. 187. (2) 13 App. Cas. 780.

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There are many cases where the limitation founded on the amount in controversy seems to act unequally between the parties, as when a plaintiff claiming more than $2,000 obtains judgment for less. In that case the defendant could not appeal, while if the defendant had succeeded the limitation would not have stood in the way of an appeal by the plaintiff. *Macfarlane* v. *Leclaire* affords an example of this occasional absence of reciprocal power to appeal, and shows that it does not, as has been sometimes thought, tell against the construction now given to section 29.

The principle, as stated by Lord Chelmsford in *Macfarlane* v. *Leclaire* and repeated by Lord Selborne in *Allan* v. *Pratt*, is that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal.

In this action the plaintiff, Cossette, claimed $10,000 damages. The court of first instance awarded him $2,000. From that judgment the plaintiff did not appeal. The defendants appealed, and on their appeal the Court of Queen's Bench sustained the plaintiff's right of action but reduced the damages to $500.

From that judgment there are two appeals to this court.

The plaintiff appeals, complaining of the deduction of $1,500 from his damages, and the defendants appeal on the ground that the judgment ought to be altogether in their favor.

If these two appeals could properly be treated as one appeal, it might be plausibly urged that the whole amount of $2,000 was in controversy. I cannot however see my way to that position. The effect would be to put us in the position of the Court of Queen's Bench hearing the appeal from the Superior Court, whereas we have to review the judgment of the

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Queen's Bench only. The appeals from that judgment are separate appeals. The defendants by their appeal seek to be relieved from the judgment for $500. That is the extent to which their interests are affected by the judgment.

The plaintiff's case is that his interests are affected to the extent of $1,500, by the deduction of that amount from his damages. Thus, the amount in controversy on the one appeal is $1,500 only, and on the other $500 only.

I think, therefore, that both appeals are unauthorised.

I should be better pleased to come to a different conclusion. Not that I object to the limitation of the right of appeal ; I think it is founded on wise policy, and should be frankly given effect to in all proper cases. But, having considered the appeals on their merits, I am satisfied that the courts decided correctly when they sustained the plaintiff's right of action. Nor would I have been disposed to disturb the judgment of the Court of Queen's Bench with regard to the amount of damages. The appeal to us is from that court only, and having regard to the fact that the damages, though technically unliquidated, are nevertheless brought by the evidence to some extent within the range of approximate calculation, and the court has, in the exercise of its undoubted jurisdiction, and after a careful consideration of such data as are available, fixed the amount at $500, I should hesitate before saying that the judgment was wrong in this particular. At the same time the award of the costs of the appeal against the plaintiff who successfully repelled the attack upon his right of action, though the court estimated his damages on a different scale from that which seemed proper to the judge who tried the action, strikes me as harsh and even unjust, and in

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order to relieve the plaintiff from that hardship I should be strongly tempted to concur with those of my learned brothers who think that the plaintiff's appeal should be allowed and the judgment of the Superior Court restored.

On the question of jurisdiction, however, I am of opinion that both appeals should be quashed without costs.

Appeal allowed with costs and judgment of the Superior Court restored.

Solicitors for appellant: *Trudel, Charboneau & Lamothe.*

Solicitors for respondents: *Girouard & DeLorimier.*

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*June 2.
*Dec. 11.

THE PEOPLES LOAN AND DEPOSIT COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

ALEXANDER GRANT AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Rate of interest—Fixed time for payment of the principal—"Until principal and interest shall be fully paid and satisfied."

A mortgage of real estate provided for payment of the principal money secured on or before a fixed date "with interest thereon at the rate of ten per centum per annum until such principal money and interest shall be fully paid and satisfied."

Held, affirming the judgment of the Court of Appeal for Ontario, that the mortgage carried interest at the rate of ten per cent. to the time fixed for payment of the principal only, and after that date the mortgagees could recover no more than the statutory rate of six per cent. on the unpaid principal. *St. John* v. *Rykert* (10 Can. S. C. R. 278) followed.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Chief Justice of the Common Pleas Division and the ruling of a referee appointed to take an account of the amount due on defendants' mortgage.

The single question raised on this appeal was as to the construction of a covenant in a mortgage for payment of interest. Such covenant provided that the mortgage would be void on payment of the principal sum "on or before the first day of June, 1884, with interest thereon at the rate of ten per cent. per annum until such principal money and interest shall be fully

*PRESENT: Sir W. J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson J.J.

(1) 17 Ont. App. R. 85.

paid and satisfied, such interest being payable and to be paid quarterly." There was also a provision that interest at the same rate should be paid on any instalment of interest in default, the same to be compounded and added to the principal half yearly.

The plaintiffs in this action were the mortgagor and the beneficiaries under certain insurance policies given as collateral security to the mortgagee, and the action was brought to redeem the said policies. A reference having been ordered to take an account of the amount due on the mortgage the referee, in taking such account calculated the interest at ten per cent. up to the first of June, 1884, and from that time he only allowed interest at six per cent., and did not compound the interest after that date. The defendants appealed to the Chief Justice of the Common Pleas Division, claiming the interest as provided in the mortgage up to the time of taking the account. The ruling of the referee was affirmed by the Chief Justice, and on further appeal to the Court of Appeal his judgment was also confirmed. The defendants then appealed to the Supreme Court of Canada.

Delamere Q.C. for the appellants. The courts below decided against us on the authority of *St. John* v. *Rykert* (1), but this case may be distinguished. *St. John* v. *Rykert* (1), was a case of a promissory note on which judgment had been recovered. The peculiarly strong words of our covenant distinguish it from that case and from *Peck* v. *Powell* (2).

The following cases were cited as instances of similar covenants: *King* v. *Greenhill* (3); *Popple* v. *Sylvester* (4); *Ex parte Fewings* (5); *Ex parte Furher. In re King* (6).

(1) 10 Can. S. C. R. 278.
(2) 15 Ont. App. R. 138.
(3) 6 M. & G. 59.
(4) 22 Ch. D. 98.
(5) 25 Ch. D. 338.
(6) 17 Ch. D. 191.

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Beck for the respondents. In *St. John* v. *Rykert* (1), the words were "until paid," which cannot be construed differently from those in this case, "until fully paid and satisfied." In *Archbold* v. *Building and Loan Association* (2), Mr. Justice Street similarly construes the words "until fully paid off and satisfied." And see *Re European Central Railway Co.* (3); *Powell* v. *Peck* (4); *Wilson* v. *Campbell* (5).

It was urged that the mortgage should be construed most strongly against us in accordance with the rule *fortius contra proferentem* but that rule has no force at the present time. Elplinstone on deeds (6); *Taylor* v. *Corporation of St. Helens* (7).

SIR W. J. RITCHIE C.J.—The defendants admit the allegations in the first paragraph of the statement of claim contained, and say that the said mortgage is in the words and figures following, that is to say :—

This indenture made in duplicate the 31st day of May, 1881, in pursuance of the act respecting short forms of mortgages, between Alexander Grant of the city of Toronto, in the county of York and Province of Ontario, barrister-at-law, and Annie Grant of the same place, wife of the said Alexander Grant, hereinafter called the mortgagors of the first part, and the People's Loan and Deposit Company, hereinafter called the company of the second part.

Witnesseth, that in consideration of seven thousand five hundred dollars, now paid by the company to the mortgagors, (the receipt whereof is hereby acknowledged), the mortgagors do grant and mortgage unto the company (their successors and assigns) forever, all and singular that certain parcel or tract of land and premises situate, lying and being in the city of Toronto aforesaid, on the north west corner of Duke and Parliament streets, in the said city, being composed of part of lot fifteen, the whole of lot sixteen and part of lot seventeen, according to plan 7 A, and being ninety-four feet on Duke street, and extending along the westerly limit of Parliament street two hund-

(1) 10 Can. S. C. R. 278.
(2) 15 O. R. 237.
(3) 4 Ch. D. 33.
(4) 15 Ont. App. R. 138.
(5) 8 Ont. P. R. 154.
(6) Bl. Ed. p. 93-4.
(7) 6 Ch. D. 270.

red and four feet : Provided this mortgage to be void on payment at the office of the company in the city of Toronto of $7,500 in gold coin if so demanded, on or before the 1st day of June, 1884, with interest thereon at the rate of ten per cent per annum until such principal money and interest shall be fully paid and satisfied, such interest to be paid quarterly, on the 1st day of June, September, December, and March, the 1st payment thereof to be made on the 1st day of September next, together with all fines imposed by the company on the mortgagors on account of default in payment according to the company's rules, and taxes and performance of statute labor : Provided that on default of payment for two months of any portion of the interest hereby secured the whole of the principal hereby secured shall become payable at the option of the company.

" Shall be fully paid and satisfied " necessarily refers to the time fixed for payment, viz.: " On or before the 1st of June, 1884, and the interest to be paid quarterly on the 1st of June, September, December and March, the first payment thereof to be made on the 1st day of September next;" in other words, until fully paid and satisfied according to the times fixed in the deed. I can see nothing in these words to show any intention to extend the time of payment of principal or interest beyond the respective times named in the mortgage. The last gale day would be the 1st June, 1884. It is quite an error to say there is any provision in this mortgage for *post diem* payments. There is no payment provided for after the 1st June, 1884, on which day, if not paid before, the principal and interest then due is made payable. There was no contract to pay beyond the period for which the money was borrowed.

I think the rate of interest allowed by the referee as damages was, under the evidence before him, most reasonable. Independent of the fact that as a general rule interest by way of damages should be the statutory rate of interest it is quite impossible to distinguish this case from *St. John* v. *Rykert* (1). There the words

(1) 10 Can. S. C. R. 278.

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were "with interest at the rate of two per cent. per month until paid." What possible difference is there between "until paid" and "until fully paid and satisfied?" If the money secured is "paid" is it not "fully paid?" And if the debt is "paid" is it not "satisfied?" The debt cannot be "paid" without being "fully paid and satisfied"; the terms "paid" and "fully paid and satisfied" are equivalent terms, the meaning being precisely the same, the only difference being that in the one case one word, and in the other four are used to express the same idea.

STRONG J.—On the 31st of May, 1881, Alexander Grant (one of the present respondents) and Annie Grant his wife, since deceased, by indenture of that date, mortgaged certain land and hereditaments to the appellants to secure the repayment of $7,500 lent and advanced by the appellants to the mortgagors and interest thereon; and by an indenture of the same date the respondent, Alexander Grant, assigned to the appellants three policies of assurance on his own life, viz.: a policy for $4,000 in the Canada Life Assurance Company and two policies, each for £499 19s. sterling, in the Eagle Insurance Company, as further and collateral security for the same loan. These several securities were subject to the following proviso for redemption:

Provided this mortgage to be void on payment at the office of the company, in the city of Toronto, of $7,500 in gold coin if so demanded, on or before the 1st day of June, 1884, with interest thereon at the rate of ten per cent. per annum until such principal money and interest shall be fully paid and satisfied, such interest being payable and to be paid quarterly, on the 1st day of June, September, December and March, the first payment thereof to be made on the 1st day of September next, together with all fines imposed by the company on the mortgagors on account of default in payment according to the company's rules, and taxes and performance of statute labor; Provided that on default of payment for two months of any portion of the

interest hereby secured the whole of the principal hereby secured shall become payable at the option of the company.

The mortgage deed also contained the following clause:

And it his hereby declared that in case the company satisfies any charge on the lands, other than a certain mortgage at present held by the Canada Life Assurance Company, the amount paid shall be payable forthwith with interest at ten per cent. per annum, and in default the power of sale hereby given shall be exercisable, and in the event of the moneys hereby advanced or any part thereof being applied to the payment of any charge or incumbrance, including the said mortgage of the Canada Life Assurance Company, the company shall stand in the position of, and be entitled to all the equities of, the person or persons so paid off.

There was also inserted in the mortgage a power of sale as follows:

Provided that the company, in default of payment for two months, may without any notice enter upon and lease or sell the said lands for cash or credit.

Prior to the execution of the before mentioned mortgage, and on the 13th of June, 1877, the respondent, Alexander Grant, and his wife had mortgaged the same lands and premises to the Canada Life Assurance Company to secure the sum of $6,000 and interest at eight per cent., and had assigned to and deposited with the last mentioned company the same policies of assurance as collateral security for that amount, and such mortgage and deposit and assignment of policies were subsisting securities at the date of the execution of the mortgage and assignment of policies to redeem which the present action was instituted and were, in fact, paid off out of the loan advanced by the appellants. The mortgage to the Canada Life Assurance Co. was subject to the following proviso:

Provided this mortgage to be void on payment of six thousand dollars in gold, with interest at eight per cent. as follows:—The said principal sum of six thousand dollars at the expiration of one year from the date hereof, with interest in the meantime, payable half-

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yearly on the thirteenth day of December and the thirteenth day of June, at the rate of eight per cent. per annum, and on payment of all sums of money which may be requisite, or which the said mortgagees, their successors or assigns, may pay or expend for premiums of insurance against loss by fire in terms of the covenant hereinafter contained, or for premiums upon the several policies of insurance upon the life of the said Alexander Grant hereinafter mentioned, with interest at the rate aforesaid upon such premiums and taxes and performance of statute labor.

Subsequently to the mortgage to the Canada Life Assurance Company, and on the 28th February, 1879, an indenture was executed to which Alexander Grant and his wife and the Canada Life Assurance Company were the only parties, whereby the time for payment of the money thereby secured was extended until the 13th of December, 1881.

The appellants were, by the express terms of the mortgage of the 31st of May, 1881, subrogated to all the rights of the Canada Life Assurance Company in respect of their securities paid off as before mentioned. By the deed of assignment by the Canada Life Assurance Company to the appellants, which was dated the 2nd day of June, 1881, and to which Alexander Grant and his wife were parties, it was admitted that the amount then due to the Canada Life Assurance Company and assigned to the appellants was the sum of $7,025 for principal and interest, and $400 for expenses.

On the 24th of August, 1877, prior to the date of the appellant's mortgage but subsequent to the mortgage to the Canada Life Assurance Company, Alexander Grant by endorsement upon the policies under his hand declared, pursuant to the statute in that behalf, that the said policies, and the sums payable thereunder, should be for the benefit of his wife for her natural life, and on her decease to such of his children as should be living at the time of the death of his said wife in proportions more fully set out in the endorsement.

Mrs. Grant having died, the respondents other than Alexander Grant are, as the children of Alexander Grant, who survived his wife, absolutely entitled to the policies and the monies payable thereunder at the death of Alexander Grant, subject only to such charge thereon as the appellants may be held to be entitled to.

Default having been made in the payment of the principal money secured by the mortgage of the 31st May, 1881, the appellants, on the 28th of July, 1888, sold the mortgaged lands for the sum of $10,360, and this amount of purchase money was received by them from the purchaser. The respondents other than Alexander Grant thereupon tendered to the appellants the sum of $120, and demanded a re-assignment of the policies. This demand having been refused by the appellants, who claimed a much larger sum to be due than the amount tendered, this action was instituted to compel a re-assignment of the policies. The action having come on to be heard upon a motion for judgment before Mr. Justice Rose on the 28th day of May, 1889, it was ordered and adjudged that it be referred to the registrar of the Queen's Bench Division for inquiry and report, pursuant to R. S. O. cap. 44, sec. 101.

The referee having heard evidence and considered the accounts laid before him subsequently made his report, dated the 27th June, 1889, whereby he found and reported that the mortgage security in the first paragraph of the statement of claim mentioned fell due on 1st June, 1884, and that the defendants were not entitled to any interest after that date under the terms of the contract in the mortgage security contained or under any contract; and the referee assessed the appellant's damages at the rate of six per cent. per annum on the unpaid principal moneys from 1st June, 1884 until

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they received payment. The referee further found that the several insurance policies in the indenture in the second paragraph of the plaintiff's statement of claim mentioned were, on the 24th day of August, 1877, assigned by Alexander Grant to the plaintiffs other than himself, who are now entitled to those policies; and that the plaintiff, Alexander Grant, by the indenture in the second paragraph of the statement of claim mentioned, assigned the policies to the defendants as collateral security for the indebtedness under the mortgage in the first paragraph of the statement of claim mentioned, and to secure the repayment of any premiums the defendants might pay in respect of the policies, but the plaintiffs, other than Alexander Grant, were not parties to such assignment to the defendants and were not bound thereby; and that the defendants had advanced in payment of insurance premiums upon the life insurance policies assigned to them, as in the second paragraph of the statement of claim mentioned, the sum of $253.53, and that they were entitled under the terms of the said assignment to the sum of $24.79 interest thereon, making together the sum of $278.32, from which sum the sum of $181.59, due by the defendants, having been deducted, there was left a balance of $96.73 due to them in respect of life insurance premiums which were a charge on the said life policies; that under and by virtue of a certain indenture of mortgage, dated the 13th day of June, 1877, made by the said Alexander Grant and Annie Grant to the Canada Life Assurance Company, the said Alexander Grant and Annie Grant mortgaged the said lands to the Canada Life Assurance Company to secure $6,000 and interest; that by assignment dated the 13th day of June, 1877, the said Alexander Grant assigned to the Canada Life Assurance Company by

way of collateral security the three several insurances policies hereinbefore referred to; that the said mortgage to the Canada Life Assurance Company was paid off by the defendants out of the moneys advanced upon the security of their said mortgage, and the defendants obtained an assignment thereof, and of their charge on the said life policies, from the Canada Life Assurance Company by way of collateral security for their mortgage hereinbefore mentioned; that the plaintiffs, before the commencement of this action, tendered to the defendants the sum of $120 in payment of the amount due to them under the assignment in the statement of claim mentioned, and also tendered to the defendants a re-assignment of the policies for execution and demanded possession of the policies, but the defendants refused to accept that sum or to give up possession thereof; and that the plaintiffs are entitled to redeem the policies, and to the possession thereof, and to have the same re-assigned to them on payment of the sum of $96.73.

From this report the present appellants appealed, assigning the following grounds of appeal:

1st. That the official referee should have allowed the defendants interest on their mortgage security at the rate mentioned in the mortgage from the date of the mortgage until actual payment, both because such rate is so reserved and made payable by the mortgage and because the evidence shows that, subsequent to the expiration of the term for payment fixed by the mortgage, the plaintiffs agreed to pay such rate if the immediate payment of the mortgage money was not enforced, and because, in any event, the defendants would be entitled to interest at the rate reserved in the mortgage as damages for breach of contract in not paying the same as therein reserved.

2nd. On the ground that the plaintiffs, other than

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Alexander Grant, have no interest in the policies, and that the said Alexander Grant is precluded from redeeming them by his contract.

3rd. Because the evidence shows that, as between the parties to the action, the mortgage to the Canada Life Assurance Company is still unsatisfied, and that the policies in question are held by the defendants as security therefor.

This appeal having come on to be heard before the Chief Justice of the Common Pleas Division that learned judge, on the 27th September, 1889, gave judgment dismissing the appeal with costs. From this order the appellants then appealed to the Court of Appeal, by which latter court the appeal was also dismissed with costs. From this last order the present appeal has been brought.

The declaration of 2nd August, 1877, made by Alexander Grant by endorsement on the policies, clearly had the effect attributed to it by the referee in his report of vesting the policies and the monies thereby assigned absolutely in the respondents other than Alexander Grant in the event, which has occurred, of Mrs. Grant's death. The original enactment which was in force at the date of the endorsed declaration, and of which sec. 5 of ch. 136 of the Revised Statutes of Ontario, 1887, is a reproduction, provides that such a declaration shall be deemed a trust for the children according to the interest expressed or declared, and that so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the father or his creditors, or form part of his estate when the sum secured by the policy becomes payable. It follows from this that no dealings with the policies by Alexander Grant and his wife subsequent in date to the 2nd of August, 1877, can in any way prejudice or affect the rights of their children,

the other respondents, and that in this respect the finding of the referee is unimpeachable. Therefore, as against the respondents other than Alexander Grant, the appellants are not entitled to a charge upon these policies more extensive than that which was imposed by the mortgage of the 13th of June, 1877, in favor of the Canada Life Assurance Company, and all charges and dispositions of the policies by Alexander Grant subsequently made are inoperative and void as against the respondents other than himself. The last named parties were, therefore, strictly entitled to redeem and have a re-assignment of these policies upon payment to the appellants of the original mortgage debt to the Canada Life Assurance Company of $6,000, together with interest calculated according to the terms of the proviso contained in the mortgage deed, together with any premiums on the policies which may have been paid by the mortgagees, and any proper allowances in respect of costs and expenses—less the amount of payments made by the mortgagors to the original mortgagees, and less a due and ratable proportion of the purchase money received from the sale of the lands and of the payments made by the mortgagors to the appellants. The referee has not, however, taken the account on this principle, but according to the terms of the appellants' mortgage of 1881, which was less favorable to the respondents (other than Alexander Grant) than the principle of accounting to which they were in strictness entitled. They have not, however, appealed from the referee's decision.

The learned Chief Justice of the Common Pleas Division, and the Court of Appeal, rest their respective decisions on the authority of the cases of *Powell* v. *Peck* (1) and *St. John* v. *Rykert* (2), and in the former case of *Powell* v. *Peck* the Court of Appeal followed the deci-

(1) 15 Ont. App. R. 237. (2) 10 Can. S.C.R. 278.

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sion of this court in *St. John* v. *Rykert*. In *St. John* v. *Rykert* it was held that upon a promissory note by which interest was reserved at the rate of 24 per cent. per annum "until paid," interest at the rate so reserved was not recoverable by way of damages after the day of payment, and that from that time interest could only be recovered at the rate of 6 per cent. per annum. This decision was founded on the case of *The European Central Railway Company* (1), and upon the explanation and approval of it by Mr. Justice Fry in the later case of *Popple* v. *Sylvester* (2). See also *re Roberts* (3). Mr. Justice Fry in the last named case distinguished it from that of *The European Central Railway Company* as follows, he says:—

> I ought perhaps to make a remark upon the case of *The European Central Railway Company*. There the covenant being to pay the principal sum with interest until repayment thereof the court held that these words meant until the day fixed for payment, and therefore they held that there was no covenant to pay beyond the day fixed for repayment of the principal. Here I have held that there is an express covenant to continue the payment of interest so long as the security should continue. That case therefore has no application.

The material words of the debentures in question in the case of *European Central Railway Company* were "the principal sum to be paid on the 11th day of October, 1865, and the interest to be payable in the meantime half-yearly until the repayment thereof (4)." Following the case of the *European Central Railway Company* and Mr. Justice Fry's comment on it, it was determined in *St. John* v. *Rykert* that the words "until paid" were equivalent to the expression "until repayment" in the case in the English Court of Appeal. In *Powell* v. *Peck* (5) interest was

(1) 4 C.D. 33.
(2) 22 Chy. D. 100.
(3) 14 Ch. D. 49.
(4) See also *Cook* v. *Fowler*, L. R. 7, H.L. 27; *re Roberts*, 14 Ch. D. 49.
(5) 15 Ont. App. R. 237.

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reserved at 8 per cent. per annum "until payment in full." Proudfoot J. allowed interest by way of damages at 6 per cent. only, after the day fixed for payment, and the Court of Appeal unanimously refused to interfere with his decision, holding that interest was only payable under the contract up to the date fixed for payment of principal, and that the rate of subsequent interest allowed by way of damages was discretionary and ought not to be interfered with. This case is valuable for a very able discussion of the principles involved and a full examination of the authorities contained in the judgments of Mr. Justice Burton and Mr. Justice Osler. For myself, I agree with the rule as to interest by way of damages there laid down except in one respect. I cannot assent to the suggestion of Mr. Justice Osler (not, however, acted on in the case under consideration) that in foreclosure and redemption actions more than 6 per cent. might be given by way of damages. Creditors have it in their power to stipulate for liquidated damages in case of default, and in my opinion if they do not do so they must, in the silence of their contract, be content with the statutory rate of 6 per cent. which, in the face of the express enactment of the statute, is not to be exceeded unless a larger rate of subsequent interest is actually contracted for. The defeasance clause in the mortgage of 1881 on the footing of which the referee seems to have taken the account, is that the "mortgage should "be void on payment on or before the 1st of June, "1884, with interest thereon at the rate of 10 per cent. "per annum until such principal and interest shall be "fully paid and satisfied." I entirely agree with the Court of Appeal and the Chief Justice of the Common Pleas Division that no sensible distinction can be made between these words and those used in the English case referred to, and in *St. John* v. *Rykert* and

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Powell v. *Peck* ; the words in the last case in particular "until payment in full" being the exact equivalent of those used in the present case.

As I have before indicated, however, the mortgage to the Canada Life Assurance Company of the 31st May, 1877, is that which alone can affect the children of Mr. Grant who claim under the statutory declaration endorsed on the policies, and the defeasance clause in that instrument is expressed even more strongly in favor of the respondents than that in the appellants' own mortgage. In this first mortgage the proviso reads: "Provided this mortgage to be void on payment of $6,000 with interest at 8 per cent., as follows: the said principal sum of $6,000 at the expiration of one year from the date hereof, with interest in the meantime payable half-yearly." The words, "in the meantime," here used, bring this case exactly within the terms of the debentures in the case of *The European Central Railway Company*, and are conclusive to show that there was no contract to pay interest ultra the day fixed for payment of the principal.

The case before us is, therefore, a much stronger one for restricting the recovery of interest at the stipulated rate to the day fixed for payment of the principal than any up to this time before the Ontario courts.

Since the foregoing portion of this judgment was written my attention has been called by the appellants' counsel to the case of *Mellersh* v. *Brown* (1). I have read the report of that case, and after the most careful and attentive consideration I have been able to give it it appears to me that so far as it has any bearing at all on the present case it is an authority for the respondents rather than for the appellants. The principal question in *Mellersh* v. *Brown* was whether the mortgagee of a reversionary interest

(1) 45 Ch. D. 225.

in personal property was to be restricted to a recovery of arrears of interest for six years in analogy to that provision of the statute of limitations which prescribes that in the case of money charged on land the mortgagee or chargee shall be limited to six years' arrears. It was held that no such analogy could prevail, a decision which has no application whatever to the question we have to deal with in the present appeal. There is nothing in the judgment in this case of *Mellersh* v. *Brown* touching the question raised in the appeal before us beyond this : The learned judge who decided that case, Mr. Justice Kay, held that interest subsequent to the day fixed for payment, and, therefore, recoverable only by way of damages, was to be at the rate of 5 per cent., not, however, because that was the rate reserved by the mortgage deed, but because it was the usual and current mercantile rate of interest. So far, therefore, the case is a strong authority for the respondents here. In England there is no statutory provision as to the rate of interest, except as to judgment debts which, by statute 1 & 2 Vic., c. 110, sec. 17, are to bear interest at 4 per cent. per annum. Here, however, we have the statute (now R.S.C. c. 127, sec. 2) fixing the rate of interest in all cases where interest is recoverable, and where by the contract a rate is not expressly stipulated for, at 6 per cent. per annum. The words of this enactment are clear :

> Whenever interest is payable by agreement of the parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be six per cent. per annum.

It follows that interest recoverable by way of damages in this country cannot exceed a yearly rate of six per cent.

Further, this case of *Mellersh* v. *Brown* is an authority, if any can be required in addition to the cases before cited, that when by the contract interest is stipulated

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for up to a certain day fixed for payment of the principal the contract is not to be considered as providing by implication for the payment of subsequent interest at the same rate.

It is true that the judgment in the case of *Mellersh* v. *Brown* contains certain dicta from which it might, perhaps be inferred that the rule restricting subsequent interest to the current mercantile rate would not apply to a suit for redemption, and the learned judge certainly does quote the dictum of Lord Justice Cotton in *re Roberts* having reference to the same point. That, however, can have no application in the present case for the reason already mentioned, that we are here bound by a statute which prescribes an absolute rate for such cases which cannot be exceeded. Further, the case of *Cook* v. *Fowler*, the appeal in which embraced two causes one of which was a redemption suit, and the note to *Mounson* v. *Redshaw* (1) seem to have escaped observation. According to the last of these authorities the rule that interest *post diem solutionis* is recoverable only by way of damages is said to apply as well to money secured by a mortgage deed as to other contracts reserving interest payable at a day certain; and it results from *Cook* v. *Fowler* that no distinction is to be made between redemption suits and actions or proceedings instituted by the creditor for the recovery of the debt. And in the face of the well established principle that the price of redemption is to be the same in a redemption as in a foreclosure suit (2), it would be difficult if the case turned on that to maintain that there was any foundation for the distinction suggested.

(1) 1 Wms. notes to Saunders p. 205.

(2) Coote on Mortgages, 5 Ed. 1102; Fisher on Mortgages, 3 Ed. 1037; *DuVigier* v. *Lee*, 2 Hare 326; *Watts* v. *Symes*, 1 DeG. M. & G. 240; *Cook* v. *Fowler*, L.R. 7. H.L. 27; *Walker* v. *Bernard*, 2 Gr. 366; *Hanson* v. *Keating*, 4 Hare 6; *Sober* v. *Kemp*, 6 Hare 160; *Neesom* v. *Clarkson*, 4 Hare 97.

It is sufficient, however, for the present purpose, to say that in the Province of Ontario the rate of subsequent interest recoverable by way of damages is fixed by the statute at six per cent., and that that rate cannot therefore be exceeded.

The appeal must be dismissed with costs.

FOURNIER J.—Concurred.

GWYNNE J.—I only add in concurrence with this judgment of Mr. Justice Strong that it is, in my opinion, too plain to admit of any argument to the contrary that there is no covenant in the mortgage in question for payment of any interest beyond the day named in the proviso for avoiding the mortgage by payment of the principal, and that, therefore, beyond that day interest given as damages must be governed by the statute referred to by my brother Strong.

PATTERSON J. concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Delamere, Reesor, English & Ross.*

Solicitors for respondents: *Beck & Code.*

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JOHN A. McRAE AND COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

E. F. LEMAY (PLAINTIFFS).....RESPONDENTS.

(By original writ.)

JOHN A. McRAE AND COMPANY (PLAINTIFFS).. ..... } APPELLANTS;

AND

E. F. LEMAY AND LEMAY AND SON (DEFENDANTS)..... } RESPONDENTS.

(By counter-claim.)

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Arbitration and award—Award made final by submission—Motion to set aside—Grounds of objection.

An award will not be set aside on the ground that a memo., furnished by the arbitrator to the losing party after its publication, showed that the accounts between the parties were adjusted upon a wrong principle, the defect, if any, not being a mistake on the face of the award or in some paper forming part of, and incorporated with, the award, and there being no admission by the arbitrator himself that he had made a mistake.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) and refusing to set aside an award in favor of Lemay & Son.

The facts of this case are fully set out in the reports of the decisions appealed from. The following statement contains all that is necessary for the purposes of this report: —

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*Present: Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

(1) 16 Ont. App. R. 348. (2) 16 O. R. 307.

McRae & Co. were contractors with the Canadian Pacific Railway Company for the construction of certain pile and trestle bridges on the line of the railway east of Port Arthur, on the north shore of Lake Superior and Lemay & Son were sub-contractors for the construction of portions of the same work. After the contract was completed a dispute arose between McRae & Co.s and the railway company in reference to the quantity of timber supplied under the contract, the difficulty arising from the use of the term "board measure" as the basis of payment. This dispute ended in a suit against the company which was settled during the trial, and the present suit was brought in which the same contest arose as to what was meant by "board measure." In this suit the parties agreed on a reference to arbitra- tion, and a submission was signed which referred "to the arbitration, award and final end and determination of George H. MacDonnell," all matters of account and counter-claim in the action in question, and all matters in difference between the parties E. F. Lemay & Son, and John A. McRae & Company. The arbitration resulted in an award being made in favor of Lemay & Son.

McRae & Co. moved to set aside the award on the grounds of the improper admission of evidence of verbal agreements varying the contract between the parties, of wrong computation by the arbitrator to ascertain the amount due the plaintiffs and not awarding payment on the basis of board measure, and of the discovery of new evidence. The affidavits in support of the motion stated that after the award was published the solicitor of McRae & Ce. had a conversation with the arbitrator who informed him that a written memo., which he produced, showed his reasons for the different findings in his award, and how he arrived at the figures and results stated therein, but that he had

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not published these reasons as his decision was to be final. It was claimed in support of the motion that this memo. showed that the arbitrator had proceeded on a wrong principle in making up the accounts between the parties and also that he had departed from his original intention as to his award.

In support of the ground of the discovery of new evidence taken in the motion, the affidavits stated that an important witness had been sick during the progress of the hearing before the arbitrator, and it was only ascertained a day or two before the motion was made that material evidence could be given by another person who had not been called as a witness.

The application to set aside the award was refused by the Divisional Court, and the decision of that court was affirmed by the Court of Appeal. From the latter decision an appeal was taken to the Supreme Court of Canada.

Christopher Robinson, Q.C., and *A. Ferguson*, Q.C., for the appellants, cited the following authorities: *In re Dare Valley Railway Co.* (1); *East and West India Docks Co.* v. *Kirk* (2); *James* v. *James* (3); *Kent* v. *Elstob* (4).

S. H. Blake Q.C., and *Keefer* for the respondents referred to *Dinn* v. *Blake* (5), *Ching* v. *Ching* (6), *Flynn* v. *Robertson* (7), *Hogg* v. *Burgess* (1), *Doed. Oxenden* v. *Cropper* (9).

SIR W. J. RITCHIE C.J.—This was a voluntary submission, without any provision therein for an appeal from the award; the reference could scarcely be larger, "the said action and all matters of account and counter

(1) L. R. 6 Eq. 429.
(2) 12 App. Cas. 738.
(3) 22 Q.B.D. 669; 23 Q.B.D. 12.
(4) 3 East 13.
(5) L.R. 10 C. P. 338.
(6) 6 Ves. 282.
(7) 3 H. & N. 293.
(8) 10 A. & E. 197; 2 P. & D. 497.
(9) L.R. 4 C.P. 327

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claim therein, and all matters in difference between the parties." The case of *Hodgkinson* v. *Fernie* (1), clearly enunciates the law that where matters in difference are referred to an arbitrator he is constituted the sole and final judge of all questions both of law and fact, the exceptions to the rule being cases where the award is the result of corruption or fraud, or where the question of law arises on the face of the award or upon some paper accompanying and forming part of the award, which is approved of in *Dinn* v. *Blake* (2), where another exception is stated, viz.: where the arbitrator himself admits that there is a mistake, which, in the case before us, the arbitrator does not admit.

The award is good on its face. The draft award or memo. relied on handed to the defendant's solicitor, was neither delivered with the award, nor did it form any part of it. Neither this draft award nor the oral admissions of the arbitrators can be used for setting aside the award.

This is not the case of an application to revoke the submission. See *Dinn* v. *Blake* (3), *Leggo* v. *Young* (4).

I agree with the reasons given by Mr. Chief Justice Armour for refusing to set this award aside, and also with him that no proper case is made for remitting the award to the arbitrators on the ground of the discovery of new evidence.

For the reasons given, and on the authorities cited by Chief Justice Armour and Mr. Justice Osler, I think the decision in the court below correct, and that this appeal should be dismissed.

STRONG J.—This is an appeal against an order of the Court of Appeal for Ontario, affirming an order of the Queen's Bench Division, refusing a motion to set aside

(1) 3 C.B.N.S. 189.
(2) L.R. 10 C.P. 388.
(3) L.R. 10 C.P. 388.
(4) 16 C.B. 626.

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an award upon the ground of mistake on the part of the arbitrator.

In my opinion there is no foundation whatever for the appeal.

Nothing in the law relating to arbitrations and awards is better established than the rule that the court will not set aside or otherwise interfere with an award on the ground of mistake in the arbitrator either as regards the law or the facts, except in certain well defined cases.

These exceptions are, first, where the mistake appears on the face of the award, or in some paper which forms part of the award and is by reference incorporated with it. Secondly, in cases where the arbitrator himself states:

> That in his opinion he has made a mistake of law or fact and was desirous of the assistance of the court, and willing to reserve his decision on the point on which he believed himself to have gone wrong.

For the first of these rules, the authority of the cases of *Hodgkinson* v. *Fernie* (1); *Dinn* v. *Blake* (2); *Flynn* v. *Robertson* (3); *Holgate* v. *Killick* (4); *Re London Dock Company* v. *Trustees of Shadwell* (5), may be quoted. For the second position besides the before mentioned cases of *Dinn* v. *Blake* (2), and *Flynn* v. *Robertson* (3); *Mills* v. *The Master, etc. of the Mystery of Bowyers* (6), may be referred to.

In the present case there is nothing on the face of the award or in any paper forming part of it showing any mistake, nor has any mistake been admitted by the arbitrator. It has been attempted to demonstrate that there has been a mistake by producing a draft award which the arbitrator, after he had published his award, handed to the appellants' solicitor and by arguing from what there appears that the arbitrator must

(1) 3 C. B. N. S. 189.
(2) L. R. 10 C. P. 388.
(3) L. R. 4 C. P. 324.
(4) 7 H. & N. 418.
(5) 32 L. J. (Q.B.) 30.
(6) 3 K. & J. 66.

have been mistaken, and also by an affidavit of the appellants' solicitor of what was stated to him by the arbitrator after the publication of the award. These are totally insufficient grounds for interfering with the award. In *Lockwood* v. *Smith* (7) Martin B. says:

> There must be some grounds given us to suppose that the arbitrator is satisfied that there has been a mistake.

Nothing before us indicates that the arbitrator in the present case is under any such impression or that he thinks he has in any respect committed an error; for all that appears to the contrary if the award was now referred back to him he would again make one exactly similar.

If any illustration of the wisdom of the rule referred to could be required it would be afforded by the course which was taken on the argument of the present appeal which resolved itself into nothing less than an appeal at large from the arbitrator's decision on the law and facts; therefore to entertain such an application would be, in effect, to supersede altogether the functions of the arbitrator whose arbitrament the parties had agreed should be final.

The appeal must be dismissed with costs.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed with costs for the reasons given by his Lordship the Chief Justice.

GWYNNE J.—Concurred.

PATTERSON J.—I cannot see my way to hold the appellant entitled to be relieved from the award of which he complains.

The submission is by an order made by consent of parties in an action in which the present respondents are plaintiffs and the appellants defendants.

(7) 10 W. R. 628.

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There is no agreement contained in the submission that the award shall be subject to appeal under the Ontario Statute, and there is no motion to refer back the award to the arbitrator for reconsideration. The present motion is merely to set aside the award.

The appellants were contractors with the Canadian Pacific Railway Company for the construction of a part of the railway. The respondents were sub-contractors under them for the construction of certain pile and trestle bridges, and they were to be paid—with some exceptions which do not effect this contract—a price per thousand feet (board measure) for the timber, round or flatted, put into the work. The price covered the work of construction as well as the supplying of the timber, which was to be procured along the line where practicable and within reasonable hauling distance.

The dispute is over the amount awarded to the respondents, which the plaintiff alleges to be more than a measurement of the timber by "board measure" will justify.

The award adjudges that the respondents are indebted to the plaintiffs in $9,900.52, without giving any details as to how that sum is arrived at, but the arbitrator had at one time intended to have made his award in a different shape, and had prepared a draft award giving full details of the process by which the result of $9,900.52 was reached. That draft was afterwards seen by the parties or their solicitors and is brought before the court with an affidavit showing how it was obtained and stating conversations with the arbitrator.

It is objected on the part of the respondent that, under the established law relating to motions to set aside awards that are good on their face, the draft award and the conversations mentioned in the affidavit

cannot properly be taken into consideration by the court. To decide that objection would involve a discussion of some questions of fact as well as of law, including a divergence in one or two particulars between the arbitrator and the respondents' solicitor in their accounts or their understanding of the conversations, &c., referred to in the affidavits filed. In my judgment that discussion is unnecessary, because I think that, even with all the materials presented by the appellant before us, we must agree with the courts below in holding that the arbitrator did not exceed his jurisdiction.

The term "board measure" is not one that explains itself. It is shown to be a term in use among lumbermen, and among them to denote the number of square feet of 1-inch boards which a log of given length and diameter is estimated to be capable of producing. Mr. Pinkerton, a partner in the appellant firm and himself an engineer, speaks of it in his evidence, and he seems to show that a lumberman would probably make his estimate by means of Scribner's tables, though the actual yield might vary according to the thickness of the saw. One of his answers is:

I have looked over Scribner; he gives a table, and it is pretty hard to arrive at a rule, because some saws are thicker than others, as a band saw will not waste as much as a circular saw, so there could not be any rule on that point.

The appellants by no means conceded that "board measure" according to Scribner's tables satisfied their contract with the railway company. They claimed the cubic contents of each piece of timber, and the company's engineers measured and certified on that basis. The company insisted on "board measure" by the lumbermen's scale, which, as Mr. Pinkerton explains, is much less than the cubic contents of the log, because you lose the slabs and saw cut.

On this dispute the appellants brought an action against the company which was compromised during

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the trial without a decision on the meaning of "board measure" in these contracts.

The respondents claimed against the appellants another mode of computation, at least as to a considerable part of their work They had three contracts, each for a different section of the railway. On one section there was timber available to supply the sizes, 12 inches square being the largest required. There is no difference between the measurements by which the respondents claimed and those of the appellants on that section. The same thing is said to be true of the first forty miles of the second section, but after that the available timber was smaller, and smaller sizes than the company's contract required were used and accepted by the company's engineers. It is, as I understand, with regard to these smaller timbers that the principal dispute exists. The respondents were not satisfied to be allowed merely the cubic contents of each stick, and of course were farther from submitting to the lumbermen's board measure. Their claim was for the full sizes of timbers required by the contract, although smaller sizes were used and accepted. As expressed by one of the Lemay family in his evidence before the arbitrator—

> The timber that was used as 12 by 12 was measured 12 feet to the running foot; timber used as 8 by 12 was measured at 8 feet to the running foot.

The dispute as to this made of computation was one of the matters in difference referred to the arbitrator. He does not appear to have adopted the respondents' method of making their computations. He takes their measurements which were made as just noticed, and says:

> But from the evidence I am satisfied that a large percentage of the timber measured as 12 inches in diameter was not that size. In fact John W. Lemay says in his evidence that some of it was not more than 9 inches in diameter at the small end. For me to arrive at the exact amount that should have been allowed it would be necessary to have

all the bridges re-measured. This is an impossibility, as many of the structures have already been filled in with earth by the railway company, and to do what I consider fair and right between the parties a deduction of 30 per cent. should be made from the above figures in the measurements made by plaintiff's witnesses Beauvais and Lemay.

Then he gives the figures which bring out the amount of the award. In doing this he makes the deduction of 30 per cent., not from measurements of Beauvais and Lemay but from the excess of their measurements over those put in on behalf of the appellants. I do not understand that to be an error as was urged at the bar. I understand the error to be in failing to express his meaning clearly. There are three reasons for so thinking. There is first the arbitrator's own figures. Then there is the fact that to deduct 30 per cent. from the gross measurements would reduce the measurements below those of the respondent; and lastly there is the affidavit of the solicitor who obtained the draft award and who talked the matter over with the arbitrator. He says the arbitrator—

> further stated to me that he considered there was no evidence whatever before him as to what system of measurements was, or was to be, adopted on the second and third contracts except the evidence of Ross and Lemay, and that as the work was all filled in, and he could not discover the actual measurements, he was obliged to dispose of the question of measurement of timber without any evidence and according to his own ideas of right and justice, and that he accordingly took Lemay's measurement, allowing thirty per cent. off the excess or difference between Lemay's and McRae's claims to make up for the fact that Lemay admitted that part of the timber was only nine inches in diameter.

I have carefully examined the cases cited to us and a number of others, and I do not see that either on authority or on principle we should be warranted in setting this award aside.

I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *A. Ferguson.*

Solicitors for respondents: *Keefer, Thacker & Godfrey.*

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*Mar. 18.

*Dec. 10.

JOHN ROLAND HETT (DEFENDANT)...APPELLANT;

AND

PUN PONG (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Solicitor—Negligence—Failure to register judgment—Retainer.

A solicitor is liable in damages to his client for neglecting to obey instructions to register a judgment and thereby precluding the client from recovering the amount of his judgment debt.

Per Strong J.—A retainer to prosecute an action does not terminate when the judgment is obtained but makes it the duty of the attorney or solicitor without further instruction to proceed after judgment and endeavor to obtain the fruits of the recovery including the making it by registration a charge on the lands of the judgment debtor.

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

The plaintiff, a merchant of Hong Kong, retained the defendant, a solicitor of the Supreme Court of British Columbia, to recover a sum of money from Kwong, Lee & Co., a Chinese firm in Victoria. Judgment was obtained against the said firm but was not registered so as to bind their real estate, and other creditors having also obtained, and registered, judgments against the same parties the real estate was all taken to satisfy them and the plaintiff was unable to obtain his money, and he brought an action against the solicitor to recover the amount of his judgment as damages for negligence in not registering.

On the trial the issue mainly turned upon whether

*PRESENT: Sir W. J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson JJ.

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or not the solicitor had received special instructions to register. The plaintiff's agent, who had originally instructed the defendant, swore that when told by the defendant that judgment had been signed he asked if he could get the money and was told that he could not, that nothing could be done except register the judgment against the property. He asked if that made any difference and was told that if he did not register he could not get the money after the property was sold, whereupon he said "if that's the case have it registered." A few days after he saw the defendant again and asked if the judgment was registered and the defendant said that it was.

The defendant did not deny the truth of this statement by the agent but thought that the first conversation took place after the other judgments had been registered against the firm of Kwong Lee & Co. and, therefore, too late to carry out the instructions. The agent, on the other hand, swore positively that it was in time.

The trial judge, in his charge to the jury, stated as his opinion that the original retainer of the defendant made it his duty to take the necessary steps to obtain the fruits of it, but he left to them the question whether or not special instructions had been given with respect to it. The jury found for the plaintiff with damages to the amount of the judgment debt. The defendant appealed to the Supreme Court of Canada.

Prior to the obtaining of the plaintiff's judgment a receiver had been appointed to the estate of Kwong, Lee & Co. in a suit between two of the partners. The defendant contended before the court below that as the assets would have to be distributed ratably by the receiver the omission to register the judgment was immaterial.

Chrysler for the appellant. The registration of the

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judgment could not affect the duties of the receiver. Beech on receivers (1); *Halton* v. *Haywood* (2); *Anglo-Italian Bank* v. *Davies* (3); *Ex parte Evans. In re Watkins* (4).

As to the duty of an attorney see *Darling* v. *Miller* (5); *Searson* v. *Small* (6); *James* v. *Ricknell* (7).

As to burden of proof see *Re Kerr* (8).

Christopher Robinson Q.C. for the respondent cited *Plant* v. *Pearman* (9), and *Harrington* v. *Binns* (10).

SIR W. J. RITCHIE C. J.—There can be no doubt that an attorney is liable for negligence in the discharge of his duty whereby his client has sustained damage, and I think an attorney is bound to bring to the exercise of his profession a reasonable amount of knowledge, skill and care in connection with the business of his client. It is quite clear in this case that there was no want of knowledge, because it is equally clear that the attorney well understood the necessity and value of the registration of this judgment and undertook to have it done, and lulled the client into a false security by telling him that he had done it, whereas, in fact, he most negligently and carelessly, without any apparent excuse, has failed to do what he had undertaken, whereby the client has lost the amount of his judgment which the evidence clearly shows would have been secured to him if the attorney had done his duty and registered the judgment as he was instructed and undertook to do.

No question arises in this case as to the retainer ceasing with the judgment. I think the question necessary to establish the defendant's liability was

(1) P. 586.
(2) 9 Ch. App. 229.
(3) 9 Ch. D. 275.
(4) 11 Ch. D. 691; 13 Ch. D. 252.
(5) 22 U.C.Q.B. 363.
(6) 5 U.C.Q.B. 259.
(7) 20 Q.B.D. 164.
(8) 29 Gr. 188.
(9) 26 L.T.N.S. 313.
(10) 3 F. & F. 942.

substantially left to the jury; the jury were fully justified in arriving at the conclusion that the attorney distinctly undertook to register the judgment and that he stated that he believed this had been done when, in point of fact, he had entirely neglected to do so. He had registered a judgment for another client after the date of the Pun Pong judgment, which registration secured the payment of the former judgment, showing conclusively that the loss of the amount of the Pun Pong judgment resulted from his omission and negligence.

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Under these circumstances I think the judgment of the court below was quite right, and this appeal must be dismissed with costs.

STRONG J.—I am of opinion that the judgment of the Supreme Court of British Columbia impugned in this appeal was in all respects right and that it must be affirmed.

A good deal was said in the course of the argument in the court below about an order for a receiver granted in a suit of *Fan* v. *Fan*, which was a partnership suit between the partners composing the firm of Kwong, Lee & Co., the defendants in the action which the appellant was retained by the respondent to prosecute, and about the effect of that order for a receiver on the priority of judgment creditors and their right to be paid out of the debtor's lands according to the order in point of date of their registration. It requires no demonstration to show that all this had nothing to do with the matters in dispute. No order or decree in the suit of *Fan* v. *Fan* could possibly affect creditors of Kwong, Lee & Co., who were not parties to the partnership suit, and it is preposterous to talk of the lands of the partnership being made equitable assets as regards judgment creditors of the firm. The court

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below were, therefore, right in disregarding this argument.

The real questions in the case are: First, whether in point of law a retainer of the appellant to bring the action did or did not make it his duty to register the judgment. And if this is to be answered in the negative then: Secondly, did, or did not, Nee Mook, the agent for the respondent, give the appellant the special instructions to register which he swears he did give? It appears to me that both these questions must be answered favorably to the respondent. Upon the evidence of Mr. Prevost there can be no doubt that if the respondent's judgment had been registered prior to the registration of the judgment for $46,214 recovered by Goetz's against Kwong, Lee & Co., and registered on the 21st July, 1886, it would have been paid out of the proceeds of the sale of the lands of the judgment debtors.

It is, however, insisted that a retainer to prosecute the action did not make it the duty of the appellant to register the judgment, and for this the case of *Darling* v. *Webber* (1) is relied on as an authority. That case, however, so far as the point actually decided in it goes, does not support the appellant's contention; the question there was not as to the duty of the attorney who recovered the judgment to register it but as to his duty to re-register at the expiration of the statutory period when the original registration was vacated by the lapse of time. It was held it was not the duty of the attorney so to re-register This may, however, well be consistently with its being the duty of the attorney to effect registration originally on the recovery of the judgment. It is true that there are dicta contained in the judgment of *Darling* v. *Webber* which, emanating from a court of such high authority

(1.) 22 U.C.Q.B. 363.

as that which decided that case, are entitled to the most respectful consideration. I am of opinion, however, that consistently with the authorities it cannot be held that a retainer to prosecute an action to judgment terminates with the recovery of the judgment, nor that such a retainer does not by itself make it the duty of the attorney or solicitor without further instruction to proceed after judgment and endeavor to obtain the fruits of the recovery.

In *Lady de la Pole* v. *Dick* (1) it was held that solicitors continued to represent their client after judgment, without any further retainer, for the purpose of appealing against the judgment, and this decision proceeded upon the principle that the retainer of the solicitor does not terminate with the judgment but continues thereafter, in the case of the solicitor of the party recovering the judgment for the purpose of obtaining the fruits of it, and in the case of the solicitor of the party condemned by it for the purpose of defending him against the execution. The authority on which this decision proceeded seems to have been an old case of *Laurence* v. *Harrison* reported in Styles (2) where Rolle C.J. propounds the law in the terms just stated. In *Bevins* v. *Holme* (3) the law is stated by Parke B. as follows:—

> We think he was right in contending that the original retainer was not determined by the judgment but continued afterwards so as to warrant the attorney in issuing execution within a year and a day or afterwards in continuation of a former writ of execution issued within that time, and also to warrant his receiving the damages without a writ of execution, the weight of prior authority being against the decision of Heath J. in *Tipping* v. *Johnson* (4).

And in two passages in Lush's practice (5) which, as well as the before mentioned authorities, were cited

(1) 29 Ch. D. 351.
(2) Sty. 426.
(3) 15 M. & W. 88.
(4) 2 B. & P. 357.
(5) Ed. 1865, Vol. 1, pp. 251-252.

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by counsel *arguendo* in *De la Pole* v. *Dick* (1), we have the high authority of the late Lord Justice Lush in favor of the view that the retainer continues until the judgment is satisfied, and for holding that the case of *Tipping* v. *Johnson* (2) to the contrary must be considered as no longer of authority. The cases of *Plant* v. *Pearman* (3) and *Harrington* v. *Binns* (4) cited in the respondent's factum also support the same conclusion.

If the rule to be deduced from these cases and authorities is now the law in England I think it ought, *a fortiori*, to be considered as applicable here. When a client retains a solicitor to collect a debt he makes no distinction between the services required for that end before judgment and those to be rendered after judgment; the retainer is, in the view of the client, not merely to establish the right by bringing the action and recovering the judgment, stopping there, but to get the money. What is expected of the solicitor is that he should do just what the witness (Nee Mook) says he told Mr. Hett, the appellant, he wanted him to do in the present instance, viz., in the words of the witness, "attend to the case." And attending to the case, in my opinion, would, even if the English authorities were not as decisive as they are, include the perfecting of the judgment as a charge on the judgment debtor's lands by registering it in any county or other division for registration purposes in which there might be reasonable grounds for presuming that the judgment debtor had lands,

But even if the original retainer had not made it the duty of the appellant to register the respondent would still have been entitled to retain the judgment in his favor now impeached, inasmuch as it is plain from

(1) 29 Ch. D. 351.
(2) 2 B. & P. 357.
(3) 26 L. T. N.S. 313.
(4) 3 F. & F. 942.

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the evidence upon which the jury, under the direction of the learned judge who presided at the trial, found for the respondent that the appellant received special instructions from Nee Mook, the respondent's agent, to register the judgment. The witness, Nee Mook, says that this was soon after the judgment was recovered and, therefore, sometime anterior to registering Goetz's judgment. Mr. Hett, the appellant, cannot fix the date of these instructions but thinks it was too late. It is clear, however, that any presumption as regards the date must be against the appellant. It was his duty as a solicitor to keep proper books containing regular records of the proceedings in cases which he was conducting as a solicitor, and as the agent representing the client swears to a particular date it does not lie in the mouth of the solicitor to say he cannot recollect the date of the instructions and that he has no entry to refer to from which it can be accurately ascertained. The appeal must be dismissed with costs.

FOURNIER J.—I am of opinion that the appeal should be dismissed for the reasons given by His Lordship the Chief Justice.

GWYNNE J.—It is to be regretted that any question as to whether the original retainer of a solicitor by a client to commence an action for the recovery of a debt involves an undertaking by the solicitor to register the judgment when recovered in the office for registration of titles affecting lands for the purpose of charging the judgment upon the lands if any there be, of the judgment debtor, was ever introduced into this case for, as pointed out by Mr. Justice Gray in the Supreme Court of British Columbia, that question was not raised upon the record. The allegation of the plaintiff in his state-

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ment of claim was that after the recovery of the judgment the plaintiff gave his solicitor express instructions to register the judgment, and that the solicitor in disregard of such instructions neglected to do so whereby the plaintiff suffered damage. The defendant, in his statement of defence, expressly denied that allegation, and he denied that he ever was instructed to register the judgment. He denied also that the plaintiff had, by any negligence of the defendant, lost the fruits of his judgment, or that if the judgment had been registered the plaintiff would have recovered the amount, or that the plaintiff had suffered any damage from the non-registration thereof. Upon issue joined on these points the case went down to trial, and the whole of the evidence offered by the plaintiff thereat was addressed to the establishment of this special instruction alleged to have been given to the solicitor after the recovery of the judgment, and of his undertaking to comply with such instruction and his subsequent assurance that he had, in fact, done so. That the learned judge who tried the case was of opinion that the original retainer to bring the action did involve an undertaking by the solicitor, and did impose upon him the duty to register the judgment when obtained, appears clearly from his judgment pronounced upon the plaintiff's motion for judgment after verdict; and that he expressed that opinion in his charge to the jury also abundantly appears, I think, from that charge as reported on the appeal case before us; but that the case was not left to the jury as resting upon that expression of the learned judge's view of the law appears also from the remainder of the charge. If the case had been rested upon the learned judge's opinion of the law upon that point there would have been nothing to leave to the jury but the question of damages, if any, which may have been sustained by the plaintiff,

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whereas it appears, by the report of what took place at the trial, that the whole contention was as to the truth of the allegation of the plaintiff in his statement of claim that the defendant had been specially instructed, after the judgment had been obtained, to register it, and upon this point the learned judge charged the jury as follows:—

It strikes me, if you believe the evidence of the Chinaman, that he did get the suggestion to register from Mr. Hett. Mr. Hett confirms this as far as his memory goes, though it appears to be very unsettled upon some points, except as to the general idea, so forcibly pressed on us by his counsel, as to the necessity of doing what was expected of him.

Well, this Chinaman learned from Mr. Hett, when the judgment was obtained, he could not get the amount of his judgment until after the property had been sold, and then, he swears distinctly, registration was mentioned. Mr. Hett himself says he mentioned registration to him. If this did take place at that time then clearly there was a dereliction of duty on Mr. Hett's part for which he is liable in damages; but if you find that the evidence does not amount to that, though it appears to me to do so, you are sole judges of the fact. Though I give you an impression of my opinion, if it does not coincide with your own judgment you are to pay no attention to mine, but your duty in such case is to act entirely on your own conviction. A man ought not, in that view, to undertake the work if he can see that it would not succeed, or if he does not see some reasonable chance of its succeeding. Nor does the evidence show you whether if the judgment had been registered at that time it would have succeeded or not. Are you or are you not satisfied, from the receiver's evidence, that if he had registered it, when it was got, against the real estate he would have got the money? That is before you, mind, for the purpose of ascertaining your conclusion. If upon the evidence you are of that opinion then I think it was a dereliction of duty not to have registered the judgment.

And again:

The defendant must have thought that there was some advantage in registering the judgment in the Law Registry office which would ensue to the benefit of his client from his having told Nee Mook he had done so. If he really did so at the time he is said to have done so, he must have thought there was an advantage in it that would accrue to the benefit of his client. I can easily imagine, and I should wish no word I say to carry more weight than it deserves, but it is very conceiv-

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able and easy to imagine that a gentleman of the occupation and business of the defendant in this case, not having been in the habit of keeping a diary, might easily not be able to charge his memory specially with the dates and times at which these important conversations are stated to have taken place.

That they did take place at the times stated, it is for you to say ; but if they did take place at the time, then the obligation he was under to see after the registration of this judgment was binding at that time upon him. The learned counsel for the defence says it could only have been after notice of the sale, and several other things, that registration was suggested, and that it was then too late. Is that reasonable ? Does it strike you in the face of the evidence as a proper point to take ?

Now there can, I think, be no doubt that the case was thus distinctly left to the jury as resting upon the truth or falsity of the evidence of the Chinaman, Nee Mook, who had sworn very distinctly as to the time, and as to the conversations between him and the defendant when the special and precise instructions to register the judgment were given by Nee Mook as agent of the plaintiff to the defendant, and the performance of the instructions was undertaken by him. As to the evidence of this Chinaman the defendant himself said that he would not swear that it was incorrect, although he had no recollection of it. And again he said :

I do not think I told him anything but that I would register, or told him I had registered.

And again he said :

I keep no diary as to interviews or attendances ; nothing to refresh my memory as to this case.

And again :

I speak only from recollection.

Now, upon this evidence there cannot be any doubt that the jury had sufficient to justify their adopting the evidence of the Chinaman, nor do I think there can be any doubt that it was upon his evidence they rendered their verdict, and I cannot think that the

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expression of opinion by the learned judge of the extent of the first retainer to bring the action operated to induce them to render their verdict as founded upon that opinion, and not upon the evidence of the Chinaman, to which their attention was so directly drawn both during the whole progress of the taking of the evidence and by the charge of the learned judge. It would, I think, have been better that no expression of opinion upon the point had been given, as it was quite unnecessary in the case, for although it be admitted that the original retainer is not exhausted by entering judgment it may well be still a question whether it involves the duty of registering the judgment in the land registry office, which, if it be a duty, might result in involving the client in great and unnecessary expense, as for example if it should appear that the judgment debtor had no lands to be affected by such registration. However, I express no opinion upon the point, as it is not necessary that I should—it must still remain an open question. All that it is necessary to decide in the present case is, that I do not think there is shown any such probability of the jury's attention having been withdrawn from the real point in issue, or that in rendering their verdict they were influenced by the judge's expression of opinion instead of by the evidence upon the point which was actually in issue to call for a new trial.

That the damage was sufficiently proved, there can be no doubt, if the special retainer to register was established, as I think we must, upon the evidence, hold that it was. The case will be a warning to the defendant not to act in the future so loosely as he admits he has been in the habit of doing in matters of such importance, not only to his clients, but to himself.

I think the appeal must be dismissed, and with costs.

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PATTERSON J.—I also am of opinion that the appeal should be dismissed.

SIR W. J. RITCHIE C. J.—I wish to make an observation in respect to the duty of solicitors to register judgments independent of instructions, having had a large experience in New Brunswick, and knowing that in that province there are certain expenses connected with such registration as a judgment would have to be registered in every county. In my office a judgment was never registered unless information was given by the client that there was property in a particular county, but execution was issued within a year and a day.

In this case I think the solicitor had special instructions to register the judgment which was the reason I did not make these observations before.

Appeal dismissed with costs.

Solicitor for Appellant: *J. P. Walls.*

Solicitor for Respondent: *Robert E. Jackson.*

EVAN JOHN PRICE (TIERS OPPOSANT IN THE SUPERIOR COURT) ..... APPELLANT;

AND

HON. H. MERCIER, *ès qual et al.*, PLAINTIFF AND INTERVENING PARTY IN THE SUPERIOR COURT) RESPONDENT.

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*Mar. 5.

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*Jan. 19.

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

Tierce-opposition to a judgment—Interest of opposant-Intervention—Sale of litigious rights—Arts. 485, 989, 990, 1583 *C. C.—Arts.* 154, 510 *C. P. C.—Judgment—When action was prescribed—Arts.* 2216, 2243, 2265, 2187 *C. C.*

P. having filed a *tierce-opposition* to a judgment obtained by the Attorney-General of the Province of Quebec in 1884, in a suit commenced by information in 1790 against the succession of one M. P. in order to have the judgment set aside on the ground that it declared escheated to the Crown a part of the Seigniory of Grondines of which he (P.) had been in possession for a great number of years and which judgment it was alleged had been obtained illegally and by fraud and collusion, one M. an advocate, who had purchased all the rights of the Crown in the said succession, intervened and asked for the dismissal of the *tierce-opposition.* The Attorney-General and the curator to the succession of M. P., the only parties to the judgment sought to be set aside, in answer to P.'s *tierce-opposition* merely appeared and declared that "*ils s'en rapportent à justice.*" Upon the issues being joined on the *tierce-opposition* and on the intervention and evidence taken, the Superior Court dismissed M.'s intervention and maintained P.'s *tierce-opposition.* On appeal to the Court of Queen's Bench by the crown and M. jointly, this judgment was reversed, and P.'s *tierce-opposition* was dismissed.

On appeal to the Supreme Court of Canada:

Held, reversing the judgment of the court below, 1st that M. had no *locue standi* to intervene, the sale to him of the crown's rights being void, *(a)* because it was a sale of litigious rights to an

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

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advocate prohibited by arts. 1485 and 1583 C. C. and therefore null under arts. 14 and 990 C. C. ; (*b*) because it was tainted with champerty, arts. 14, 989, 990 C.C. ; (*c*) because M. admitted he had no interest in the case, art. 154 C. P. C.

2nd. That P. being in possession of the property declared escheated to the crown in a proceeding to which he was not a party had a sufficient interest under the circumstances in the case to file a *tierce-opposition*, and that the judgment of 1884 should be set aside because *inter alia*, (*a*) it was obtained by fraud and collusion ; (*b*) the action being prescribed in 1884 (Arts. 2216, 2242, 2265 C. C.) P. under art. 2187 had the right to avail himself of this prescription.

Fournier J. dissented on the ground that P. not having alleged or shown a right superior to that of the crown his *tierce-opposition* should be dismissed.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, (appeal side) reversing a judgment of the Superior Court, whereby a *tierce opposition* filed by the appellant to a judgment rendered in the Superior Court of the 14th June, 1884, was maintained.

Upon an information filed by the Attorney-General for the King in 1790, claiming as escheated to the crown certain real estate, viz: a portion of the Seigniory of Grondines forming part of the succession of one Marie Piery, widow of Jean Baptiste Hamelin Francheville, and alleging that she died intestate and without heirs, and that the deceased was a bastard, the curator to the succession appeared and pleaded to the information, and no further steps or proceedings were taken until 11th March, 1884, when Hon. L. O. Taillon, Attorney-General for Province of Quebec, obtained a *reprise d'instance*, and after certain proceedings were taken to appoint another curator, &c., and the filing of an amended information, and the hearing of the case on the merits, the Superior Court on the 14th June, 1884, rendered a judgment in favor of the crown.

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On the 24th July, 1884, the Queen, represented by the Commissioner of Crown Lands, sold to G. P. Lafontaine, as agent for T. T. Moreau, among other property, all that heretofore described as forming part of the estate and succession of the late Marie Piery, belonging to Her Majesty *par droit de desherence*, and on the 24th March, 1885, T. T. Moreau, as assignee of the crown, brought an action against the present appellant, claiming the property in question.

Upon the service of this action the present appellant filed an opposition (*tierce opposition*) to the judgment of June, 1884, which declared the property of which he had been in possession for over 30 years, as escheated to the crown, and the respondent for and on behalf of Moreau intervened.

The pleadings and documentary and oral evidence produced on the *tierce opposition* and on the intervention are fully stated in the judgment of Mr. Justice Taschereau hereinafter given.

The Superior Court rendered the judgment now appealed from, on the 1st February, 1887, maintaining the opposition of the appellant and dismissing T. T. Moreau's intervention.

On an appeal to the Court of Queen's Bench for Lower Canada (appeal side), that court allowed the appeal on the ground that the present appellant, in order to succeed on his *tierce opposition*, should have alleged an interest on a right superior to that of the party who had obtained the judgment sought to be set aside, but reserved to the appellant his right to have it declared by the court, upon regular proceedings, that the judgment complained of does not affect the immoveables in appellant's possession.

Irvine Q.C., and *Stuart* Q.C., for appellant, and *Beique* Q.C., for respondents.

The arguments and authorities relied on by counsel

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are reviewed at length in the judgments hereinafter given.

Sir W. J. RITCHIE C J.—I feel very great embarrassment in arriving at a conclusion in this case in consequence of the great diversity of opinion of my brother judges from the Province of Quebec, for both of whose opinions, it is needless to say, I entertain the highest respect, and from the able manner in which both have dealt with the question at issue, and to which judgments, having been accorded the privilege of reading them, I have given the most serious consideration.

The question, independent of the merits, seems to resolve itself very much into a matter of procedure, namely, as to the right of Price, an intervening party, to make a *tierce opposition* to the judgment in this case, the learned judge of the Superior Court holding that there was a manifest interest in the opposant by *tierce opposition* to call in question the legality of the judgment in the present case, declaring the Seignory Grondines, or any part thereof, belonging to or in the possession of the opposant, to be the property of Her Majesty as against the opposant who was not a party to the present action. On appeal the majority of the Court of Queen's Bench, on the contrary, holding that to authorize a person, not a party to a judgment, to form a *tierce opposition* to this judgment, it was not sufficient that he may have an interest contrary to him who has obtained this judgment, but it is necessary that this interest should be founded on a right superior to that of the party who has obtained this judgment in his favor.

I cannot bring my mind to the conclusion that Price, the tiers opposant, had no interest which was affected by the judgment in this case. He is in

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possession of the land in question, and has been so for a very long time, some fifty years, adverse to the crown, and I cannot think his right to this possession would not be seriously affected by the said judgment; in addition to which this judgment would be registered and could continue in force for thirty years, during all of which time it would seriously affect the ability of the tiers opposant to sell or deal with the property, and the title under which it is fair to assume he claims to hold this possession; and in any proceeding instituted to dispossess the opposant this judgment, it appears to me, would necessarily be the basis of the plaintiff's claim. If so, I cannot avoid thinking that he has a substantial and direct interest in having it removed, if he can show, as he alleges, that the judgment was fraudulently, improperly and illegally obtained, and therefore I cannot help thinking he had a right to file an opposition to such judgment by virtue of Art. 110 C.C P., which declares that any person whose interests are affected by a judgment rendered in a case in which neither he nor the persons representing him were made parties can file an opposition to such judgment.

My brother Taschereau, whose views I feel constrained to adopt, has, in a very full and elaborate judgment, traced the history and merits of this, I may say, very extraordinary case, from its inception, more than one hundred years ago, and has discussed at length the law as applicable to it, and has, so far as I am capable of forming an opinion, shown that this appeal should be allowed. Consequently I am relieved from doing more than concurring in that judgment which he will deliver, which, however, I must say, I do with the greatest diffidence.

I therefore think the appeal should be allowed, the judgment of the Court of Queen's Bench reversed and the judgment of the Superior Court restored.

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FOURNIER J.—La présente contestation a été soulevée sur la tierce-opposition produite par l'appelant Price, au jugement de la cour Supérieure, en date du 14 juin 1884, accordant à la Couronne, par droit de deshérence, la possession et la propriété de la succession de dame Marie Piery, veuve de Jean-Baptiste Hamelin Francheville.

Cette procédure avait été commencée par Alexandre Gray, procureur-général, au nom de Sa Majesté, par une information en date du 9 juillet 1790, dirigée contre J.-Bte. Gueyrault, nommé curateur à la succession vacante de la dite dame Piery.

Le 7 juillet 1791, Nicolas Piery, Marie Madeleine Piery et Marie Scholastique Piery intervinrent pour réclamer la dite succession contre le curateur. Le même jour il fut permis à Jenkins Williams, Ecr., soliciteur-général, vu le décès d'Alexandre Gray, procureur-général, de reprendre l'instance au nom de Sa Majesté.

Le 11 mars 1884, l'honorable Louis Olivier Taillon, procureur-général de la province de Québec, obtint de la cour Supérieure la permission de reprendre l'instance en cette cause en remplacement de Jenkins Williams. Le 8 mars de la même année, Adalbert Fontaine, de Québec, avocat, ayant été nommé curateur en remplacement de Gueyrault, reprit, le 14 du même mois l'instance comme défendeur.

L'intervention de Nicolas Piery et autres fut renvoyée le 4 juin par jugement de l'honorable juge Casault. Et la cour, le 14 juin, considérant que Sa Majesté avait prouvé les allégués de son information, déclara par son jugement que les biens de la dite succession appartenaient à Sa Majesté par droit de deshérence et ordonna au curateur Fontaine, ès-qualité, de rendre compte à Sa Majesté de sa gestion et administration des biens de la dite succession et de payer et délivrer à Sa Majesté les argents, droits, crédits, effets,

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titres et sûretés appartenant à la dite succession, avec la possession des terrains et parties de seigneurie, etc., pour l'usage de Sa Majesté.

L'appelant Price qui se trouve en possession d'immeubles appartenant à cette succession s'est porté tiers-opposant au jugement qui a ordonné au curateur d'en remettre la possession à Sa Majesté qui en est déclarée propriétaire par droit de deshérence.

Il base son opposition principalement sur les moyens suivants :—que dans une certaine cause pendante, savoir, le n° 1796, il a été poursuivi par Tancrède Toussaint Moreau, comme acquéreur des droits appartenant à la couronne en vertu du jugement qui l'a déclaré propriétaire par droit de déshérence des biens de la succession Piery, le 14 juin 1884, dans la présente cause, et qu'en qualité de cessionnaire de ces droits il réclame du tiers-opposant, une partie de la seigneurie des Grondines, appelée le fief de Francheville, dont celui-ci est en possession paisible comme propriétaire depuis un grand nombre d'années, avec aussi tous les arrérages et revenus perçus par le dit opposant, et à défaut du paiement d'une somme de $100,000. Que le dit Tancrède T. Moreau, cherche comme acquéreur des droits de la Couronne à priver le dit opposant de sa possession et jouissance de la dite propriété et qu'en conséquence celui-ci a intérêt à se porter opposant au jugement qui a été rendu en cette cause le 14 juin 1884.

Cette action de Tancrède T. Moreau est encore pendante.

Price allègue encore dans son opposition que ce jugement est illégal, irrégulier, erroné et non fondé en faits et en loi, et devrait être annulé, révoqué et mis de côté, pour les raisons suivantes :—

1° Parcequ'il n'y a aucune preuve établissant que Marie Piéry était une enfant illégitime. 2° Parce qu'il n'y a pas de preuve que la dite Marie Piery fut pro-

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priétaire d'aucune partie de la dite seigneurie des Grondines, parce que si la dite Marie Piery eût été illégitime, sa succession vacante n'aurait pas appartenu à la Couronne de France ; que tous les procédés faits dans la dite cause depuis 1884 sont entachés de fraude, irréguliers et illégaux.

Que le jugement renvoyant l'intervention de Nicolas Piery *et al.*, a été obtenu par surprise, etc., etc. Et l'opposant conclut à ce que tous les procédés faits depuis 1884 soient déclarés frauduleux et collusoires et le jugement du 14 juin 1884 déclaré nul.

Sur cette opposition Tancrède T. Moreau a été reçu partie intervenante et a produit une défense en droit à cette partie de la dite opposition qui se lit comme suit :

That the intervention in this cause filed on the seventh day of September, one thousand seven hundred and ninety-one, by Nicolas Piery, Marie Madeleine Piery, and Marie Scholastique Piery, should not have been dismissed and the judgment in this cause rendered on the fourth day of June, one thousand eight hundred and eighty-four, dismissing such intervention, was obtained from the court by surprise, and is illegal, null and void, in as much as there was at the date of such judgment legal presumption of the death of such intervening parties and of their attorneys, and that no judgment could legally be rendered upon such intervention until the heirs and legal representatives of the said intervening parties had been legally summoned to continue the said intervention.

That the proceedings taken in the name of the Crown for the purpose of forcing the said intervening parties to appoint attorneys in lieu of their said attorneys being since deceased and the judgment rendered upon such proceedings are, for the same reason, illegal, null and void and of no effect.

Parceque cette partie de la dite opposition de l'opposant doit être retranchée et rejetée, en admettant que les allégués en seraient vrais.

Parce que l'opposant excipe du droit d'autrui.

Le dit intervenant plaida aussi au mérite de la dite opposition les moyens suivants :—

Que l'opposant n'a aucun intérêt dans l'opposition et dans l'action

intentée par Sa Majesté pour recouvrer les biens de la succession de feu Dame Marie Piery et qu'il n'est pas lésé par le jugement rendu en icelle.

Que l'opposant n'a aucun droit dans les dits biens, qu'il n'en est pas, n'était pas et n'a jamais été lui ou ses auteurs, propriétaire et en possession des dits biens revendiqués par la dite action et qu'il n'allègue aucun titre.

Que les prétendues illégalités et informalités alléguées par l'opposant n'ont pu lui causer aucun tort et lui préjudicier, et qu'en supposant pour un moment qu'elles seraient fondées—ce que l'intervenant nie—ce ne seraient que des nullités sans grief et dont l'opposant ne peut se plaindre.

Que tous et chacun des faits allégués dans la dite opposition, sont faux et mal fondés, et que l'intervenant les nie tous spécialement, spécifiquement, et comme s'il les niait *seriatim*.

Que toute la procédure a été faite régulièrement et légalement, pour et au nom de Sa Majesté et qu'il n'y a eu aucune fraude ou collusion ou artifice, parce que les dits intervenants Piery, seuls, pourraient invoquer les dits moyens et se plaindre des dites procédures, et que l'opposant est sans intérêt pour le faire.

Sur la contestation, ainsi liée, après preuve faite de part et d'autre, la cour Supérieure rendit jugement le 1er février 1887, maintenant l'opposition de l'appelant.

That the action and intervention of the heirs Piery were pending at the time the Court of Common Pleas ceased to exist, 1793, and that no evidence had ever been adduced in proof of the allegations of the principal demand or of the intervention; that no proceedings were taken to revive the said suit before any existing Court of the Province, by and on behalf of his Majesty George III.

That the action against the defendant, Gueyrault, was a personal action to account, which, had the King established a right of property in the succession or shewn provisional possession thereof under judicial authority, a judgment to account would have condemned the defendant, Gueyrault, in the amount proved, but upon default of the Crown to prove property or possession of the estate, the action could not be maintained:

That all the parties being dead, Attorney-General Taillon could not validly move to continue the suit in lieu of Jenkin Williams, Solicitor General to King George III:

That if the case could be revived after a century, it could only be done by some one representing King George III against the heirs or legal representatives of J. B. Gueyrault, by means of an action *en reprise d'instance* commencing with a writ of summons.

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That King George III was not shewn to be vested with any property in the succession, nor to have been put in provisional possession thereof:

That Mr. Fontaine was not the heir or legal representative of Gueyrault and he is not shewn to have been in the possession of the estate in question:

That there is no pleading or demand in the Record, by Her Majesty claiming the succession as her property, and the judgment, in consequence, was *ultra petita* and inoperative.

Ce jugement ayant été porté en appel à la cour du Banc de la Reine, a été infirmé sur le principe que l'appelant n'avait pas démontré qu'il avait un droit supérieur à celui de la partie qui avait obtenu ce jugement en sa faveur.

En effet, les moyens invoqués consistent principalement dans l'invocation des droits des héritiers Piery, s'il en existe, et de moyens d'irrégularités dans la procédure.

La cour a déclaré que pour être autorisé à former une tierce-opposition à un jugement, il ne suffit pas d'avoir un intérêt contraire à celui qui a obtenu le jugement, mais il faut que cet intérêt soit fondé sur un droit supérieur à celui de la partie qui a obtenu ce jugement en sa faveur. Que l'objet de la tierce-opposition n'est pas seulement de faire annuler le jugement dont se plaint le tiers-opposant, mais de faire prononcer le tribunal contradictoirement sur le mérite des droits réclamés par le tiers-opposant et par celui qui a obtenu le jugement attaqué par la tierce-opposition.

Dans cette cause, le tiers-opposant, ni par les allégués de son opposition, ni par ses conclusions, n'a mis en question le droit de la couronne aux biens qui ont été délaissés par feu Marie Piery lors de son décès. Il a simplement demandé que le jugement fut annulé pour des vices de forme dans la procédure et pour absence de preuves, et en invoquant le droit d'autrui. Ces allégations sont tout à fait insuffisantes.

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Le recours extraordinaire à la tierce-opposition n'est pas accordé pour faire déclarer nul un jugement pour des irrégularités, il faut, comme le dit le jugement de la cour du Banc de la Reine, que l'opposant allègue et démontre un droit supérieur au droit de celui qui a obtenu le jugement. Ceci est confirmé par toutes les autorités.

Il y a plusieurs conditions nécessaires pour avoir droit de former opposition à un jugement. La première de toutes est d'établir que le jugement dont se plaint l'opposant lui cause un préjudice. Comment peut-il démontrer ce préjudice s'il n'allègue pas son droit, s'il ne fait pas voir qu'il a aux propriétés réclamées, un titre qui, mis en comparaison avec celui de son adversaire, doit l'emporter et lui faire adjuger légalement la propriété. C'est une condition essentielle de la tierce-opposition de mettre la cour en état de juger sur la validité des titres respectifs des parties.

Le droit, (dit Bioche), doit être certain et légitime ; en cas d'incertitude on ne saurait admettre une attaque dirigée contre une décision de justice et autoriser peut-être une procédure frustratoire (1).

Dalloz dit (2) :—

Aussi la première condition pour agir par la voie de la tierce-opposition est d'éprouver un préjudice à nos droits (art. 474). Cette disposition repose sur ce principe de droit et d'équité : pas d'intérêt, pas d'action.

Carré et Chauveau (3) :

Ce n'est pas un intérêt, mais un droit quelconque compromis directement, qui est indispensable pour légitimer la voie de la tierce-opposition.

Et plus loin il ajoute :

Il faut, ainsi que l'enseignent MM. Favard de Langlade (4), et Poncet (5), que l'intérêt qui sert de mobile au tiers-opposant soit réel, légitime, en d'autres termes, que l'atteinte portée à l'existence d'un de ses droits actifs autorise l'emploi du recours extraordinaire qui lui est ouvert contre cette sentence pour en obtenir la rétractation (6).

(1) Vo. Tierce-opposition No. 25.
(2) Vo. Tierce-opposition No. 44.
(3) Vol. 4, p. 270, Q. 1, 709.
(4) 5 Vol. 596.
(5) Vol. 2, p. 113 et suivantes—n° 404 à 413.
(6) See also. Poncet, 4 Vol., p. 97, No. 393 in fine. Idem p. 117, No. 406, and p. 118, No. 408, in fine. Pigeau, 1 Vol., pp. 484 et 485. Voir Forme d'Opposition par tierce-partie. *Thouin* v. *Leblanc* 10 L.C.R. 370.

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Appréciée d'après les principes énoncés dans ces autorités, il est évident que la procédure de l'opposant est tout à fait vicieuse. D'abord, parce qu'il n'a fait aucune allégation qui puisse mettre la cour en état de décider le mérite des prétentions respectives des parties —n'ayant allégué aucun titre à la propriété en litige— la cour ne peut décider que l'opposant a un meilleur titre que le contestant (l'intimé); qu'il ne fait voir aucun préjudice, puisqu'il ne montre aucun titre—et le titre qu'il doit produire doit être certain et légitime. Loin de prendre cette position, qui est la seule que puisse prendre le tiers-opposant, il ne conclut pas même à ce que la propriété qu'il réclame lui soit adjugée; il conclut simplement à la nullité du jugement en faveur de l'intimé. C'est-à-dire qu'il fait une demande qui ne décide rien, ni sur le droit de la Couronne à cette propriété, ni sur le sien. C'est-à-dire qu'il fait comme dit Bioche:

Une attaque contre une décision de justice par une procédure frustratoire.

Les droits de la couronne dans cette cause sont ceux des héritiers de Marie Piery, veuve de J.-Bte Hamelin Francheville, morte en 1785, sans laisser de représentants. Ces droits appartenaient, du moment de son décès, au domaine public par droit de déshérence, ou succession irrégulière. Laurent dit (1):

Quoique les successeurs irréguliers n'aient pas la saisine, ils ont la propriété des biens héréditaires, de plein droit, dès l'instant de l'ouverture de l'hérédité.

Le droit de la couronne remontant à 1785, l'appelant aurait dû alléguer dans son opposition un titre antérieur ou supérieur à celui de la couronne, ou bien alléguer et prouver qu'avant cette époque cette propriété avait été acquise par la prescription. Mais comme on l'a déjà vu il n'a allégué aucun titre quelconque. Dans son

(1) Vol. 9, p. 292.

opposition il n'allègue la possession de cette propriété que d'une manière indirecte en disant que l'intimé :—

Demands from appellant who is and has been for many years past in open public and peaceable possession of the Seigniory of Grondines as proprietor thereof, etc., etc.

Il n'allègue pas non plus que cette possession est antérieure au jugement qu'il attaque.

L'appelant se trouvant comme opposant dans la position d'un demandeur, c'était à lui à faire preuve des erreurs qui auraient été de nature à faire rétracter le jugement. Il aurait dû établir que s'il eut été partie en cause ses titres auraient empêché ce jugement d'être rendu ; ou prouver l'existence d'héritiers de madame Piery, et que partant il n'avait pu exister de déshérence en faveur de la Couronne ; que le fief Francheville ne faisait pas partie des biens délaissés par madame Piery. Mais il était sans intérêt à faire cette preuve, à moins de pouvoir aussi prouver qu'il dérivait son titre de madame Piery, ce qu'il ne pouvait aucunement faire, car il n'a et ne produit aucun titre à la propriété qu'il réclame. Conséquemment les deux moyens de la demande du procureur-général, que le fief Francheville appartenait à madame Piery et que sa succession est tombée en déshérence, n'ont été nullement attaqués. Le droit de la Couronne reste donc clairement établi.

Il est facile de comprendre pourquoi l'opposant n'a pas allégué de titre au fief Francheville. C'est parce que lors de la vente par le shérif, en octobre 1807, à Moses Hart, de la seigneurie des Grondines, il a été fait dans le titre accordé à ce dernier, par le shérif, dans l'acte de vente passé par Têtu et Bélanger, notaires, l'exception suivante :—

Every part and parcel of the seigniory of St. Charles and Grondines, containing.....
save and except the following parts and parcels of the said seigniory of St. Charles.

That is to say : "First, one undivided fourth and one undivided

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eighth of that part of the seigniory of St. Charles, commonly called the fief Francheville, which fief begins on the South West, at the line which separates the seigniory of St. Charles from that of Dorviliers, contains in front twenty-six arpents, six perches and twelve feet by the whole depth of the seigniory, and on the North East side at the line which separates the seigniory of St. Charles from the seigniory of Latesserie, commonly called Lachevrotière, contains twenty-two arpents in front by three leagues in depth, exclusive in both parts of any right in each island and battures in front of said seigniory and is claimed by the attorney general for and on behalf of His Majesty.

Cette vente fut faite en vertu d'un ordre de la cour du Banc de la Reine dans lequel cette exception est exprimée dans les mêmes termes.

Le 26 février 1810, Hart revendit la propriété à P. Charay avec la même exception, et le 8 juillet 1831, Charay vendit à Burnet qui revendit ensuite à l'hon. D. E. Price qui par son testament a légué la propriété en question à l'appelant.

Dans le titre de Burnet à l'hon. D. E. Price en date du 21 décembre 1871, la propriété est décrite de la même manière et contient la même réserve, avec cette seule différence que référence est faite au titre de Charay, du 8 juillet 1831, passé devant Campbell, notaire public, dans les termes suivants :—

Save and except such parts or portions of the said seigniory lands and tenements as were and as are in the said deed of sale excepted and reserved.

Plus loin il est dit que Price prend la propriété :—

Without any other or greater estate, right, title, or interest than the said Peter Burnet hath therein.....

.....

to have and to hold the premises so sold, assigned, transferred and made over to the said D. E. Price, his heirs and assigns for ever, subject to the reservations and provisions herein before mentioned and referred to and more especially in the deed of sale under which the same were acquired by the said late Peter Burnet from the said Pierre Charay.

Un témoin du nom de Lacourcière entendu de la part

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de l'appelant dit que la réserve dans l'acte de vente de Burnet à Price et celle contenue dans l'acte de Charay à Burnet se rapporte au fief de Francheville mentionné dans les divers actes et procédures comme le fief de Francheville réclamé par le procureur général pour Sa Majesté.

Tel est le titre en vertu duquel D. E. Price s'est mis en possession de ce fief en 1871. Ce titre ne contient aucune transmission du droit de propriété à Price et ne peut même servir de base à la prescription. Tout au contraire il contient une réserve expresse du fief Francheville qui est déclarée appartenir à la couronne. L'appelant est l'héritier de D. E. Price et n'a partant pas plus de droit que lui à la propriété dont il s'agit. Il lui eut donc été impossible, s'il eut été partie au jugement du 14 juin 1884 de se faire déclarer propriétaire du fief Francheville auquel il n'a aucun titre. Et la cour n'eut pu faire autrement que de déclarer comme elle l'a fait que le fief Francheville était échu en 1787 à la Couronne par droit de déshérence. Dans tous les cas, l'appelant ne peut se faire adjuger la propriété en question, parce qu'il ne la réclame pas par son opposition, et qu'il n'a pas mis la cour en position de décider la question de titre ; il ne demande que la nullité du jugement, qui, si elle était prononcée, n'aurait pas plus d'effet que le jugement n'en a maintenant, puisque n'y ayant pas été partie, ce jugement n'affecte nullement ses intérêts ni ses droits. C'est *res inter alios judicata.* Cette procédure est tout-à-fait inutile et frustratoire. Ce n'est qu'en faisant triompher ses moyens de défense à l'action prise contre lui par Fontaine qu'il pourrait arriver à son but. C'est cette action qu'il aurait dû mener à jugement en cour au lieu de recourir à la tierce-opposition que la loi ne lui accorde pas dans le cas actuel.

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Par tous ces motifs, je suis d'opinion de renvoyer l'appel avec dépens.

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TASCHEREAU J.—Over one hundred and five years ago, on the 25th March, 1785, one Marie Piery, widow of Jean Baptiste Hamelin Francheville died, at Quebec. intestate, and without leaving any then known heirs,

On the same day, one Gueyrault was named curator to her vacant succession. The said curator appears to have proceeded to the inventory required by law, but an extract only of such inventory, dated the 30th January, 1787, is to be found in the record. In this extract a portion of the seigniory of Grondines, consisting of a frontage of 26 *arpents*, six *perches et* twelve *pieds* by three leagues in depth is entered as forming part of the said succession.

On the 9th of July, 1790, the Attorney-General filed an information in the Court of Common Pleas, at Quebec, against this curator, claiming for his Majesty King George III., the succession of the said Marie Piery, and more particularly the aforesaid portion of the seigniory of Grondines *à titre de bastardise et deshérence.* On the 16th of July, 1790, the curator filed an answer to this information whereby he alleges, 1st. That the succession of Marie Piery was not vacant, as she had left legitimate heirs in France who, as he alleges, were entitled to her succession; 2nd. That even if these heirs did not accept the succession, the crown could not, in any case, maintain its claim as to the seigniory of Grondines, because such seigniory, in law, for reasons given in the said answer, became, by Marie Piery's death, the property of one Hamelin and one Boisvert, who then were in actual possession of it; 3rd. That consequently the said Hamelin and Boisvert should have been made parties to the information, or that the

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King, to have his claim on the said seigniory established, should proceed against them by a direct action.

The Attorney-General, on the 25th September, 1790, replied to the curator's plea, praying that the succession aforesaid, in the curator's hands, should be accounted for and delivered over to His Majesty's Receiver-General.

It would appear that towards the end of 1790, or in the beginning of 1791, an intervention claiming the said succession was filed by the brother and sisters of Marie Piery, in answer to which, on the 7th of July, 1791, the Solicitor-General for the King, substituted that same day to the Attorney-General, filed an opposition or plea. However, neither this intervention nor the crown's said opposition or plea are now to be found in the record.

On the 13th July, 1791, the intervening parties filed an answer to the crown's opposition or plea and on the 15th the Solicitor-General filed a replication to that answer, both of which are in the record. This ends the proceedings in the Court of Common Pleas, with the exception of the filing, on the 9th February, 1808, by the intervening parties of a copy of Gueyrault's appointment as curator; and for the next seventy-six years, no proceedings whatever were taken in the case either by the crown, or by the curator, or by the heirs Piery.

By deed executed on the 12th of January, 1884, the Quebec Government promised to sell for the sum of $300 to one Tancrède Toussaint Moreau, barrister, of Montreal, all the rights of the crown in the said succession, and authorised him to continue the proceedings, in the name of the crown, upon the aforesaid information of 1790. One Eugène Pierre Lafontaine, also a barrister, and partner as such of the then Prime Minister, Mr. Mousseau, accepted this promise of sale

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as agent of Moreau and in his name. It is clearly established however, by the evidence of Moreau himself, and of one Martin, to which I shall refer later on, that it was himself, Lafontaine, who was the real purchaser of the crown's rights and that Moreau had no interest whatsoever in the matter.

A short time after that deed, on the 8th March, 1884, one Adalbert Fontaine was appointed curator to replace Gueyrault who had been appointed in 1795, on a petition purporting to be in the Attorney General's name. On the 11th, the Honourable Louis Olivier Taillon, as Attorney General, took up the *instance* for Her Majesty on the information of 1790, with conclusions against Fontaine, the said new curator. (In these and all subsequent proceedings, I must here observe, the Attorney General had nothing whatever to do with the case, and all the proceedings, though in his name, were taken and carried on by and in the interest of the purchaser of the crown's rights, who, by the aforesaid promise of sale, was even bound to give to Her Majesty, before taking any proceeding, security for the costs to be incurred and those already incurred).

On the 13th March the new curator promptly declared that he was willing to take up the *instance*. On the previous day he had gone before a notary and had passed a deed of amended inventory, giving a new description of the part of the Seigniory of Grondines that, in his opinion, the crown was entitled to, a fact of which he had not the least personal knowledge; and upon this amended inventory an amended information was subsequently, on the 20th of March, by consent, fyled in the name of the crown.

On the 22nd of March a notice was served on the intervening parties at the Prothonotary's office, on the part of the Attorney-General, calling upon them to appoint a new attorney in lieu and place of Barthelot

Dartigny deceased, their attorney in 1790. Only eleven days before, however, the Attorney General had served his petition *en reprise d'instance* on this same Barthelot Dartigny at the Prothonotary's office. No further proceedings, it would appear, were taken on that notice; but on the 15th of April following, upon a rule *nisi* taken by the curator defendant, it was ordered that, upon the intervening parties' default to name a new attorney within thirty days thereafter, their intervention would be dismissed, and accordingly, upon such default, on the 9th of June the intervention was dismissed, with the consent, the judgment adds, of the plaintiff and of the defendant, A. and B. consenting that C.'s intervention be dismissed. This rule *nisi*, I notice, had also been served on the intervening parties at the Prothonotary's office, the bailiff solemnly making his return upon oath that he had not been able to find the parties in the District of Quebec. There was, it is evident, no reason to doubt the truth of this return, for, when their intervention was fyled, in 1791, the youngest of these claimants must have been at least 21 years old, so that in 1884, when this return was made, he, if living, would have attained the respectable age of one hundred and fourteen. Then the curator, strange to say, who so obtained, upon motion, the dismissal of this intervention, was not a party to the contestation thereon. The crown alone had appeared and joined issue upon it. Now, what right he had to move to dismiss a proceeding to which he was not a party, or what interest he had, as curator, on a contestation between the crown and the heirs Piery, I fail to see. The present appellant, it is true, may not have the right to invoke *jus tertii* and to impugn proceedings which do not concern him, but I have referred to them as evidence of the means resorted to by the interested parties to get at a final judgment on the information.

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The intervention having been so disposed of in this singular way the parties interested found no difficulty, with the ready assistance of the curator Fontaine, in obtaining a judgment in their favor, and on the 14th of June, 1884, the Superior Court declared Marie Piery's succession, and more especially that part of the Seigniory of Grondines described in the supplementary inventory, escheated to the crown, with order to this curator to deliver up possession thereof.

On the 24th of July following the Quebec Government, according to the promise of sale previously passed, executed a deed of sale to Eugene Pierre Lafontaine, here again falsely pretending to act as agent for Tancrède Toussaint Moreau, of all its rights under the aforesaid judgment for the sum of $300.

Upon this sale, in March, 1885, an action in Moreau's name was brought against the present appellant, alleging that he, the appellant, by himself and his *auteurs*, had been in possession of that part of the Seigniory of Grondines declared escheated to the crown by the judgment of the 14th of June, 1884, and had illegally received the rents and revenues thereof for at least fifty years, with conclusions that he, Moreau, as assignee of the crown's rights, be declared to be the proprietor of the said part of the said seigniory, and that the appellant be condemned to deliver it up and to account for its revenues since 1871, unless he prefer to pay $100,000.

Upon the service of this action Price, the present appellant, filed an opposition (*tierce opposition*) to the said judgment of June, 1884. On this opposition Moreau filed an intervention by which, and the *moyens* in support thereof, he alleged that Price had no title to the property in question, and had never been in possession thereof, and that the said property had been duly declared escheated to the crown, in whose rights he, the said Moreau, claimed to be.

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This intervention and the *tierce opposition* were submitted together to the Superior Court, where, on the 1st February, 1887, a judgment was given dismissing Moreau's intervention, maintaining Price's *tierce opposition* and avoiding the judgment of the 14th June, 1884, so far as the same might affect the said opposant or the said Seigniory of Grondines. Upon an appeal to the Court of Queen's Bench, by the crown and by Moreau jointly, this judgment of the Superior Court was reversed, and Price's *tierce opposition* was dismissed. Hence the present appeal by Price, upon which, as in the court below, the crown joined with Moreau as respondent.

The first of these proceedings that obviously comes up for our consideration on this appeal is Moreau's intervention (though there is no reference whatever to it in the judgment of the Court of Queen's Bench), and on that intervention Moreau's *locus standi* and right to intervene on Price's *tierce opposition* is the first question that suggests itself for enquiry. He, of course, alleges, as the basis of his right to intervene, the sale to him by the Government of the 24th of July, 1884. Now this sale, it seems to me, is null, of a *nullité de plein droit*. It was, as the promise of sale itself was, clearly a sale of litigious rights, without warranty and for a nominal price (1). And the sale of litigious rights to advocates or attornies practising before the courts under the jurisdiction of which those rights would fall is expressly prohibited by art 1485 C.C. And by art. 14 C.C. (not in express terms in the Code Napoleon), all prohibitive laws import nullity. Then, by art. 989 C.C. a contract with an unlawful consideration has no effect, and the consideration is unlawful when it is prohibited by law or contrary to public order, 990 C.C. And on this point,

(1) Merlin Rep. Vo. *droits litigieux* ; Art. 1583 C.C.

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I may at once remark, it is immaterial whether this sale is to be considered as made to Moreau or to Lafontaine, as both are practising attornies. As well said by the Supreme Court of Louisiana in a recent case under the article of their code corresponding with our art. 1485: "The elevated standard which the learned profession must occupy in public esteem makes it the imperative duty of courts to exact a rigid compliance with a rule calculated to enhance the honor and usefulness of the profession" (1). It is also immaterial that this objection has not been taken. The courts are bound to take cognizance of infractions of laws enacted in the public interest, even when passed *sub silentio* by the litigating parties (2).

I have not failed to notice that this litigation is pending in the District of Quebec and that Moreau, examined as a witness, swears that he is generally practising in Montreal. But as such he is entitled, I take it, to practise anywhere in the Province before the Court of Queen's Bench and I would say in any of the judicial districts before the Superior Court. I should judge from this record itself by the fact that, in this very case, his own action against Price taken at Quebec is signed by MM. Robidoux & Fortin, who, it is in evidence usually practise in Montreal. Then, apart from the consideration that this sale was made to a practising attorney it seems to be unlawful and void as tainted with champerty, an offence punishable under

(1) *Denuy* v. *Anderson* 36 La. Ann. 762.

(2) Pothier Vente 583 ; 1 Duvergier No. 199 ; Laurent, Vol. 1 Nos. 46, 49, 71, 150 ; Vol. 15 No. 475 ; Vol. 16 Nos. 16, 124, 157, 164 ; and Vol. 24 No. 55 ; 3 Demolombe, 237 ; 1st. Troplong, Vente No. 396 ; 24 Demolombe, Nos. 378, 381 ; S.V. 43, 2, 411 ; 4 Aubry & Rau, 322, 323, 345, 359 ; Guillouard, vente, Vol. 1, Nos. 140, 141, 144; Merlin Rep. vo. droits litigieux No. 3 ; Fav. de Lang. vo. exception, par. 6 ; Merlin Rep. vo. nullité, pars. 1, 2; and Dunod there cited : 4 Marcadé, 459 ; Dalloz vo. vente, No. 2005 ; S. V. 9, 2, 252 ; S. V. 40, 2, 539 ; S. V. 74, 1, 423.

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the criminal law of the country; see arts. 14, 989, 990 C.C. Wharton, law lexicon vo. *Champerty* ; *Earle* v. *Hopwood* (1) ; *Grell* v. *Levey* (2). Upon these ground alone, the judgment of the Superior Court which dismissed Moreau's intervention could, in my opinion, be supported. But if, in addition, we take into consideration the fact admitted by Moreau himself, that he has no interest whatsoever in the case, that the sale by the Government to him was a sham to cover a sale to Eugène P. Lafontaine, it seems to me unquestionable that his intervention must, in any case, be thrown out. To be allowed to intervene in a case an interest in the event of the suit must be shown. Art 154 C.P.C. ; *Dorion* v. *Dorion* (3); and an intervening party who has no interest must be *mis hors de cour.*

I now come to the appellant's *tierce opposition*, One of the allegations of this opposition is, that all the proceedings taken in 1884 on the information of 1790 were fraudulent and collusive. Now, of this allegation there is, on this record, abundant and cogent evidence, as well directly from the depositions of the witnesses examined as indirectly from the proceedings themselves. I have already alluded to the fact that, as admitted by Moreau himself, he has no interest whatever in the case. It is falsely, fictitiously and with intent to deceive (no euphemism is possible) that his name appears as vendee in the deeds of January 12th and July 24th, 1884, and it was Eugène P. Lafontaine, the prime minister's partner at the bar, who was the real purchaser. One Joseph Martin, also a practising attorney, and who, as such, appeared for Lafontaine in this case on the proceedings of 1884, brought up as a witness on the intervention by the intervening party himself also clearly proves this fact, giving as the reason why this contrivance was resorted to:

(1) 9 C.B.N.S. 566. (2) 16 C.B.N.S. 73.
(3) 13 Can. S. C. R. 193.

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That as Lafontaine was then the law partner of Mr. Mousseau, the then prime minister, the adversaries of the prime minister, and of Lafontaine himself who might later on enter the political career, might have caused some trouble to the government or to Lafontaine, and that as the transaction appeared more advantageous to the purchaser than to the Government it might be criticised by Lafontaine's or the prime minister's adversaries.

This witness, Martin, further admits that, in payment of his services as attorney for Lafontaine in this case, it was agreed between him and Lafontaine that he, Martin, would share in the profits of the suit. The following passage of his deposition leaves no room for doubt as to this :

Q. Vous êtes intéressé dans le procès ? R. Oui.

Q. Voulez-vous dire à la cour quel est votre intérêt ? R. Mr. Lafontaine m'avait chargé de le représenter ici dans toutes les procédures et recherches qu'il devait faire ; et pour cela, il m'a dit qu'il me donnerait une part dans le résultat du procès.

Q. Au lieu de vous rémunérer en argent pour les services que vous lui rendiez, il vous a intéressé de cette manière ? R. Oui.

They, in other words, he and Lafontaine, agreed to a pact *de quotâ litis* and were to be associates in this traffic on litigation. Now, though this so very reprehensible conduct on the part of these two members of the bar cannot, in any way, affect the solution of the questions in controversy in the case yet the court cannot allow it to pass unnoticed. A reference to the following authorities, *inter alia*, will show how strictly forbidden to advocates and attorneys stipulations of that nature have always been. Laurent, on *pacte de quota litis*, says (1) :

C'est toujours avilir le saint ministère de la justice que de le souiller par les sordides calculs de la cupidité.

And Morin, de la discipline, says (2) :

Ce qui est surtout interdit, c'est toute stipulation qui impliquerait, ou sous entendrait, plus ou moins, une participation réelle aux bénéfices espérés du procès. Ou sait combien est antipathique à la profes-

(1) Vol. 24, No. 60. (2) par. 124 bis.

sion d'avocat le *pacte de quotâ litis*, trop souvent proposé par les plaideurs. De tout temps la loi a trouvé contraire à la morale, et conséquemment nul, tout traité entre plaideur et avocat, associant celui-ci au gain du procès, lui promettant une partie de l'objet en litige ou de sa valeur. On doit réputer tel tout pacte analogue entre avocat et client, par example, celui qui promettrait conditionnellement à l'avocat une chose déterminée, ou bien un honoraire proportionné un résultat recherché.

Favard de Langlade Repert. and Merlin Repert. vo. *pacte de quotâ litis*, Marcadé (1), and Blackstone (2), also condemn severely all transactions tainted with champerty, more especially when entered into by practising attorneys.

Now, to return to the case and to the fact I have alluded to, that it was Lafontaine, and not Moreau, who purchased the rights of the crown, we have thereby unquestionable evidence from these parties themselves that, at its very inception, they resorted to simulation in the furtherance of their scheme. Let us see now what was their subsequent mode of action in the matter. Clothed with the permission to use the Attorney General's name they began their proceedings on the information by a "reprise d'instance" on the 11th of March, 1884, as I have already stated, signed "per Joseph Martin, duly authorised"; the same "Joseph Martin" I have alluded to. It was then 94 years since the last contentious proceeding had been taken by the crown on the information (25th September, 1790), and 93 years since the last contentious proceeding upon the intervention of the heirs Piery (15th July, 1791).

I have already stated that, on the 8th of March preceeding, one Adalbert Fontaine had been appointed curator to the vacant estate of Marie Piery in lieu of Gueyrault, who had been appointed in 1785. This Adalbert Fontaine, also an advocate, and as such, as

(1) Vol. 6 under art. 1597. (2) Vol. 4 p. 135.

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partner of Joseph Martin, himself testifies that he was so appointed upon the suggestion of Joseph Martin, acting for Lafontaine, in the name of the Attorney General. Immediately after his appointment he declared that he took up the *instance*, and again, upon the suggestion of Joseph Martin, consented to re-make the inventory. And to further avoid all possibility of obstruction and delay to the plaintiff he appeared as attorney of record for himself as defendant. Later on, only one witness is examined for the plaintiff, and that witness is this same Fontaine, who thus appears on the record in the threefold capacity, of defendant, of attorney and of a witness. So much for that aspect of the proceedings.

I now come to the merits of the judgment of the 14th June, 1884, itself.

It seems to me plain that, even if the plaintiff had been entitled to a judgment at all on this information, the description given in the amended inventory, and in this judgment, of the part of the seigniory of Grondines, left by Marie Piery at her death, is altogether unsupported by the documents of record. This judgment declares escheated to the Crown two separate parts of this seigniory, described by metes and bounds. Now, Marie Piery, as far as I can make out from the record, never had a title to any part of that seigniory, but to an undivided share of it. Her own title is her marriage contract, in virtue of which, at her husband's death, she inherited all of his estate. Now, her husband's title was a sale to him, on the 8th April, 1762, by one Langanière, and all what that deed conveyed to him was one-fourth of one-half of the said seigniory "indivis avec les autres héritiers." Further a deed of "foi et hommage," of the 15th June, 1781, by Marie Piery herself jointly with her co-seigniors, purports to be as to her for her undivided part,

and an undivided part only, of the seigniory. "A cause du fief et seigneurie de Grondines dont ils jouissent tous en commun et par indivis;" "relevant en plein fief de Sa Majesté dont ils jouissent tous sans partage et par indivis," are words in that deed which it seems to me leave no uncertainty upon that point. Two "procès verbal de bornage" of the 15th November, 1783, were relied upon by the respondents as evidence of a partition of the seigniory between the owners thereof. But I cannot see anything of that kind in these deeds alone and by themselves. The first is nothing but the location of a division line between the Grondines and Lachevrotière seigniories, and the second was never completed and signed by the surveyor without which signature it is an absolute nullity, besides being, as it seems to me, unintelligible and further, not signed by Augustin Hamelin upon whose requisition it appears to have been made but most illegally only by his wife for him. Moreover no partition was ever concluded by this deed of "bornage." It does not even purport to make any, but was probably made in view of a partition which the parties, it may be assumed, intended to proceed to later, but which was never made from the fact perhaps that Marie Piery died not long afterwards. Then there is no evidence whatever of the possession by Marie Piery or her husband of a separate and divided part. The extract of the inventory of 1787 cannot be taken as affording such evidence. Such an inventory could not in any case be evidence of possession or of any other fact whatever against third parties. The curator, in 1790, in his plea to the information denied that he was in possession of the part of this seigniory claimed by the crown and not only has no evidence to the contrary ever been brought forward but it appears on the record that a comparatively short time afterwards, on the

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10th September, 1806, this seigniory of Grondines was sold by the sheriff to one Moses Hart, in a case of *Blanchard* v. *McNider* under the express reserve (I assume upon an opposition by the crown) of two undivided parts, declared in the sheriff's deed to be claimed by the crown, and this upon a motion of the Attorney General himself, who appeared in the case for the plaintiff Blanchard. Now it seems to me that the crown, as a necessary consequence of this sheriff's sale, never had since the right, under any circumstances, to claim any part of this seigniory but the undivided parts so reserved in this sale, assuming they ever had any, and that the judgment of the Superior Court of 1884, which declared escheated other distinct and divided parts thereof, is, on that ground alone, utterly erroneous and would not have been obtained but for the collusion between the parties.

This judgment adjudicates upon property which has never been in the possession of either of the curators. When the first curator pleaded to the information that he was not in possession of any part of this seigniory, admitting that he was in possession of the other property claimed, the crown merely replied that he should render an account of what he had in his hands. That was equivalent to a withdrawal of the claim as to the seigniory. The crown officers, aware, it may be presumed, of the truth of the fact pleaded by the curator, evidently saw that it would have been as useless as illegal to get a judgment against the curator ordering him to deliver up or account for a property he never had the possession of (1).

When the first curator further pleaded that not he, but Boisvert & Hamelin, were then in possession of the property claimed by the crown, and that the crown should not further proceed upon the information as to

(1) See 9 Laurent, 237 et seq.

this seigniory without bringing them in the case, the crown ought to have so brought them in, and have its claim to this property adjudicated upon contradictorily with the parties in possession of it *animo domini*.

I may add further that there may be doubts as to the legality of Fontaine's nomination as curator. Can a succession be deemed vacant when the crown comes forward to claim it ? See Art. 1331 C.P.C. Arts. 637. 638, 639, 684, 687 C.C.

Une succession (says Laurent) (1) réclamée par l'état, à défaut d'héritiers ou autres successeurs irréguliers, ne peut être reputée vacant, et dés lors les arts. 811 *et seq.* (684 of our code) ne lui sont pas applicables.

En conséquence, il n'y a pas lieu à la nomination d'un curateur à cette succession en attendant le jugement d'envoi en possession au profit de l'état ; et si un curateur a été nommé par le tribunal avant la réclamation de l'état, ce curateur doit être révoqué, sauf au tribunal à remettre l'administration provisioire de la succession à tel gérant qu'il trouve convenable.

I simply refer for the decisions and the authorities in support of these propositions to Sirey's Code Civil Annoté, under Art. 768 Nos. 8 et seq. without further investigating the question or coming to any determination upon it. The new curator may, perhaps, be considered as the *gérant chargé de l'administration provisoire*.

Another objection to the *reprise d'instance* of 1884, taken by the appellant in his factum, one which the curator Fontaine did not, of course, take, as he was appointed not to take objections, is that the action was then prescribed. I refer on this point to Arts. 2216, 2242, 2265 C. C. and to the following authorities :—

Merlin (1.)

On ne doit pas confondre, en fait d'instance, la prescription avec la péremption.

And citing Brodeau :

(1) 9 vol. No. 245.

(2) REP. vo. *Prescript.* sec, 3 par. 8, No. 1.

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La partie qui, après la dernière procédure, demeure 30 ans dans l'inaction, est censée avoir abandonné son droit ; après 30 ans tout est péri et prescrit. Les assignations, les jugements, tout se prescrit par 30 ans, indépendamment du décès des parties.

Aubry & Rau (1).

L'interruption (de prescription par une action) est également à regarder comme non avenue, si l'instance vient à s'éteindre par la discontinuation de poursuites pendant 30 ans.

Le Roux de Bretagne (2).

Si même il y avait eu discontinuation de poursuites pendant 30 ans, l'instance serait éteinte par la prescription.

And at No. 510,

La discontinuation de poursuites pendant 30 ans éteint tout à la fois l'instance et l'action.

Rodière, Proced. (3).

L'instance, à défaut de la péremption peut s'éteindre par la prescription trentenaire. Comment supposer, en effet, qu'une instance puisse subsister pendant une série indéfinie de siècles.

Laurent (4).

Tout droit s'éteint par le laps de 30 ans : donc s'il y a eu discontinuation de poursuites pendant 30 ans, l'instance sera éteinte. La jurisprudence est en ce sens, quoique la question soit controversée.

Re Marconnay (5).

Indépendamment de la péremption pour discontinuation de poursuites pendant 3 ans, les instances sont soumises à la prescription de 30 ans pour défaut de poursuites pendant ce laps de temps.

Habitans de Langlet (6).

L'instance en cassation se prescrit par défaut de procédures pendant 30 ans. Plus de demande en reprise d'instance après cette date.

Villegouan, C. Talhouet. Cassation (7).

L'instance ne conserve l'action qu'autant que l'instance n'est pas elle-même prescrite pas une discontinuation de poursuites pendant plus de 30 ans.

Le droit de demander la peremption d'instance se prescrit par 30 ans, à partir de l'expiration de 3 ans sans poursuites (8).

(1) 2 Vol 350, par. 215
(2) 1er. Prescription No. 491.
(3) Vol. 1 p. 462.
(4) 32, Vol. 100.
(5) S. V. 32. I, 67.
(6) S. V. 37, I, 105.
(7) S. V. 41, 1, 776.
(8) S. 53, 1, 185.

Delmas v. *Bruvois* (1).

La prescription de 30 ans éteint les instances discontinuées pendant ce laps de temps.

And in the Journal du Palais, 1887 (2), Rodière on that case says,

Cette décision nous paraît fort bien rendue malgré l'opinion de Carré, Chauveau & Bourbeau.

In 1886, *in re* Boueix (3).

Lorsqu'une instance a été suspendue pendant plus de 30 ans, l'action et l'instance elle-même se trouvent éteintes en même temps par la prescription, et dans ce cas la reprise d'instance faite postérieurement est sans effet et doit être rejeté comme non recevable. Cette solution est aujourd'hui définitivement admise.

It follows from these authorities, that if Fontaine, instead of taking up the instance, had waited till an action *en reprise d'instance* was taken, and had met such action with a plea of prescription, he would have had it dismissed. A clearer proof of collusion between him and the parties acting as plaintiffs cannot be had. The appellant, under art. 2187 C.C., has now the right to avail himself of this prescription.

As to the appellant's right to a "tierce opposition" in this case, it is not, in my opinion open to controversy. The respondents cannot argue that, because the judgment of 1884 was as to him *res inter alios judicata*, he, the appellant, is estopped from impeaching it. It is precisely against a judgment to which he is not privy, that a party aggrieved by it is given the right to a "tierce opposition," as the very name of this proceeding implies. (4). And the fact that the appellant here might, in another case, avail himself of the illegality of the said judgment,

(1) Dall., 56, 1, 266 ; Sirey, 56, 2, 120 ; Sirey, 56, 1, 1887.

(2) Page 899.

(3) Cour d'appel de Limoges D. 88, 2, 313. I refer also to Marcadé, prescription, on art. 2262, pages 182 and 303, and 4 Rev. Crit. (1854), page 516, and Mourlon p. 516 ; 6 Rev. Crit. (1855), page 252, and to Bernat de St. Prix, vol. 1, 395, note 4.

(4) S. V. Table générale vo. tierce opposition.

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does not deprive him of his remedy by a "tierce opposition." (1). So to hold, would obviously be to deny the right, under any circumstances, to that proceeding. Then, it seems to me unquestionable, that the appellant here has sufficient interest and "qualité" to impeach this judgment. (2). As to his "qualité," it cannot be denied. He was clearly not privy to it. As to his interest, it is to me equally clear. Why was it obtained by Moreau? Or by Lafontaine and Martin rather? If not only for the very purpose of laying the foundation of an action against him, and to enable them to impugn his rights to this seigniory of Grondines. Would they now treat it as of no value to them, as a nugatory proceeding towards their interests, it might then well be asked why they intervened at all on the present issue between the appellant and the crown, what induced them to join on this contestation; if it did not concern them, what motives prompted them to so strenuously contend for the legality of a judgment foreign to the rights they assert? They obtained, behind his back, a judgment declaring escheated to the crown a property of which he, the appellant, is in possession *animo domini* since fifty years, and they would forsooth say to him that he has no interest whatever in the matter, that it is none of his business. Their contention is untenable. The measure of their interest to uphold this judgment is the measure of his interest to have it annulled.

It is obvious that even if no action had been taken against him upon it, that judgment, as long as it stands must have the effect to cast a cloud on his title and possession, a *trouble de droit*. It could be registered at

(1) Cardot, de la tierce opposition, 29 Rev. Crit. page 50.

(2) Denizart vo. tierce opposition. Bioche, proc. vo. tierce-opposition No. 20.

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any time, and thereby be the cause, in case of a sale for instance, of serious embarrassment to him. And, if no action were taken upon it how could he contest it? By a direct action perhaps, as in *Thouin* v. *Leblanc* (1) but how much more simple and direct under the circumstances is the remedy that the law has provided the "tierce opposition." A case in the Cour de Cassation of *Commune de Lalley c. Commune de Prébois* (2), is precisely in point :

Une décision judiciaire qui déclare une personne propriétaire peut être invoquée *adversus omnes*, sauf aux tiers à l'egard desquels cette décision n'a pas l'autorité de la chose jugeé à la faire tomber par la voie de la tierce opposition.

Or as given in Sirey :

Si la décision judiciaire qui déclare une personne propriétaire d'un fonds n'a point l'autorité de la chose jugée contre le possesseur qui n'y a point été partie, elle équivaut toutefois à un titre vis-à-vis de celui-ci comme tout autre, sauf la voie de la tierce-opposition ouverte (3).

That decision, it seems to me, entirely supports the appellant's right to a tierce-opposition in the present case.

The respondents argued that as a "tiers opposant" must show a right superior to the right of the party who has recovered the judgment impeached, therefore, the appellant's opposition here must be dismissed, as it is not based on any title. But the fallacy of this arugment is apparent. It is a *petitio principii*. It assumes that the crown has proved a title to the property declared escheated. Now, that is precisely what the appellant controverts, and, in my opinion, has established. As to him, his possession of fifty years alleged in Moreau's action itself fyled with the "tierce opposition" is his title, and a sufficient one to entitle him to his conclusions against a plaintiff who has neithe title

(1) 10 L.C.R. 370.

(2) D. 64, 1 473.

(3) S. V. 65, 1, 359.

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nor possession. He has established his rights on the *rescindant* and the *rescisoire*.

In connection with that point I have not failed to notice a case, of *Tercinet* v. *Tripier* (1), though it was not cited. In that case the Cour de Cassation held that

L'arrêt qui déclare l'existence au profit de l'une des parties d'un droit de propriété est opposable aux tiers, sauf à ces derniers à l'égard desquels cet arrêt n'a pas l'autorité de la chose jugée à l'attaquer au moyen de la tierce opposition ou même directement, mais à la charge de détruire la preuve qui en resulte en établissant en leur faveur soit un droit de propriété préférable, soit possession antérieure légalement acquisitive.

This last part of the "arrêt" supports the legal proposition submitted by the respondents, that a "tiers opposant" must show a right superior to the right of the party whom judgment has declared proprietor. But this obligation imposed on a "tiers opposant" has been fulfilled by the appellant here. Having proved that the Crown has no title to the property declared escheated, and never had the possession thereof, he has the right, as I said before, to rely on his actual possession alone, to have the judgment of 1884 set aside. He has not got to prove a "possession légalement acquisitive," where the party who obtained the judgment adverse to his rights had neither title nor possession, and this, aside from the further consideration, a weighty one here, that this judgment could not have been obtained but for the connivance of the defendant, a feature of this case which distinguishes it from all the authorities cited by the respondents, and upon which the appellant might, perhaps, have contended, that it was not necessary for him to show a superior right to the right of the plaintiff.

The objection has been taken by the respondents to the conclusions of the "tierce opposition," that they are

(1) D. 66. 1, 5.

too restricted, in that they do not ask that the information of the crown be dismissed. I am rather inclined to think the point well taken, and that the appellant might have asked more than he did, but that is not, in my opinion, a reason why we should refuse him what he asks.

There is one point more to which I deem it necessary to refer, from an observation made by my learned colleague, whose concurrence in this judgment, I very much regret we have failed to get. I understood the learned judge to say that Price could never have acquired the ownership of a certain part of this seigniory by perscription, because his primary title, the sheriff's sale I have alluded to, and other subsequent conveyances of the seigniory, expressly reserve a part of it to the crown. Now, there is no question of perscription raised by the pleadings, and we do not determine anything whatever on this point. I simply refer to it, with deference to my learned colleague, lest our silence should be construed as an acquiescence in what has been said on the matter.

I am of opinion that we must allow the appeal and restore the judgment of the Superior Court with costs in Queen's Bench and in this court in favor of appellant against the crown and Moreau, jointly and severally.

GWYNNE and PATTERSON JJ. concurred with Taschereau J.

Appeal allowed with costs.

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

Solicitors for respondent: *Beïque, Lafontaine & Martin.*

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*Mar. 12, 13, 14.

*Dec. 9.

JOHN GREEN & COMPANY ..... APPELLANTS;

AND

THE CITIZENS INSURANCE CO. AND OTHERS ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Arbitration and award—Application to set aside an award—Time for applying—9 & 10 W. 3 c. 15 s. 2—R.S.O. (1887) c. 53 s. 37—Reference back to arbitrators for re-consideration and re-determination.

In the Province of Ontario the governing statute as to the time for applying to set aside an award which has been made under a rule of court, or to remit it to the arbitrators for re-consideration and re-determination, is R.S.O. (1887) c. 53 s. 37, and it is not required that the application should be made before the last day of the term next after the making of the award as provided by 9 & 10 W. 4 c. 15 s. 2. Gwynne J. dissenting.

An award may be remitted to arbitrators for re-consideration and re-determination under the Ontario statute though the result of the re-consideration may be to have the award virtually set aside by a different, or even contrary, decision of the arbitrators.

The court is justified in remitting an award to the arbitrators if fraud or fraudulent concealment on the part of the persons in whose favor it is made is established, or if new evidence is discovered which, by the exercise of reasonable diligence, could not have been discovered before the award was made.

APPEAL from a decision of the Court of Appeal for Ontario (1) varying the order of the Divisional Court by which the proceedings were remitted to arbitrators for further reference.

The appellants, Green & Co., are assignees of policies of insurance against fire issued by the respective respondents to C. W. & J. Henderson, a firm carrying on a general business at Wingham, Ont. The property

*PRESENT: Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 13 P.R. (Ont.) 70.

insured having been lost, and a dispute having arisen in respect of such loss, the matter was referred to arbitration under a clause in the policy, the arbitrators chosen being Judge Chadwick, of Guelph, and Judge Davis, of London. The submission contained in the policy provided that in case they could not agree upon an award the arbitrators chosen should appoint an umpire and such umpire should make an award upon the evidence taken before the two arbitrators without calling the witnesses before him or hearing the parties. Evidence was taken by the arbitrators and they being unable to agree Judge Woods, of Stratford, was chosen as the umpire, and an award was published adjudging that appellants were entitled to receive from the several companies the aggregate sum of $4,000 with interest. The submission to arbitration was then made a rule of court according to a provision therein contained.

The several companies afterwards commenced actions to set aside the award as being fraudulent. These actions were discontinued and other actions instituted for the same purpose. Then, ten months after the award was made, the respondents moved the Divisional Court to set the award aside and to remit the matter to the arbitrators for re-consideration and re-determination. The grounds of such motion were that the umpire had not decided the matter on the statements of the arbitrators as required by the submission; that the owners of the property insured did not make a full statement of the property saved but fraudulently concealed a portion thereof and claimed that it was burnt, and gave false testimony in respect to it; and that new evidence had been discovered as to such fraudulent dealing and perjury. This motion was heard by Mr. Justice Rose, who made the following order:—

"It is ordered that the matter of the said submis-

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sion be referred back to the said arbitrators and umpire to take evidence and inquire and report as to whether any of the goods insured, and if any to what extent, were not destroyed by fire, either by reason of salvage, fraud or concealment on the part of the assured or by reason of any other cause, and that in respect of the question so remitted the reference and proceedings thereon be governed by the terms of the original submission herein."

The respondents appealed from this order with a view of having the matters sent back to the arbitrators without any restriction as to the evidence to be taken, and the appellants, by way of cross-appeal, sought to have the application to set aside or remit the award dismissed. The Court of Appeal varied the order of Mr. Justice Rose by ordering the case to be sent back on the terms of the original submission. From that decision this appeal was brought.

Aylesworth and *Hellmuth* for the appellants.

The application to set aside the award was made too late and the court had no jurisdiction to entertain it. By 9 & 10 Will. 3 ch. 15 sec. 2 such an application had to be made before the last day of the term next after the making of the award. Terms were abolished in Ontario by 44 Vic. ch. 5 sec. 18 (1) but the statute expressly provides that in cases where they were previously used for determining the measure of time in which any act should be done they are still to be referred to for the same purpose. This is also the case in England under the Judicature Act, 1873. *College of Christ's Hospital* v. *Martin* (2). In *Kean* v. *Edwards* (3) Armour C.J. held that an award must be moved against within the time corresponding to the term after it was made.

Between July, 1887, when the award was made, and

(1) R.S.O. (1887), ch. 44, sec. 56. (2) 3 Q.B.D. 16.
(3) 12 P.R. (Ont.) 625.

May, 1888, the time of moving to set it aside, some three terms would have elapsed under the old system.

It will be urged that the award is not set aside but only remitted to the arbitrators, and therefore it is not within the statute. As to that the motion is to set aside, and the effect of the order is, practically, to set it aside. The arbitrators may refuse, and cannot be compelled, to act further, and the time for bringing an action on the policy has elapsed. The case of *Leicester* v. *Grazebrook* (1) is relied upon by the respondents. That case is opposed to a long line of decisions and has not been considered of sufficient importance to appear in the regular reports. Moreover, the case has no application as matters were presented to the court which are wanting in the present case. See also *Zachary* v. *Shepherd* (2).

Respondent's counsel was called upon to argue the question of juridiction.

Bain Q.C. for the respondents.

By R.S.O. (1887) ch. 53 sec. 37, the court may, from time to time, or at any time, remit matters referred, or any part of them, to the arbitrators for re-consideration.

The authorities show that it is within the discretion of the court to deal with an award of arbitrators and the question is whether or not the discretion will be exercised in each case as it comes up.

The following authorities were cited. Russell on Awards (3); *Burnand* v. *Wainwright* (4); *In re Dare Valley Ry. Co.* (5); *Warburton* v. *Haslingden Local Board* (6); *Caswell* v. *Groucutt* (7); *Gartside* v. *Gartside* (8).

Aylesworth and *Hellmuth* on the merits.

The evidence charged to be false is that of Henderson

(1) 40 L.T.N.S. 883.
(2) 2 T.R. 781.
(3) 6 ed. p. 483.
(4) 1 L. M. & P. 455.
(5) 4 Ch. App. 554.
(6) 48 L. J. C. L. 451.
(7) 31 L. J. Ex. 361.
(8) 3 Anst. 735.

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who had no interest in the proceedings but to set an award aside on such ground the false testimony must be that of the party seeking to enforce it. *Scales* v. *East London Waterworks Co.* (1); *Pilmore* v. *Hood* (2).

The respondents having chosen their remedy by bringing an action cannot afterwards ask for a summary order.

The fraud should be established in a proceeding where the appellants could have means of protecting themselves; it cannot be tried out in this way. *Mills* v. *Society of Bowyers* (3).

Bain Q. C. for the respondents cited Redmond on Awards (4); *Abouloff* v. *Oppenheimer* (5).

STRONG J.—This matter was originally a reference to arbitration of a claim for loss under a policy of insurance against fire on a stock of dry goods granted by the respondents in favor of Messrs. C. W. & J. Henderson, which claim had been assigned by the Hendersons to the present appellants, Green & Co.

The technical objection insisted upon by the appellants, and which at the hearing of the appeal seemed to make it very difficult to support the decision appealed against, has not, on further consideration, appeared to me to be insurmountable.

The enactment of 9 & 10 Wm. 3 c. 15, which enabled a party to a submission made a rule of court to apply to set aside an award upon the ground that the same was procured by "corruption or undue means," provided the application was made before the last day of the term following the making of the award, would have become, as regards the limitation of the time for moving, literally inapplicable when, by the Judicature Act, terms were abolished, if

(1) 1 Hodges 91.
(2) 8 Scott 180.
(3) 3 K. & J. 66.
(4) P. 261.
(5) 10 Q. B. D. 295.

it had not been for the 56th sec. of the act, which provided that the division of the year into terms might still be referred to for the purpose of determining the time within which any act was required to be done. *College of Christ* v. *Martin* (1); *Giles* v. *Morrow* (2); *Kean* v. *Edwards* (3).

By section 37 of the act respecting arbitrations and references (Revised Statutes Ontario 1887, cap. 53) it is enacted that when the submission has been made a rule of court

> the court or a judge may at any time and from time to time remit the matters referred, or any or either of them, to the reconsideration of the arbitrator or arbitrators or umpire, as the case may require, upon such terms as to costs and otherwise as to the court or judge seem proper.

This section is almost a verbal reproduction of sec. 8 of the English C.L.P. Act of 1854.

In exercise of the jurisdiction thus conferred an application was made to Mr. Justice Rose in May, 1888, more than three terms after the publication of the award,

> for an order to declare that the award in this matter is void and invalid and should be set aside and to remit the matters referred to the re-consideration and re-determination of the original arbitrators mentioned in the said submission.

This motion was supported by voluminous affidavits to the effect that since the publication of the award new evidence had been discovered showing that valuable goods, which were claimed to have been destroyed by the fire, had not, in fact, been so destroyed, but had been concealed and not accounted for by the insured.

I do not propose to enter into any consideration of the evidence upon the merits of the application, but I may say at once that I entirely agree with the court

(1) 3 Q.B.D. 16. (2) 4 O.R. 649.
(3) 12 P.R. Ont. 625.

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below that these affidavits and the cross-examination had upon them, as well as the cross-examination of the appellants' witnesses, make out a *primâ facie* case of fraud amply sufficient to warrant a re-consideration of the case referred, if the rules of procedure will admit of such a disposition of the matter; and further, that it sufficiently established that this evidence has been discovered since the award, and could not, by reasonable diligence, have been discovered before.

Mr. Justice Rose disposed of the motion by making an order referring it back to the arbitrators and umpire:

> To take evidence and inquire and report as to whether any of the goods insured, and if any to what extent, were not destroyed by fire either by reason of salvage, fraud or concealment on the part of the assured, or by reason of any other cause.

This order was varied by the Court of Appeal by directing a general reference back to the arbitrators for re-determination and re-consideration upon the terms of the original submission to be substituted for the limited reference back directed by Mr. Justice Rose. From this order of the Court of Appeal the present appeal has been taken to this court.

There can be no doubt that if it was not for section 37 of the Ontario Arbitration Act already extracted there would, in consequence of the lapse of time, have been no jurisdiction to interfere with the award by simply setting it aside.

The validity of the order under appeal must, therefore, depend altogether upon the extent of jurisdiction conferred upon the court below by the 37th section.

It was argued with great force and ability by Mr. Aylesworth for the appellants that inasmuch as the order under appeal would, in the event of the arbitrators upon a re-consideration of the matters referred coming to a different determination from that contained in the original award, have the effect of setting it aside

altogether the application to refer back involved a proceeding which the statute of William the 3rd expressly required to be made not later than the term following the publication of the award. I cannot accede to this argument. In every case in which the matter of the submission under the statute is sent back to the arbitrator for re-consideration the consequence may follow that the award will eventually be superseded and thus, virtually, set aside by a different, possibly a directly contrary, decision of the arbitrator. If, therefore, the objection put forward were to prevail the result would be to strike the words " at any time " contained in section 37 out of the statute altogether. This would be a virtual repeal of the enactment, and no authority has suggested that it can be done. Upon the only admissible construction sec. 37 must, following the plain words in which it is expressed, be taken as authorising an order remitting the reference to the arbitrator, although the application is not made within the limit of time prescribed by the statute of William.

It is obvious that there is a wide difference between the jurisdiction conferred by the statute of William and that arising under the 37th section of the Arbitration and Awards Act. Under the former the award could only be absolutely set aside, with the effect of annulling the submission altogether and remitting the parties to their strictly legal rights and remedies before the ordinary tribunals, but under the reference back authorized by the latter act the arbitrator chosen by the parties (in the case of a voluntary submission) would be still left to deal with the case, the submission would be kept alive and the ultimate decision would thus remain with the conventional tribunal selected by the parties. These considerations may well have induced the legislature to impose less strictness as regards time in cases coming under the modern enact-

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ment than that which was applied by the express limitation contained in the former act. The conclusion is, therefore, that both upon authority and principle, when a proper case is made for a reference back under the 37th section the application is not restricted as to time by the limitation prescribed by the statute of Wm. 3 for moving to set aside an award. This was decided by the case of *Leicester* v. *Grazebrook* (1) referred to in the judgment of the Chief Justice of the Court of Appeal, and I see no reason to doubt the correctness of the report of that case. All that is required is that the application must be made with reasonable promptitude, and it is, in my opinion, shown that that condition was complied with in the case before us.

The question is then reduced to this: What is to be considered a proper case for exercising the jurisdiction given to the courts by the 37th section?

Upon this head the authorities undoubtedly show that, for some reason, the English courts have by their decisions very much restricted the operation of the 8th section of the C.L.P. Act of 1854, corresponding to the 37th section of the Ontario Act. The reason of this seems to have been a repugnance to entertaining applications which might, in any way, involve a review of the arbitrators' decision in the nature of an appeal.

In the case of *Hodgkinson* v. *Fernie* (2), decided in 1857 by a court composed of judges of the highest authority, it was said that the jurisdiction to refer back under the statute was intended to be limited to cases in which that power would, before the statute, have been exercised under a clause to that effect contained in the submission, and was, therefore, to be restricted to cases of fraud and to cases of mistake of fact or law either apparent on the face of the award or on some paper referentially incorporated with it or volun-

(1) 40 L.T.N.S. 883. (2) 3 C. B. N. S. 189.

tarily acknowledged by the arbitrator; and this statement of the law was expressly approved by the same court in the late case of *Dinn* v. *Blake* (1). As these decisions do not seem to have been called in question in any later reported case I am of opinion that we must accept them as establishing the construction of the statute in this respect, and, therefore, as authorities which we must follow in deciding this appeal.

Then, to apply the law thus propounded, I am of opinion that the present case does come within the rule which is laid down in the cases cited as to what constitutes a proper case for a reference back to the arbitrator for reconsideration.

In *Hodgkinson* v. *Fernie* (2). Williams J. says :—

> The law has for many years been settled, and remains so at this day, that when a cause or matters in difference are referred to an arbitrator, whether a lawyer or layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully established that position where awards have been attempted to be set aside on the ground of the admission of an incompetent witness, or the rejection of a competent one. The court has invariably met these applications by saying : 'you have constituted your own tribunal, you are bound by its decision.' The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other which, though it is to be regretted, is now I think firmly established, viz., where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award.

And at the conclusion of his judgment the same judge says :

> This provision of the statute was intended merely to introduce into every order of reference the clause familiarly known as Mr. Richard's clause. Nobody ever dreamt that the introduction of that clause into the order had the effect of altering the law as to the decision of the arbitrator being conclusive.

In the same case Willes J. says (3) :

(1) L. R. 10 C. P. 388. (2) 3 C. B. N. S. 202.
(3) P. 205.

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It seems to me that the 8th section was simply intended to enable a court to send back a case to the arbitrator in all cases where otherwise, by reason of the want of a clause for that purpose, they would have been precluded from so doing.

The judgment of Williams J. has been generally received as a correct statement of the law and was expressly approved in the case of *Dinn* v. *Blake* (1). Although it is not so said directly, yet I understand Mr. Justice Williams to imply, that in a case of fraud, meaning thereby, of course, fraud or fraudulent concealment by one of the parties, or by some one identified with a party, a reference back under the 8th section would be proper; and it is apparent from the following passage in the judgment of Brett J. in *Dinn* v. *Blake* (1), that the last named judge also understood it in that sense.

In *Dinn* v. *Blake* (1), Mr. Justice Brett, says:—

> This is a reference under the C.L.P. Act. Before that act there was some fluctuation of opinion as to the question in what cases an award might be referred back; and after the act it was asserted that the powers of the court were larger than they were before. In the case of *Hodgkinson* v. *Fernie* (2), both questions, viz., as to when there was power to refer back and as to the effect of the statute, were considered, and the law was clearly declared in the judgment of Williams J. He lays it down that the award cannot be sent back and the arbitrator forced to review it merely on the ground that there has been a mistake of fact or of law. The exceptions he mentions to the rule are where there has been corruption or fraud, and where it appears on the face of the award that there has been a mistake of law or fact.

Then, taking these authorities as furnishing the criterion by which we are to ascertain in the present case if there was jurisdiction to send back the award for re-consideration by the arbitrators, I am of opinion that the evidence is amply sufficient to make out a *primâ facie* case of fraud and fraudulent concealment on the part of the Hendersons under whom the present appellants claim. It is shown that goods of consider-

(1) L.R. 10 C.P. 388. (2) 3 C.B.N.S. 189.

able value were concealed in such an unusual way as to indicate a deliberate intention to defraud, some of these goods having been actually packed away in the coffins in an undertaker's shop. But, as I said before, I do not intend to discuss the evidence, and I content myself with the observations on it already made, and with saying that I entirely agree in the view of it taken by the Court of Appeal. I think there would be a great failure of justice and a great defect in the law, if a case like the present could not be ordered back for review by the arbitrators.

There is, in addition to the ground of fraudulent concealment of the goods, another distinct ground upon which the order appealed against can be supported. In the extracts already made from the judgments delivered in *Hodgkinson* v. *Fernie* (1) it is, as already mentioned, said that the measure of jurisdiction under the 8th section was the extent of the power to refer back under the clause which it was the practice to introduce into submissions and orders of reference before the statute was passed. In the case of *Burnand* v. *Wainwright* (2) Wightman J., under a clause of the kind just mentioned, referred the case back to the arbitrator on the ground of the discovery of new evidence material to the inquiry, although there were no circumstances of fraud or concealment shown. In the case of *Davenport* v. *Vickery* (3) a similar order was made under like circumstances. These cases have never, so far as I can discover, been overruled or dissented from, though it is true that Willes J., in his judgment in *Hodgkinson* v. *Fernie* (1) mentions the case of *Burnand* v. *Wainwright* (2) and says he expresses neither "assent nor dissent" from the doctrine there laid down. I think we may, therefore, assume these cases to be still law. Then, if the

(1) 3 C.B. N. S. 189.
(2) 1 L. M. & P. 455.
(3) 9 W.R. 701.

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standard by which we are to measure the jurisdiction in the present case depends on what could have been done under the conventional clause irrespective of the statute, these cases show that apart from the question of fraud, and on the distinct ground of the discovery of new material evidence, no want of diligence or promptitude in discovering it being imputable to the respondents, the case ought to be referred back, and *a fortiori* ought it to be so dealt with when these newly discovered facts go to show that a fraud was practised by the parties under whom the appellants claim.

The appeal should be dismissed with costs.

FOURNIER J. concurred.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed for the reasons given by my brother Strong.

GWYNNE J.—(After stating the facts of the case His Lordship proceeded as follows) :—

It was enacted by 9 & 10 Wm. 3 c. 15 sec. 2 that

> any arbitration or umpirage procured by corruption or undue means shall be adjudged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage made and published to the parties.

By the Ontario Judicature Act of 1881, 44 Vic. ch. 5 sec. 18, it was enacted that :

> The division of the legal year into terms shall be abolished so far as relates to the administration of justice, and there shall not be terms applicable to any sitting or business of the high court of justice, or of any commissioners to whom any jurisdiction may be assigned under this Act, or of any commissioners of assize, but in all cases in which, under the law now existing, the terms into which the legal year is divided are used as a measure for determining the time at or within

which any act is required to be done the same may continue to be referred to for the same or the like purpose, unless and until provision is otherwise made by any lawful authority.

This enactment is taken verbatim from the Imperial Statute, 36 & 37 Vic. c. 66 sec. 26. Now, if the statute of William III is to apply to the motion made in the present case by the insurance companies, the last day for making complaint of the corruption or undue practice charged was Friday, the ninth day of September, 1887.

But it is contended that it is not the statute of William III that governs the present case, but the 164th section of the Upper Canada Common Law Procedure Act, ch. 22, C.S.U.C., which was taken from section 8 of the Imperial Common Law Procedure Act, 17 & 18 Vic. ch. 125, and which is now the 37th sec. of ch. 53 of the Revised Statutes of Ontario, 1887, and is as follows :—

In case, in a reference to arbitration, whether under this Act or otherwise, the submission is made a rule of the high court or a county court, the court or a judge may, at any time, and from time to time, remit the matters referred, or any or either of them, to the re-consideration of the arbitrator, or arbitrators, or umpire, as the case may require, upon such terms as to costs, or otherwise, as to the court or judge seem proper.

We must be governed in a case like the present by the decisions of the English courts upon the Imperial statute *in pari materiâ.*

It is to be borne in mind that the sole grounds of the motion as stated in the notice of motion are : 1st, misconduct in the umpire in deciding without hearing the statements of the arbitrators as required by the submission ; and

2nd, which is the main ground and the one upon which the Court of Appeal for Ontario has proceeded, on fraudulent concealment by C. W. and J. Henderson, the insured through whom Green & Co. claim, of a

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portion of the property saved from the fire, and fraud and perjury committed by them in the evidence given by them on the hearing before the arbitrators. Now in the English courts it has never been adjuged or contended that the above section of the common law procedure act had either the effect of extending the time for moving to set aside an award as having been procured by fraudulent and corrupt means within the statute of William, or of authorising the reference back of an award procured, as the award in the present case is alleged to have been, by corrupt means including fraud and perjury, and which if so procured the statute of William declared should be adjudged to be void and of none effect and should be set aside by the court in which the submission was made a rule, so as complaint should be made within the time prescribed by the statute. No case has been found in the English courts, where the reference back of an award alleged to have been procured by corruption and undue means was ever granted or asked for as being within the provisions of the above cited section of the common law procedure act; but on the contrary the intent of the legislature in enacting that section, as declared in the cases which have been adjudged upon it, is clearly, I think, established to be that a reference back in a case like the present is not a thing which is authorised by the section. In *Hodgkinson* v. *Fernie* (1) Cockburn C. J. was of opinion that the section of the C.L.P. act in question was only intended to apply to cases where the court sees grounds for setting aside the award, but where the mistake might be set right by sending the matter back to the arbitrator:

It is true, he says, the section gives the court authority in any case where reference shall be made to arbitration at any time, and from time to time, to remit the matters referred, or any or either of them,

(1) 3 C.B. N.S. 199.

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to the re-consideration and re-determination of the said arbitrator upon such terms as to costs or otherwise as to the said court or judge may seem proper.

I am, however, clearly of opinion that it was not intended by that enactment to alter the general law as to the principles upon which the courts had been in the habit of acting in determining whether they would or would not set aside awards, but merely to give the court power to remit the matter to the arbitrator for re-consideration in all cases, though the submission should not contain that extremely useful clause giving them that power where it turned out that there was a fatal defect in the award, but of such a nature as not to render it expedient to set aside the award, and thus render nugatory all the expense that had been incurred under the reference. I see nothing "on the face of the award" that would have justified the court in interfering to set it aside, and therefore, I think it is not a case in which jurisdiction to send it back is conferred upon us by sec. 8 of 17 & 18 Vic. ch. 125.

And in that case Williams J. says:

This provision of the statute was intended merely to introduce into every order of reference the clause familiarly known as "Mr. Richards' clause."

Crowder J. says:—

The intention of the 8th section evidently was to give the court the same power in all cases to send back an award for re-consideration, as they before had only in those cases where the submission or order contained a special provision to that effect.

And Willes J. declares his opinion to be precisely to the same effect. So in *Holland* v. *Judd* (1), in 1858, the same court as had decided *Hodgkinson* v. *Fernie* (2) sent back an award which was, upon the face of it, defective in the arbitrator,—a county court judge,—not having certified how he disposed of the several issues in the cause. In *Hogge* v. *Burgess* (3) the Court of Exchequer refused to remit the matter of an award to have a correction made in a matter in which it was contended the arbitrator was mistaken both in law and in fact *because no defect appeared on the face of the award*, and Martin B. giving judgment referring to *Phillips* v. *Evans* (4), says:

(1) 3 C. B. N. S. 826.
(2) 3 C. B. N. S. 189.
(3) 3 H. & N. 293.
(4) 12 M. & W. 309.

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Alderson B. says it is safer to abide by the general rule of not allowing awards to be set aside for mistakes. That was clearly the old rule, and we have now to deal with an act of parliament operating upon these proceedings by compulsory reference. It is well known that up to a certain period there was no power to send back an award to an arbitrator; the clause for that purpose was first introduced by the late Mr. Vaughan Richards, and it enabled the court to remit the matters referred to the arbitrator instead of setting aside the award.

The legislature, he then says, acting on that state of things enacted the 3rd, 7th and 8th sections of the common law procedure act, and after setting out these sections he says as to the 8th:

It seems to me that is nothing more than enacting that the clause introduced by Mr. Richards shall apply to all orders of reference made under the 3rd section.

And Channel B. there says:

The 8th section gives the court or a judge no more power than they would have had under an ordinary reference, that is, they may remit in compulsory references, where in references made by consent they might have sent back the matters to the arbitrator.

In *Lord* v. *Hawkins* (1) the award was bad upon its face, and the order was made in 1857 to remit the matters in difference under a special agreement in the submission to that effect. In *Mills* v. *Bowyers' Society* (2) the object of the 8th sec. of 17 & 18 Vic. ch. 125, was declared to be:

To enable the court, where any error formal or otherwise had occurred which would vitiate an award, to send it back if they thought fit to the arbitrators "to correct such error," instead of setting the award wholly aside.

And it was further held that:

If a mistake had been made in the award not apparent on the face of it, and such mistake is admitted in an affidavit by the arbitrators, such an admission is sufficient to authorize the court to refer it back under the statute, as it was to set aside the award under the former practice.

And so also that:

(1) 2 H. & N. 55. (2) 3 K. & J. 66.

Although the arbitrators insist that they have made no mistake, but state the principle upon which they made the award, and the court is of opinion that such principle is not consistent with the reference, the court may remit the matter.

In *Morris* v. *Morris* (1), in 1856, the award was remitted to the arbitrator to enable him to correct a defect appearing on the face of the award. In *Aitken's Arbitration* (2), in 1857, the award was remitted to enable the arbitrator in like manner to correct a defect appearing on the face of the award.

In *Flynn* v. *Robertson* (3) in 1869, the arbitrator had, by mistake, made an award in favor of the defendant instead of the plaintiff; the mistake was admitted by both parties and by the arbitrator who explained the circumstances under which it had occurred, and the award was remitted to him to enable him to correct the mistake. In *Re Dare Valley Railway Company* (4) in 1868, the court remitted an award back to an arbitrator, it having appeared from a paper produced by the arbitrator, in explanation of his award, that there had been a mistake made by him as to the subject matter referred to him, and in point of legal principle affecting the basis on which the award was made. But in *Dinn* v. *Blake* (5), in 1875, the Court of Common Pleas held that the court will not, in case of a mistake, send back an award without an assurance from the arbitrator himself that he is conscious of the mistake and desires the assistance of the court to rectify it. It is there expressly laid down that an award, good upon its face, is final, and cannot be interfered with by the court except only in cases where there is corruption on the part of the arbitrator or excess of jurisdiction, or where the arbitrator himself admits that there is a mistake and,

(1) 6 E. & B. 383.
(2) 3 Jur. N.S. 1296.
(3) L.R. 4 C.P. 324.
(4) L. R. 6 Eq. 429.
(5) L.R. 10 C.P. 388.

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as it were, craves the assistance of the court in setting it right.

By the above cases it appears, I think, to be well established that the jurisdiction conferred by the C. L. P. Act upon the courts to refer back awards and the matters in difference to the re-consideration and re-determination of arbitrators was a remedial jurisdiction conferred by way of substitution for the jurisdiction formerly exercised by the courts to set aside awards for defects appearing on the face of the award, excess of jurisdiction or acknowledged mistakes in the award, and the jurisdiction so conferred is limited to the like cases as before the passing of the C. L. P. Act it had been exercised in by agreement contained in the submission to arbitration, namely:

1. Where some defect appears on the face of the award which, in order to make the award unobjectionable, should be rectified;

2. Where, although no defect appears on the face of the award, a mistake has been made by the arbitrator, which he admits having made in such a manner as to display, as it were, a desire to be enabled by the court to rectify;

3. Where the arbitrator has exceeded his jurisdiction; or—

4. Where the arbitrator states the principle upon which he has proceeded and the court is of opinion that such principle is not consistent with the reference.

Now, whether or not the above heads cover all the cases in which the courts can exercise jurisdiction to refer back an award, there can be no doubt that the motion to refer back authorized by the Common Law Procedure Act is in substitution for the motion to set aside the award for certain particular grounds

of objection under the old practice, and there has been no case found of a reference back, or of an application for that purpose where, the objection to the award was that it had been procured by the corruption, fraud and perjury of one of the parties to the arbitration, or of a witness. Indeed, such a motion could not, in my judgment, be entertained for a moment, because, as the jurisdiction to refer back is a remedial jurisdiction, substitutional for the jurisdiction formerly exercised to set aside the award for certain grounds of complaint not going to the merits of the matters in difference, it would be destructive of the principle upon which the jurisdiction to refer back is founded if it should be absolutely necessary to adjudge the award to be fraudulent and void as a preliminary step to referring it back, as it would be, and as has been done in the present case, where the objection to the award is founded upon the allegation that it had been procured by the fraud, corruption and perjury of one of the parties thereto, or of a witness, and so irremediable. The notice of motion is not for an order to refer back the award for its amendment in some particular in which it appeared upon its face to be defective, or for anything done by the arbitrators in excess of jurisdiction, or for any mistake which needed correction, but for an order whereby it should be "declared;" that is adjudicated, that the award is void and invalid as having been procured by the fraud, corruption and perjury of the assured, and for that reason should be set aside, and to remit the matters referred to the re-consideration and re-determination, &c., so that unless the award should be declared to be void for the reasons stated in the notice of motion and should therefore be set aside there was nothing asked to be, nor in point of fact was there anything to be, referred back. And if

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the award should be set aside, as that could be ordered only as a consequence of the court pronouncing the award to be void as having been procured by the fraud, corruption and perjury of the assured, who were, and in the nature of things could be, the only witnesses upon the points in respect of which the fraud and perjury was charged to have been committed, it would be a mere delusion to refer back the matters in difference for re-consideration by the arbitrators accompanied by a judgment that the testimony upon which the award was founded was false and perjured, and therefore not to be received or entertained. The object of the insurance companies in making the motion would, therefore, seem to have been, as its effect undoubtedly was, to operate, not as a motion to refer back within the meaning and under the provision of the C. L. P. Act in that behalf, but simply as a motion to have the award adjudged to be void and invalid as having been procured by the fraud, corruption and perjury of the Hendersons, the parties insured. The learned Chief Justice of Ontario, in his judgment in the Court of Appeal, says that the evidence before the learned judge before whom the motion was made either amounted to nothing or "was a case of actual, personal, wilful fraud," and he might have added "perjury on the part of the assured."

If, then, the award was open to objection upon this ground it was quite unnecessary to move to set it aside, for if void for the reasons stated it never could be enforced, and if, notwithstanding that the award was void, a motion to set it aside should be made the court had no jurisdiction to entertain it as not having been made within the time prescribed by 9 & 10 Wm. 3 c. 15. Upon this point there does not seem to be any contradiction in the cases.

In *North British Railway Company* v. *Trowsdale* (1), it was held, in 1866, that a motion to set aside an award could not be made even with consent of the parties after one term after the publication of the award.

In *Re Corporation of Huddersfield and Jacomb* (2), it was held, in 1874, by Malins V.C., and affirmed by the Court of Appeal (3), that a motion to set aside an award must be made within the time prescribed by the statute 9 & 10 Wm. 13, c. 15, but that the service of notice of motion was a sufficient commencement of complaint to satisfy the provisions of the statute.

In *College of Christ* v. *Martin* (4) it was held, in 1877, by the Court of Appeal, consisting of Cockburn C.J., and Bramwell and Brett, Lords Justices, affirming the judgment of the Q. B. Division, that notwithstanding that terms were done away with by 36 & 37 Vic. c. 66 s. 26. they are used still as a means of determining the time within which proceedings to set aside an award must be taken, and that in the particular case, as the 8th of May was the last day upon which, under 9 & 10 Wm. 3 c. 15, the proceeding must have been instituted, the court had no jurisdiction to entertain a motion made after that day. And in *Smith* v. *Parkside Mining Company* (5), it was held in 1880 by the Exchequer Division following *in re Corporation of Huddersfield and Jacomb* (2), that the service of a notice of motion was a complaint made in the court before the last day of the term after the publication of the award and that therefore the statute of William 3 had been complied with and the court had jurisdiction to entertain the motion to set aside the award.

(1) L.R. 1 C.P. 401.
(2) L.R. 17 Eq. 476.
(3) 10 Ch. App. 92.
(4) 3 Q.B.D. 16.
(5) 6 Q.B.D. 67.

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This is an instructive case because the objection to the award was of a technical character, viz., want of finality appearing on the face of the award, and the case was, therefore, one in which an application to refer back the award for amendment under the provision of the C. L. P. Act in that behalf might have been made ; and the court, after determining that the proceedings to set aside the award had been taken within the time prescribed by the statute of William, and after having heard the motion, refused to set aside the award but themselves made an order referring it back for amendment, thus showing that where a motion is made to set aside an award the statute of William must be complied with, and that where an order is made under the provisions of the C. L. P. Act to refer back the award is not set aside and the reference back is substitutional and wholly remedial.

In the present case the judgment appealed from appears to have proceeded wholly upon the assumption that all of the above cases, showing a concurrence of all the courts as to the law where the application is to set aside an award, are overruled by the judgment of the Queen's Bench Division in *Leicester* v. *Grazebrook* (1), decided in 1879. It is obvious from *Smith* v. *The Parkside Mining Co.* (2) that the Exchequer Division were not of that opinion in 1880, when the judgment in *Leicester* v. *Grazebrook* (1) was recent ; but apart from the difficulty of conceiving that Cockburn C.J., Lush and Manisty JJ. sitting in the Queen's Bench Division could have contemplated that they were making a decision in the slightest degree at variance with the judgment of Cockburn C. J. himself, sitting with Lords Justices Bramwell and Brett in the Court of Appeal in *Christ College* v. *Martin*, (3) or with the judgment of Malins V. C. in L. R. 17 Eq. affirmed in ap-

(1) 40 L.T.N.S. 883.
(2) 6 Q. B. D. 67.
(3) 3 Q. B. D. 16.

peal by Lords Justices James and Mellish, in 10 Ch. App. 92, a reference to the meagre report of *Leicester* v. *Grazebrook* (1) shows that the motion was not at all to set aside an award but the ordinary case of a motion, under the C. L. P. Act, to refer back the award for the correction of some technical defect in the award, the nature of which is not even stated in the very meagre report of the case ; but that it was the ordinary case of a reference back for the correction of some technical defect is apparent from the fact that there does not appear to have been any objection to the reference back as soon as it was decided that the application was not too late. The case was evidently one of an application by the party in whose favor the award was made for the purpose of having rectified some technical defect appearing on th face of the award and not an application by the party against whom the award was made, as in the present case, to have the award declared void as having been procured, as alleged, by fraud, corruption and perjury, and it can have no application in the present case.

But, even if the application had not been too late, and if, therefore, the court had had jurisdiction to entertain a motion to set aside the award, I am of opinion that the grounds upon which the application was rested, and has been maintained, were of such a nature as to have required a trial of the complaint with the intervention of a jury in an ordinary action raising the precise issue whether or not the award had been procured by the fraud, corruption and perjury charged. If the award, which, it must be borne in mind, was in favor of Green & Co., is to be avoided by the evidence of John Henderson, taken eight months after the making of the award, in which he now asserts that both he himself and C. W. Henderson were guilty of

(1) 40 L.T. N.S. 882.

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wilful and corrupt perjury in the evidence given by them upon the arbitration, the parties to be affected by such evidence, and who are not even suggested to have been privy to the perjury whereof Mr. John Henderson now accuses himself and C. W. Henderson, should surely have the opportunity given them of questioning the truth and *bona fides* of Mr. John Henderson's later evidence, and of taking the opinion of a jury upon the question whether the perjury was committed in the evidence given on the arbitration or in that given eight months after by Mr. John Henderson and used by the insurance companies on their application to have the award declared to be void. The language of Lords Justices James and Thesiger in *Flower* v. *Lloyd* (1), although disapproved of by the Court of Appeal in *Abouloff* v. *Oppenheimer* (2), as applied to the case of an action instituted to avoid a judgment upon the allegation of its having been obtained by fraud and perjury of the party in whose favor it was rendered, seems to me, when applied to the present case, to be singularly appropriate, and so applied, it would read much as follows:

Assuming the alleged fraud and perjury to have been committed by C. W. and J. Henderson, as is now alleged by the latter, can such fraud and perjury be established in such a manner as to be acted upon judicially to the prejudice of Green & Co., in whose favor the award was made, upon a motion made to the court to declare the award to be void for such fraud and perjury? Has the court on motion jurisdiction to declare, or which is the same thing to adjudicate, that an award had been procured by fraud and perjury, and was, therefore, void to the prejudice of the person in whose favor the award was made and who was a stranger to the fraud and perjury charged? These

(1) 10 Ch. App. 333. (2) 10 Q. B. D. 307.

questions would require very grave consideration before they are answered in the affirmative. Where is litigation to end if judgment obtained in an action or an award obtained on an arbitration fought out adversely upon the very question of fraud, the charge of which is now repeated, could be declared to be void upon the ground of fraud and perjury, on the inquiry in relation to it, on a mere motion before a judge? Perjuries, falsehoods, frauds, when detected, must be punished and punished severely, but can such grave charges, after having been once tried, be re-opened even upon the confession of one of several parties accusing himself and others of fraud and perjury, and be substantiated (to the prejudice of a party who is a stranger to the fraud and perjury), otherwise than in an action instituted in the ordinary manner, wherein an issue as to the existence of the fraud and perjury charged shall be joined between the parties sought to be prejudiced by their being substantiated, who, in the present case, are Green & Co., and the parties seeking to be benefited thereby, who are the insurance companies?

In my opinion these questions can only be effectually answered either in an action brought by the insurance companies, or one of them, of the nature of the actions commenced by writs of summons in November, 1887, and discontinued, or in an action by Green & Co. upon the award, if the court below should think fit, upon their motion to enforce the award, to decline doing so, and should leave them to their action upon the award. But for the reasons already given I am of opinion that this appeal should be allowed with costs, and that the motion made in the court below by the insurance companies should be ordered to be refused with costs.

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PATTERSON J.—The facts on which the questions in dispute mainly turn may be briefly stated.

A firm of C. W. & J. Henderson insured their stock of merchandise with several insurance companies. A fire occurred. After the fire, and before the loss was adjusted, the Hendersons assigned their claims upon the policies to John Green & Co. Disputes arising respecting the loss, a submission to arbitration was entered into between the several insurance companies, C. W. & J. Henderson and John Green & Co. The arbitrators were Judge Chadwick of Guelph and Judge Davis of London, who, if they disagreed, but not unless they disagreed, were to appoint an umpire who was to decide the matters in difference upon the statements of the arbitrators and such reference to the evidence as he should think proper, and make his award without hearing the parties or examination of witnesses before him.

The arbitrators disagreed and appointed Judge Woods of Chatham as umpire.

The umpire made his award on the 28th of July, 1887.

The submission was made a rule of the High Court of Justice, Queen's Bench Division, at the instance of John Green & Co., and in June, 1888, over ten months after the making of the award, the insurance companies moved for an order to declare that the award was void and invalid, and that it should be set aside, and to remit the matters referred to the re-consideration and re-determination of the original arbitrators mentioned in the submission.

The principal ground of the motion was the alleged recent discovery that the Hendersons had by deliberate fraud concealed a part of their goods which they had saved from the fire, and that their proofs of loss and

also their evidence before the arbitrators were fraudulently false in relation to the amount of their loss.

The motion was heard before Mr. Justice Rose, who made an order :

That the matter of the said submission be referred back to the said arbitrators and umpire to take evidence and inquire and report as to whether any of the goods insured, and if any to what extent, were not destroyed by fire, either by reason of salvage, fraud or concealment on the part of the assured or by reason of any other cause, and that in respect of the question so remitted the reference and proceedings thereon be governed by the terms of the original submission herein.

From that order the companies appealed to the Court of Appeal, contending that the award ought to be set aside and the whole matter remitted back to the arbitrators.

The appeal was allowed and an order made that

the matter of the submission between the parties above-named be referred back to the arbitrators for re-consideration and re-determination upon the terms of the said original submission ; and that all questions of costs, in respect of such reference back, shall be reserved till after the determination of the said matters so referred back.

Before the Court of Appeal the respondents (who are appellants in this court) were not content to support the order of Mr. Justice Rose. They insisted, by way of cross-appeal, and they now insist, that the motion ought to have been altogether dismissed because of the lapse of time since the making of the award, and because the case presented was one for simply setting aside the award and not for referring the matter back to the arbitrators. Their answer to a motion to simply set aside the award would have been the conclusive one that, under the statute 9 & 10 Wm. III, ch. 15 the motion could not be later than the term following the making of the award.

A good many of the numerous cases which touch, more or less directly, the subjects of the contest have

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been brought to our attention in the course of the learned and thorough discussion at our bar. I shall not find it necessary to refer to many of them. I do not think the solution of the questions in dispute requires much more than a careful attention to the statutes on the subject of arbitrations, and I think that the questions are correctly solved by the judgment now in review.

It is familiar law that when parties submitted a dispute to arbitration, choosing their own tribunal, a court of common law could not set aside the award until the act of 9 & 10 Wm. III ch. 15 gave power to do so when an award was procured by corruption or undue means, provided it was complained of before the last day of the term following the making of the award.

It is also familiar law that in all cases but exceptional ones the courts met applications to set aside an award by saying "You have constituted your own tribunal; you are bound by its decision." The only exceptions to that rule, as stated by Williams J. in *Hodgkinson* v. *Fernie* (1), were cases where the award was the result of corruption or fraud, and one other, viz., where the question of law necessarily arose on the face of the award or upon some paper accompanying and forming part of the award.

I shall have to refer again by-and-bye to this statement of the law.

Hodgkinson v. *Fernie* (1) is relied on principally as a leading decision that an award will not be referred back to the arbitrator for any cause for which it could not properly be set aside. It is not my purpose to inquire whether that rule is universal and not subject to exceptions. Cases such as *Flynn* v. *Robertson* (2) and others, some of which are there cited, suggest a

(1) 3 C. B. N. S. 189, 202. (2) L. R. 4 C. P. 324.

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contrary opinion, but the inquiry is not, in my judgment, at present called for, as I shall presently show.

The 8th section of the English C.L.P. Act, 1854, which first gave power to refer back an award, was represented in Ontario by R. S. O. (1877), ch. 50 sec. 213 or R. S. O., (1887), ch. 53 sec. 37, which gave power to the court of which the submission was made a rule, or a judge, to

> at any time and from time to time, remit the matters referred, or any or either of them, to the re-consideration and re-determination, [these last two words are omitted in R. S. O., 1887] of the arbitrator or arbitrators or umpire as the case may require, upon such terms, &c.

There is here no indication of any limit to the discretion of the court on deciding for what reason an award shall be sent back. On the contrary the expressed purpose of sending it back, viz., for re-consideration and re-determination by the arbitrator, is opposed to the idea that the determination evidenced by the document, however erroneous it may be demonstrated to be, must be sacredly respected, as it also is to the idea that the only purpose in sending back an award must be for the performance of the *quasi* ministerial duty of correcting some apparent error by correctly expressing the determination previously arrived at. It is for re-consideration and re-determination.

In the present case the charge is that the award was procured by fraud. Whether or not that charge is substantiated by the evidence adduced on the motion is a matter that we can scarcely be expected to discuss very critically. It was for the court below to deal with on the evidence, and it cannot be held that the evidence did not fully justify the view taken by the court. There was no reason why the re-consideration should not be by the originally appointed arbitrators. No suggestion of unfairness or other personal objection to them was made.

Now, taking *Hodgkinson* v. *Fernie* (1) to be a leading

(1) 3 C. B. N. S. 189

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case on the subject, how does it apply to the immediate question ? We have good authority for applying to the referring back of an award the law there laid down with more direct reference to setting aside an award. I find the remarks of Williams J., to which I have adverted, quoted by Brett J. in *Dinn* v. *Blake* (1) as if immediately addressed to the question of referring back an award. This is his language :

> In the case of *Hodgkinson* v *Fernie* (2) both questions, viz., as to when there was power to refer back, and as to the effect of the statute, were considered, and the law was clearly declared in the judgment of Williams J. He lays it down that the award cannot be sent back and the arbitrator forced to review it merely on the ground that there has been a mistake of fact or of law. The exceptions he mentions to the rule are where there has been corruption or fraud, and where it appears on the face of the award that there has been a mistake of law.

A third exception is spoken of by Brett J. and the learned judges who sat with him, as established by the later cases of *Mills* v. *Bowyers' Company* (3) and *Flynn* v. *Robertson* (4), viz., when the arbitrator admits his mistake. In *Dinn* v. *Blake* (1) the application to refer back an award on the ground of the arbitrator being mistaken in his law was refused because the mistake was not admitted by the arbitrator and did not appear on the face of the award.

The case is a distinct authority for the proposition that, under the rule stated in *Hodgkinson* v. *Fernie* (2) as interpreted and applied in *Dinn* v. *Blake* (1), an award may be referred back to the arbitrator for the same causes, including fraud in procuring the award, for which it may be set aside.

We have then to consider if the motion in this case was in time.

It appears to have followed the discovery of the fraud with reasonable promptness.

(1) L. R. 10 C. P. 388.
(2) 3 C. B. N. S. 189.
(3) 3 K. & J. 66
(4) L. R. 4 C. P. 324.

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The statute leaves the question of time at large. The expression is "at any time and from time to time," giving to the courts a discretion unfettered by any statutory limit but necessarily governed, as in every case of judicial discretion, by what is under the circumstances reasonable.

That is the understanding evidenced by the case of *Leicester* v. *Grazebrook* (1), in which a divisional court consisting of Cockburn C. J. and of Lush and Manisty JJ. made an order to refer back an award after the time limited by the statute of William had elapsed, affirming the discretion of the court to do so when the delay was reasonably accounted for.

We have no report of the decision except a short note in the Law Times. It does not seem to have found its way into the Weekly Notes. It was probably one of the many cases which are merely the application to particular facts of rules that are already familiar in practice. It is useful, however, as a reported instance in which the phrase "at any time and from time to time," was construed by its own force, and without qualifying it by any limitation borrowed from the statute of William.

It has long been my opinion that for some cause, possibly the inertia arising from the intimate association in the legal mind of the statute of William III and its limitations with the subject of arbitration, the provisions of the Common Law Procedure Acts have not always been administered with as much liberality as the statutes would have justified. One notable example of this is the application to compulsory references of some of the stricter doctrines appropriate to voluntary references where the parties really appoint their own tribunal. These stricter rules of practice, adopted or continued under the C. L. P. Acts in England, were, as a matter of course, followed in Upper Canada under the C. L. P. Act of 1856, and the old

(1) 40 L. T. N.S. 883.

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measure of sanctity continued to be ascribed to awards, whether made on compulsory or voluntary references, until the important relaxation provided by the provincial legislature by giving an appeal from awards in some form, and in most cases of arbitration. The order now in appeal is in the spirit of the day, which tends to bring the subject of arbitration more under the supervision and control of the courts than formerly, and to place it more fully on a footing with other forms of litigation.

I take the English Arbitration Act, 1889, to be also an advance in the same direction, and to remove whatever necessity may have seemed to exist for construing one enactment by reference to another. The act embodies the provisions of the C. L. P. Act and those of the act of Wm. III now in discussion. It provides in the 10th section, in the most general terms, that in all cases of reference to arbitration the court or a judge may from time to time remit the matters referred or any of them to the re-consideration of the arbitrators or umpire. Note in passing the omission of the redundant words " and re-determination," which, as already pointed out, were dropped in Ontario two years earlier (1). One provision of section 11 is that where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set aside the award. No time for this proceeding is limited by the statute, the limitation being left to the more flexible machinery of the general orders of the court (2).

In my opinion the judgment of the Court of Appeal should be affirmed and the appeal dismissed with costs.

Appeal dismissed with costs.

Solicitors for Appellants : *Hellmuth & Ivey.*

Solicitors for Respondents : *Bain. Laidlaw & Co.*

(1) R. S. O. (1887,) ch. 53 s. 37. (2) G. O. LXIV rule 14.

HER MAJESTY THE QUEEN ....APPELLANT ; 1890

AND *Mar. 21, 22.

ROBERT HENRY McGREEVY.....RESPONDENT. *Dec. 10.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Claim for extra and additional work done on Intercolonial Railway—31 *V. c.* 13 *ss.* 16, 17, 18, *and* 37 *V. c.* 15—*Change of Chief Engineer before final certificate given—Reference of suppliant's claim to Engineer—Report or certificate by Chief Engineer recommending payment of a certain sum—Effect of—Approval by Commissioner or Minister necessary.*

In 1879 the respondent filed a petition of right for the sum of $608,000 for extra work and damages arising out of his contract for the construction of section 18 of the Intercolonial Railway without having obtained a final certificate from F. who held at the time the position of Chief Engineer. In 1880 F. having resigned F. S. was appointed Chief Engineer of the Intercolonial Railway and investigated amongst others the respondent's claim, and reported a balance in his favor of $120,371. Thereupon the respondent amended his petition and made a special claim for the $120,371, alleging that F.S.'s report or certificate was a final closing certificate within the meaning of the contract, which question was submitted for the opinion of the court by special case. This report was never approved of by the Intercolonial Railway Commissioners or by the Minister of Railways and Canals under 31 Vic. ch. 13 sec. 18. The Exchequer Court, Fournier J. presiding, held that the suppliant was entitled to recover on the certificate of F.S. On appeal to the Supreme Court of Canada,

Held, reversing the judgment of the Exchequer Court, 1st. Per Ritchie C.J. and Gwynne J., that the report of F. S., assuming him to have been the Chief Engineer to give the final certificate under the contract, cannot be construed to be a certificate of the Chief Engineer which does or can entitle the contractor to recover any sum as remaining due and payable to him under the terms of his contract, nor can any legal claim whatever against the Government be founded thereon.

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

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2nd. Per Ritchie C. J., that the contractor was not entitled to be paid anything until the final certificate of the Chief Engineer was approved of by the Commissioners or Minister of Railways and Canals, 31 Vic. ch. 31 sec. 18 and 37 Vic. ch. 15 ; *Jones* v. *Queen* (7 Can. S. C. R. 570.)

3rd. Per Patterson J., that although F. S. was duly appointed Chief Engineer of the Intercolonial Railway, and his report may be held to be the final and closing certificate to which the suppliant was entitled under the 11th clause of the contract, yet as it is provided by the 4th clause of the contract that any allowance for increased work is to be decided by the Commissioners and not by the Engineer, the suppliant is not entitled to recover on F. S's. certificate.

Per Strong and Taschereau JJ. (dissenting) that F. S. was the Chief Engineer and as such had power under the 11th clause of the contract to deal with the suppliant's claim and that his report was "a final closing certificate" entitling the respondent to the amount found by the Exchequer Court on the case submitted.

Per Strong, Taschereau and Patterson JJ. That the office of Commissioners having been abolished by 37 Vic. ch. 15, and their duties and powers transferred generally to the Minister of Railways and Canals, the approval of the certificate was not a condition precedent to entitled the suppliant to claim the amount awarded to him by the final certificate of the Chief Engineer.

APPEAL from a judgment of the Exchequer Court of Canada (1)

The proceedings in this case were commenced in December, 1879, by a petition of right, by which the respondent claimed to recover a large sum of money under a contract made with him and the Commissioners of the Intercolonial Railway for the construction of section 18 of that railway.

In October, 1885, the respondent amended his petition of right by inserting paragraph 27*a*, which is as follows :

"27*a*.—The Chief Engineer of said railway on or about the twenty-second day of June, one thousand eight hundred and eighty-one, duly certified to the Minister of Railways and Canals that the extra and

(1) 1 Ex. C. R. p. 321.

additional works and other matters claimed for in the foregoing paragraphs hereinbefore contained, had been executed and done as extra and additional to the extent mentioned in Schedule "C" to this petition, and that the amounts in Schedule "C" hereto should be paid in respect thereof by your Majesty to your petitioner, and also certified that the original contract work had been executed, and that there should be paid by your Majesty to your petitioner in respect thereof the amount mentioned in said Schedule "C" and said Minister has not disapproved of said certificate, but has, as such Minister unduly, arbitrarily and improperly withheld his express approval of said certificate although a reasonable time for approving or disapproving thereof has elapsed, and your petitioner, not waiving but insisting upon his right to be paid the amount claimed in Schedule "B," submits and claims that in any event he is entitled to be paid the amount set forth in Schedule "C" as aforesaid, and that the want of an express approval in writing of said certificate by the said Minister, as aforesaid, should not under the circumstances alleged be permitted to be pleaded or to avail as a defence to the claim for payment of the amount mentioned in said Schedule "C."

"Your petitioner prays that his said claims may be adjudicated upon, upon the merits as to the facts, and that he be paid whatever amount upon inquiry shall be found due to him in respect thereof and interest and costs, and that if upon any defence of a purely technical or legal character pleaded herein, it is held that your petitioner cannot recover in respect of Schedule "B" hereto, then that your petitioner be paid the amount claimed in Schedule "C" herein and interest and costs."

Before proceeding upon the merits of the Petition of

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Right a special case was prepared for the opinion of the court and the following statement of admission signed by both parties :

" Statement of admission by both parties :

The only question to be argued, at this stage of the case, is as to whether the suppliant is entitled to recover on the certificate or report of Shanly referred to in clause 27*a* of the Petition of Right, reserving to the suppliant the right, if the court decide against him on that question, still to proceed on the other clauses of the petition for the general claim.

It is admitted :

1. That the contract alleged in petition, paragraph one, was entered into as therein alleged, copy of which contract is produced marked " A."

2. That the suppliant began and prosecuted the works, and executed a large amount of work in respect of the contract and section 18 of the Intercolonial Railway.

3. That Sandford Fleming was Chief Engineer of the Intercolonial Railway when the contract was entered into, and up to the month of May, 1880, when an order-in-council was passed on the 22nd May, 1880, which is herewith submitted marked " X."

4. That in 1879 the suppliant presented a large claim for balance of contract price and extras.

5. The said Fleming, as such Chief Engineer, from time to time furnished the said suppliant with progress estimates of the work done under the said contract, which were paid, but gave no final certificate in respect of said contract for section 18 as required by the statute. The work was finished in December, 1875.

6 An order-in-council and report are herewith produced marked " B." The effect and admissibility of such papers and Mr. Shanly's appointment are to be discussed.

7. The claim of suppliant, with those of other contractors on said railway, came before said Shanly.

8. That said Shanly made, and duly forwarded to the Minister of the Department of Railways and Canals, the certificate or report, a true copy of which is produced by the crown marked " C."

9. That the said certificate or report duly reached the Minister of Railways and Canals on or about its date.

10. Subsequently, by order-in-council of the 28th July, 1882, a copy of which is hereto annexed marked " D," the suppliant's claim, with others, was referred to three Commissioners to inquire and report thereon.

11. The suppliant was called upon by the Commissioners to appear before the said commission and give evidence, and was examined with other witnesses in reference to his said claim ; but such appearance and examination was without prejudice to his rights, as expressed by his counsel in paper marked " E." herewith submitted.

12. The Commissioners made their report, herewith submitted, which is to be found in the sessional papers for 1884, vol. 17, No. 53.

13. And upon such report, on the 5th August, 1884, on the authority of an order-in-council of the 10th April, 1884, a copy of which is hereto annexed marked " F," the Government paid to the suppliant the sum of $84,075.00, being composed of $55,313 principal, mentioned in said report, and $28,762 interest.

14. A copy of the receipt given by the suppliant for the amount of such payment is hereto annexed, marked " G."

15. On the 18th April, 1884, the suppliant addressed a letter to the Minister of Railways, marked " H," which was received. This is admitted as a fact, but the admissibility and effect of such letter is denied.

16. It is also admitted that, on the 10th September,

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the Department of Railways addressed a letter to the suppliant of which a copy is annexed marked " I," and which the suppliant received.

(Sgd.) C. ROBINSON,
Counsel for Crown.
(Sgd.) D. GIROUARD,
For Suppliant.

October, 14th, 1887."

Clause 11 of the contract reads as follows:

" And it is further mutually agreed upon by the parties hereto, that cash payments, equal to eighty-five per cent. of the value of the work done, approximately made up from returns of progress measurements, will be made monthly on the certificate of the Engineer that the work for or on account of which the sum shall be certified has been duly executed, and upon approval of such certificate by the Commissioners. On the completion of the whole work to the satisfaction of the Engineer, a certificate to that effect will be given; but the final and closing certificate, including the fifteen per cent. retained, will not be granted for a period of two months thereafter. The progress certificate shall not in any respect be taken as an acceptance of the work, or release of the Contractor from his responsibility in respect thereof, but he shall, at the conclusion of the work, deliver over the same in good order according to the true intent and meaning of this contract and of the said specification."

The following is a copy of the report or certificate of Mr. F. Shanly, marked " C " in the above statement of admission :—

INTERCOLONIAL RAILWAY.

" C."

CHIEF ENGINEER'S OFFICE,
OTTAWA, June 22nd, 1881.

F. BRAUN, ESQ.,
Secretary Department of Railways.

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Re R. H. McGREEVY. SECTION 18.

SIR,—Herewith I submit my report upon the claim made by Mr. McGreevy, for extra and additional work done by him under his contract, in the years 1870-1-2-3-4 and 5, which has been referred to me for investigation.

The original lump sum for which he contracted to complete the work was $648,600, being at the rate of $32,430 per mile for 20 miles, subject, however, to certain additions or deductions as the case might be, and as set forth in the contract.

The contract was entered into in July, 1870, and was to be completed in July, 1872, but owing to various causes, amongst others, as alleged, the difficulty in procuring men, it was not finally brought to a close until the end of 1875, and even then, not being quite completed, the Government after that date expended some $7,500 in addition to the payments previously made, as reported by Mr. Brydges in 1877.

Mr. McGreevy in May, 1877, filed a petition of right, by which he claimed a sum of $603,000 for extras; subsequently, in 1879, by schedule "B," a copy of which is attached hereto (sheet "A"), he makes a claim for $839,557.40 for extra work over and above the lump sum of his contract, and including a sum of $45,000 as an alleged balance due on the contract proper.

After carefully investigating the nature and foundation for the claim, and going fully into the evidence produced on behalf of the claimant and of the crown respectively, the full report of which as taken down in shorthand marked "E," Nos. 1, 2, 3, 4 and 5, is herewith submitted, I have come to the conclusion, owing to various unforeseen difficulties, and in view of the contract being for a lump sum, where the contractor was to assume all risks from weather, increase in the cost and scarcity

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of labor, the great difficulty in such a country of ascertaining previous to tendering the real nature of the material to be excavated, or the facilities for the procuring of stone, timber, &c., for building, most of which had to be brought from a great distance, that the deductions and additions provided for by the contract should be waived, and the lump sum on a final settlement be adhered to and allowed, together with certain items claimed by Mr. McGreevy as extra to and not properly belonging to the contract, and as set forth in sheet "A" herewith numbered 10, 11, 12, 18 and 19 respectively. All the other items mentioned in sheet "A," except 20 and 21, afterwards referred to, I consider to be clearly covered by the contract and specification, and that no allowance should be made for them.

Item 10. Second-class masonry built as first-class.

From a personal examination of nearly all the structures referred to, as well as from the weight of the evidence produced in support of the claim, and given by skilled engineers and mechanics, most of whom were in the employment of the Government at the the time the work was being carried on, I am inclined to think that the claim is fairly established, in so far as the quantity so built is concerned ; the price, however, should be only $6, not $9, per cubic yard, the former being the difference in the schedule rates, between first and second-class masonry ; see sheet "C" attached hereto. I therefore recommend payment as follows of this item : 4,617 cubic yards, at $6, $27,702.

Item 11. Portland cement used as ordered instead of hydraulic cement. This claim is fully supported by the evidence as to the fact, and it generally agrees that the additional cost was $1.50 per cubic yard ; I would therefore pronounce it proved, and recommend payment therefor : 8,892 cubic yards, built in Portland cement, at an extra cost of $1.50 per cubic yard, $13,338.

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Item 12. Crib wharfing. Claim based upon the fact that the plans were entirely changed and enlarged from those exhibited at the time the tender was put in, and in fact that double the material then called for had to be used ; that is, I think, fully proved in evidence, and I therefore recommend that payment be made proportionally at the rate of 75 cents per cubic yard, which is equivalent to $3 per lineal foot as tendered (see sheet " C " attached hereto) on the original plan. The total quantity is proved at 160,000 cubic yards, or say 20,000 lineal feet, containing 8 cubic yards per foot, less estimated and allowed in final estimate 80,600 cubic yards —79,400 cubic yards at 75 cents per cubic yard, $59,550.

Item 18. Iron pipes in place. This item is properly extra to the contract, and I treat it as such. A price per lineal foot is stated in the schedule to the tender, but no mention is made of it either in the specification or bill of quantities. The length laid down, as shown by Mr. Grant's final measurement, is 424 lineal feet, and the quantity of masonry and concrete used is, I think, admitted, as is also the quantity of masonry saved by the substitution of the pipes for stone culverts. The account will then stand thus :

424 lin. ft. iron pipes at $25.....	$10,600
352 c. yds. 1st class masonry at $14...	4,928
425 c. yds. concrete at $5.....	2,225
	$17,753
Less—2nd class masonry saved, 1,308 c. yds. at $8.....	10,464
Recommended to be paid.....	$ 7,286

Item 19. Iron pipes delivered but not used by the contractors.

This claim is not disputed, it having been recognized by Mr. Schreiber in his final estimate of November 1875. There seems to have been 219 lin. feet, 10 inches

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say 220 feet, left on the ground and taken by the Government. This would make as nearly as possible 100,000 lbs., which I have valued at 4 cents per lb.

100,000 lbs. iron pipes at 4 cts per lb... $4,000
The foregoing items aggregate.....$111,879
Lump sum of contract..... 648,600

Total amount with extras.....$760,479

There now only remains to be dealt with items 20 and 21.

Item 20. Damage and delay at Millstream Bridge.

The evidence in support of this item, principally that of Mr. Grant and Mr. McGreevy himself, fails to make out, in my opinion, the case, and Mr. Bell and Mr. Fleming for the crown most emphatically deny that there were any grounds for such a claim, I cannot therefore recommend its being entertained.

Item 21. Two additional miles over the length (20 miles) tendered for.

It was so obvious that the lump sum of $648,600 was based on a distance of 20 miles, and not 18 as claimed, the mileage price, $32,430 being distinctly mentioned, that in an early part of the investigation Mr. McGreevy through his counsel consented to withdraw it.

The principal witnesses to the above items were for item 10, Messrs. J. D. Cameron, Charles Odell, A. L. Light, Peter Grant and R. A. McGreevy, in support; and Messrs. Bell and Fleming against.

For item 11, Messrs. Cameron, Lourie, Imlay, Grant, and McGreevy in support; and Messrs. Bell and Fleming against.

For item 12, Messrs. Michaud, Odell, Townsend, Grant and McGreevy in support; and Messrs. Bell and Fleming against.

Items 18 and 19 not disputed. Evidence documentary.

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On the general principles and interpretation of the contract, Mr. C. J. Brydges was called and examined by the crown. He referred chiefly to a report made by him on this case in June, 1877, in reply to the petition of right, recommending that the strict letter of the contract be adhered to, this doubtless is perfectly correct in law, but I cannot help thinking that the present is a class of case where a little equity may very properly be introduced.

I have nothing further to add, the claim for extras to the extent of $111,879 has I think, been satisfactorily proved, which sum added to the lump sum of the contract $648,600 which I have before recommended, should be retained makes a total of $760,479 from which must be deducted the sums already paid to the contractor, or otherwise expended by the Government on the works, amounting to $640,108, leaving a balance in favour of the contractor of $120,371 as shown on sheet "D," to which sum I think he is fairly entitled.

I am, sir,

Your obedient servant,

(Signed) F. SHANLY,

Chief Engineer, I. C. R."

The case having come on for trial, several witnesses were examined by the crown to prove that the report or certificate forwarded by Mr. Shanly had not been treated by the Minister of Railways and Canals, as a final certificate and that it had been repudiated and witnesses were adduced by the suppliant to show that Mr. Shanly's reports on other claims had been paid approved and the amount he had awarded had been paid.

The Exchequer Court of Canada, Fournier J. presiding, held that the certificate or report of Mr. F. Shanly was sufficient to entitle the suppliant to proceed

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before the court in order to recover the amount awarded to him by said certificate or report.

The parties having been heard subsequently before the judge, and the suppliant's counsel having declared that he renounced his claim for any surplus claimed by his petition over and above the amount certified to in the next report or certificate of Mr. F. Shanly, judgment was given for the suppliant for the sum of $65,058 and costs and the petition as to the excess was dismissed.

The crown then appealed to the Supreme Court of Canada.

C. Robinson Q C. and Hogg Q. C. for appellant, and Girouard Q.C. and Ferguson Q.C. for respondent.

The statutes and clauses of the contract which bear upon the case are referred to at length in the report of the case in the Exchequer Court Reports (1), and in the judgments hereinafter given.

Sir W. J. RITCHIE C.J.—The following is the statement of admission by both parties to this appeal:

"The only question to be argued at this stage of the case is as to whether the suppliant is entitled to recover on the certificate or report of Shanly referred to in the clause 27*a* of the petition of right, reserving to the suppliant the right, if the court decide against him on that question, still to proceed on the other clauses of the petition for the general claim."

The suppliant does not seem to contend that he was not bound to have, under the contract, a final certificate of the Chief Engineer, but he alleges that the certificate given by Mr. Shanly was such final certificate and that he was not bound to obtain the approval of the Minister, standing in the place of the Commissioners with whom the contract was made, as to the certificate of Mr.

(1) Vol. 1, p. 321 et seq.

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Shanly. This, in my opinion, cannot be considered, in any sense of the term, such a certificate as the contract and the statute contemplate and which the crown, on a strict legal interpretation of the contract, has a right to insist upon. Mr. Shanly, as his report or certificate shows, has come to the conclusion, for certain reasons such as "owing to various unforeseem difficulties, and in view of the contract being for a lump sum where the contractor was to assume all risks from weather, increase in the cost and scarcity of labor, the great difficulty in such a country of ascertaining previous to tendering the real nature of the material to be excavated, or the facilities for the procuring of stone, timber, etc., for building, most of which had to be brought from a great distance, that the deductions and additions provided for by the contract should be waived."

And at the conclusion of the report he says :—

On the general principles and interpretation of the contract Mr. C.J. Bydges was called and examined by the Crown. He referred chiefly to a report made by him on this case in June, 1877, in reply to the petition of right recommending that the strict letter of the contract be adhered to. This, doubtless, is perfectly correct in law, but I cannot help thinking that the present is a class of case where a little equity may very properly be introduced.

What does the contract require ?

On the completion of the whole work to the satisfaction of the engineer a certificate to that effect shall be given.

And section 18 of the Intercolonial Railway Act provides that—

No money shall be paid to any contractor until the Chief Engineer shall have certified that the work for, or on account of, which the same shall be claimed has been duly executed, nor until such certificate has been approved by the Commissioners.

Assuming Mr. Shanly to have been the Engineer in Chief entitled to give the final certificate under the contract it is, in my opinion, quite impossible to suppose that Mr. Shanly could have thought that he was

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giving such a certificate. What right had he to waive the provisions of the contract? What right had he to depart from the strict letter of the contract which he, himself, says it was perfectly correct, in law, to adhere to? What right had he to introduce what he is pleased to term a little equity into the case? Or what right has any court to eliminate from this case the express provisions of instruments intended to protect the public revenues of the country and prevent the payment of any moneys to contractors until approved of by the commissioners or the Minister of Railways now representing the Commissioners? The contract must be read in connection with this provision which cannot, in my opinion, be ignored. So far from Mr. Shanly's report being treated as a final certificate and approved of, the evidence of the Minister of Railway, representing the Commissioners, is distinct and positive that so far from being approved of it was distinctly repudiated, and instead of being accepted a commissioner was appointed to enquire into and report on suppliant's claim with others before the commissioner. The suppliant appeared, and, with the crown, produced witnesses, and which Commissioner awarded the suppliant a certain sum which was paid him, and, in my opinion, this should have ended the matter.

Had it been expressly stipulated by the contract that the money should be paid on the final certificate without the approval of the Commissioners or Minister, &., would not this provision, being in direct violation of the statute, be void, and the contract be governed by the statute which gives them no power to dispense with this important stipulation?

Unless I am prepared to go back on the case of *Jones* v. *The Queen* (1) and to hold that was wrongly decided, which I am by no means prepared to do, I must hold

(1) 7 Can. S.C.R 570.

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that the suppliant has failed to establish his case and that this appeal must be allowed.

STRONG J.—The questions to be primarily decided on this appeal are: First, whether Mr. Frank Shanly was at the time he made his report or certificate of the 22nd June, 1881, the Chief Engineer of the Intercolonial Railway; and secondly, whether that certificate is to be regarded as a final and closing certificate within the meaning of the contract. The learned judge who presided at the hearing of this petition of right in the Exchequer Court decided both these points in favor of the suppliant and I am of opinion that his decision was in these respects entirely right.

The Order in Council of the 23rd June, 1880, was made upon the report of the Minister of Railways and Canals, stating that Mr. Sanford Fleming declined the appointment and recommending that Mr. Shanly be appointed to be Chief Engineer of the Intercolonial Railway. The Order in Council by which the recommendation of the Minister of Railways and Canals was approved by the Governor General constituted the instrument of appointment by virtue of which Mr. Shanly held the office and exercised the authority and performed the duties appertaining to it. This Order in Council certainly states that "the engagement should be understood to be of a temporary character," but it is not suggested that Mr. Shanly's appointment had been revoked or his tenure of office in any way interfered with at the time he made the certificate or report of the 22nd June, 1881. This Order in Council therefore, in my opinion, invested Mr. Shanly with all the powers which, as was provided by the contract between the crown and the Suppliant were to be exercised by the Chief Engineer of the Inter-

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colonial Railway, at least so far as the same remained unperformed by his predecessor in office. Had the Engineer originally appointed died it cannot be doubted that it would have been competent for the Governor General in Council to appoint a successor who could properly perform such functions remaining unperformed as the contract assigned to the Engineer, and I can see no reason why there should be any difference in this respect between a vacancy so caused by death and that which was actually caused by the resignation of Mr. Fleming. There is nothing in the appointment of Mr. Shanly which is not in strict conformity with the provisions of the act respecting the construction of the Intercolonial Railway. (31 Vict. c. 13) sec. 4 of which is as follows :

> The Governor General shall and may appoint a Chief Engineer to hold office during pleasure who under the instructions he may receive from the Commissioners shall have the general superintendence of the works to be constructed under this act.

As I have said I see no reason why, in the case of the death of the original Chief Engineer during the progress of the works or after their completion, a Chief Engineer should not be appointed by whom the certificates required by sec. 11 of the contract might well be given. The fact that the works were not constructed under the superintendence of such secondly appointed Chief Engineer would not, as it seems to me, make any difference ; and if such a new appointment might be made in the case of the death of the original Engineer no reason can be suggested why the same course might not be followed in the case of his resignation or refusal to accept a re-appointment.

Next we have to inquire whether the report or certificate of Mr. Shanly dated the 22nd June, 1881, was a final and closing certificate such as is required by the 11th section of the contract. I am of opinion that it was.

The Intercolonial Railway Act (31 Vic. c. 13 sec. 18) provides that:—

No money shall be paid to any contractor until the Chief Engineer shall have verified that the work for or on account of which the same shall be claimed has been duly executed, nor until such certificate shall have been approved of by the Commissioners.

The eleventh clause of the contract is as follows:—

And it is further mutually agreed upon by the parties hereto that cash payments equal to eighty-five (85) per cent of the value of the work done approximately made up from returns of progress measurements will be made monthly on the certificate of the Engineer that the work for, and on account of, which the sum shall be certified has been duly executed and upon approval of such certificate by the Commissioners. On the completion of the whole work to the satisfaction of the Engineer a certificate to that effect will be given, but the final and closing certificate including the fifteen per cent. retained will not be granted for a period of two months thereafter. The progress certificates shall not in any respect be taken as an acceptance of the work or the release of the contractor from his responsibility in respect thereof, but he shall at the conclusion of the work deliver over the same in good order according to the true intent and meaning of the contract and of the said specifications.

It will be observed that this clause makes mention of three different certificates, first those which are called "progress certificates," to be given by the Engineer during the continuance of the work, being based on an approximate estimate of the work done and which, subject to a deduction of 15 per cent., were to be paid at once on the approval of the Commissioners. With these Mr. Shanly had, of course, nothing to do. Then there was a certificate which was to be given upon the completion of the whole work, a certificate that it had been so completed to the satisfaction of the Engineer. And lastly, there was a third certificate to be given by the Engineer, which is denominated the "final and closing certificate" and which was to include the 15 per cent. retained from the progress estimates. This last mentioned certificate is clearly a

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separate and distinct certificate from that secondly mentioned, for it is expressly provided that it is not to be granted for a period of two months after the completion of the works, while the second certificate is to be granted immediately upon completion. There is no reason, however, why these two certificates should not be blended in one, provided two months have elapsed after the completion of the works. I can see, therefore, no reason why we should not consider Mr Shanly's report as embracing both these certificates. As regards the completion of the works the report of Mr. Shanly is not very formal, but no one who reads the third paragraph of it can doubt that what he says implies that the works had been wholly completed to his satisfaction some years prior to the date of his report, and therefore much longer than two months before he gave his "final and closing" certificate, which, in my opinion, is also to be found in this report.

This brings us to the very important question: What meaning is to be attached to these words "final and closing certificate?" No doubt they at first seem general and vague. but when taken and considered with reference to the other provisions of the contract I think they will be found not so vague as to be insusceptible of a reasonable interpretation.

What then was this "final and closing certificate" to contain? It could not have been intended to relate to the completion of the work, for that was to be dealt with by the second certificate which it was for the Engineer to give as soon as the work was completed, whilst the final and closing certificate was not to be given until two months after completion. It would have been entirely unnecessary and superfluous for the purpose of ascertaining the balance due to the contractor if the contract price was to be strictly adhered to and that was to be the sole measure of the con-

tractors' remuneration, for that price being what is called a lump sum was written in the contract itself, so that the balance due to the contractor would have been ascertainable by a mere deduction of the aggregate of the payments made on progress certificates from the contract price, and no certificate from the Engineer would be required for that purpose there being no measurements or quantities to be taken, and such a calculation could be more appropriately and easily made by the officers who had charge of the accounts of the works than by the Engineer. We must, therefore, find some other object for the certificate in question than any of these purposes. Now the words "final" and "closing," even strictly construed, indicate that this certificate was to put an end to some matters which might remain open or in dispute after all questions relating to the completion and sufficiency of the work had been concluded by the other certificate as to final completion, and when the ascertainment of the balance remaining due in respect of the contract price was reduced to a mere matter of calculation, a simple sum of addition of the amounts paid from time to time in progress certificates and of the subtraction of the result from the fixed contract price.

Then what could possibly remain open or in dispute between the contractor and the crown but claims made by the former in respect of additional or extra work performed by him in excess of that required by the specifications? This is the only possible object or purpose for which a "final" and "closing" certificate could have been required, the bringing to an end and closing claims for work performed *extra* the contract. And when we consider that as the contractor was not entitled to be paid a dollar even of the unpaid residue of the contract price until he procured a certificate of the Engineer which (as many cases decided in this

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court relating to contracts on this same Intercolonial Railway have established) was an indispensable condition precedent to his being paid, it was not unreasonable or unfair, more especially when we remember that the Engineer's certificate was originally to be approved by the Commissioners, that the contractor should have the benefit of a conclusive determination of claims made by him, just as the crown reciprocally had the right to have any complaints which it might make of defaults on the part of the contractor adjudicated upon in the same way by the Engineer before he gave his certificate respecting the completion of the works. Moreover, such a clause is of such universal use in building and railway construction contracts that a contract which did not contain a similar provision would be out of the usual course. I should, therefore, if this clause eleven stood alone, having regard to the fact that the contract price was a fixed sum and not one to be ascertained by the measurement of quantities and work, have considered that it was intended to give to the Engineer (subject to the approval of the Commissioners) the most full and absolute power to determine what claims of the contractor should be admitted and what should be rejected. It is, however, suggested that inasmuch as claims for extra work are expressly excluded by clause nine of the contract it was impossible that the final and closing certificate of the Engineer could have any reference to such claims. I cannot, however, accede to this view. No doubt the ninth clause is framed in terms which would, if there was nothing more in the contract, disentitle the contractor to make any claim for what was strictly " extra work," that is work incidental to that which was called for by the specifications, not, however, to work which was entirely additional, but if there had been added to that clause an exception in express words of such claims for extras

as the Chief Engineer by his final and closing certificate (to be approved by the Commissioners) might allow, there could have been no doubt but that a claim like the present would not be excluded by the ninth clause.

Then in construing the contract we are not only entitled but bound to have regard to the whole of it, and not to adopt a narrow construction derived from a single clause; it is, therefore, according to sound rules of interpretation open to us to consider whether such an exception as I have just supposed is contained in some other part of the instrument under consideration. And we may be bound to read such an exception into the contract even though it is not contained in express words but is to be derived from clear and necessary implication. These are general principles of construction which no one can dispute, and the only difficulty (if any there be) which can arise here, is in their application to the instrument we have to construe. Now if we had found in the eleventh clause in connection with the provision for this "final and closing certificate," words indicating that it should be conclusive as regards claims for extra and additional work, we should have no alternative open to us but to construe them as an exception to the rigorous exclusion of any claim fo extras contained in the ninth clause. No one will deny that the ninth clause would in the case I put be thus controlled and cut down. Then if from necessary implication we find that the only reasonable and sensible meaning which can be given to these words describing the Engineer's certificate as one which is to be "final and closing" that is conclusive of some matters which were in controversy between the contractor and the crown, and if it is demonstrated that there could be no other matters to which this final certificate by the Chief Engineer could possibly apply we do shew by necessary implication that this certifi

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cate was by the plain intention indicated by the contract to be one embracing just such claims as have been dealt with by Mr. Shanly in his certificate and report, and consequently we are bound to read the eleventh clause as containing an exception to the ninth clause by expanding the words "final and closing," to mean just what would have been meant if it had been expressly said that the certificate was to be conclusive as to extras.

As this contract was to be performed in the Province of Quebec I am of opinion that it should properly be construed according to the law of that Province. Having, however, satisfied myself that this would be the strict and proper construction of the contract according to the rules applied by English courts in the construction and exposition of written instruments, I need not refer to the far wider and more liberal principles applied by courts administering French law in the interpretation of contracts and in arriving at the intentions of the parties when clauses of a harsh or unusual nature are under consideration. Therefore Mr. Shanly having been, as I have already said, "The Chief Engineer," within the contract and the statute I am of opinion that his certificate did not include matters beyond his jurisdiction, and that in all other respects the document in the form of a letter or report signed by him and dated the 22nd of June, 1881, complied with the requisites of a final and closing certificate as called for by the eleventh clause of the contract.

It is, however, provided by the 18th section of the act (31 Vic. c. 13) that no money shall be paid except upon the certificate of the Chief Engineer "nor until such certificate shall have been approved of by the Commissioners," and it is objected that there has been no such approval in the present case. Of course, the first and obvious answer to this objection is that there were

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no Commissioners to give their approval when Mr. Shanly made his certificate. It is, however, said that by the statute 37 Vic. ch. 15, the Minister has been substituted for the Commissioners. It is true that the powers of the Commissioners are generally transferred to the Minister, but according to well understood principles of statutory construction a statute will never be interpreted as having the effect of varying a contract and imposing new obligations and conditions on a contracting party unless such an intention is indicated by express words. Moreover the object of the approval of the Commissioners seems to have been to ensure financial control by them of the moneys voted by parliament for the construction of the railway, and this purpose would be subserved by other general provisions relating to all public works after the work came under the control of the Department.

As regards the objection that the suppliant waived his rights by going before the Commissioners of inquiry, I cannot assent to that. He appeared before that board under a most emphatic and distinct protest which was amply sufficient to protect him in that respect.

The acceptance of the money awarded by the Commissioners amounting to $84,075 cannot, in the face of the protest already mentioned, taken in connection with the letter of the suppliant to the Minister of Railways, dated the 18th of April, 1884, and the terms of the receipt of the 5th of May, 1884, signed by him upon the payment of the money, constitute any waiver or abandonment of his right to maintain this petition of right.

I am of opinion that this appeal should be dismissed and the judgment of the Court of Exchequer affirmed with costs.

TASCHEREAU J. concurred with Strong J.

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GWYNNE J.—In this case the respondent, by petition of right, claimed to recover from the Dominion Government a large sum of money under a contract made with him under the act respecting the Intercolonial Railway for the construction of section 18 of that railway. The question now before us arises under the paragraph in the Petition of Right numbered 27*a*, which is as follows (1).

The work mentioned in this schedule "C," and the amount claimed in respect thereof are, and the schedule itself is, as follows:—

4,617 c. yards masonry at $6	$27,702
8,892 do do in Portland cement, extra price, $1.50	13,338
9,400 c. yards crib work at 75c	59,550
Iron pipes in culverts	7,289
Iron pipes not used	4,000
	$111,879
Contract price, lump sum	648,600
Total	$760,479
Amounts deducted by Chief Engineer (in his certificate referred to in paragraph 27*a*) as payments on account according to report of Mr. Brydges, 1877	640,108
Balance	$120,371

Now, the only right in virtue of which the respondent could assert any claim against the Dominion Government is the contract set out in his petition of right for the construction of the portion of the Intercolonial Railway therein mentioned. Three paragraphs in that contract, namely, the 4th, 9th and 11th are material. The contract was for the complete construction of section 18 according to specifications thereto annexed for the lump sum of $648,600.

Then it was provided by the above paragraphs as follows:—

(1) See p. 371.

4. The Engineer shall be at liberty at any time before the commencement or during the construction of any portion of the work, to make any changes or alterations which he may deem expedient in the grades, the line of location of the railway, the width of cuttings or fillings, the dimensions or character of structures, or in any other thing connected with the works whether or not such changes increase or diminish the work to be done or the expense of doing the same, and the contractor shall not be entitled to any allowance by reason of such changes, unless such changes consist in alterations in the grades of the line of location, in which case the contractor shall be subject to such deductions for such diminution of work or entitled to such allowance for increased work (as the case may be), as the Commissioners may deem reasonable, their decision being final in the matter, &c., &c., &c.

9. It is distinctly understood, intended and agreed that the said price or consideration of $648.600 shall be the price of and be held to be full compensation for all the works embraced in or contemplated by this contract, or which may be required in virtue of any of its provisions or by-law ; and that the contractor shall not upon any pretext whatever be entitled by reason of any change, alteration or addition made in or to such works or in the said plans and specifications, or by reason of any of the powers vested in the Governor in Council by the said Act entitled : "An Act respecting the construction of the Intercolonial Railway," or in the Commissioners or Engineer by this contract or by-law, to claim or demand any further or additional sum for extra work or as damages, the contractor hereby expressly waiving and abandoning all and any such claim or pretention to all intents and purposes whatsoever, except as provided in the 4th section of this contract.

11. And it is further mutually agreed upon by the parties hereto that cash payments equal to 85 per cent. of the value of the work done, approximately made up from returns of progress measurements, will be made monthly on the certificate of the Engineer that the work for and on account of which the same shall be certified has been duly executed and upon approval of such certificate by the Commissioners. On the completion of the whole work to the satisfaction of the Engineer, a certificate to that effect will be given, but the final and closing certificate including the fifteen per cent. retained will not be granted for a period of two months thereafter. The progress certificates shall not in any respect be taken as an acceptance of the work or the release of the contractor from his responsibility in respect thereof, but he shall at the conclusion of the work deliver over the same according to the true intent and meaning of the contract and of the said specifications.

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It is obvious, I think, from this contract that the certificate of the Chief Engineer on the completion of the whole work, that the work had been completed to his satisfaction, implied that it had been accepted as completed in accordance with the provisions of the contract. Such a certificate could operate so as to entitle the contractor in virtue of it alone to recover whatever balance of the lump sum agreed upon remained unpaid only in case no alterations whatever should have been made under the above fourth paragraph. In that case the balance due was easily ascertainable by deduction of the amounts paid under the progress estimates from the bulk sum for which the whole work had been agreed to be completed ; but, in case any alterations had been made under the fourth paragraph nothing would be payable to the contractor in virtue of such a certificate of the Chief Engineer, nor until the calculations necessary to be made and approved in accordance with the provisions of the fourth paragraph should be made and approved as therein provided, for it is expressly agreed that the contractor shall have no claim whatever in such a case except under the provisions of the said fourth paragraph, and that the "final and closing certificate" shall not be granted until the expiration of two months after the Engineer shall have given his certificate that the work has been completed to his satisfaction.

In the case before us the claim is that many alterations had been made within the provisions of the fourth paragraph of the contract, so that the certificate of the Chief Engineer that the work had been completed to his satisfaction would not in itself entitle the contractor to recover any part of the amount claimed by him in his petition of right. He could only recover whatever sum, if any, should be ascertained as being due to him upon a calculation being made in accord-

ance with the provisions of the fourth paragraph, and so far from anything having ever been found due to him under that paragraph in excess of what he has already received, it appears, incidentally, that the Commissioner, the late Mr. Brydges, in 1877, reported that he had been overpaid; but, however this may be, the contention now is that the contractor, in June, 1881, became entitled in virtue of a report then made to the Minister of Railways by the late Mr. F. Shanly, then Chief Engineer of the Intercolonial Railway, to recover the sum of $120,371.

Now, Mr. Shanly became Chief Engineer of the Intercolonial Railway under the circumstances and for the purpose hereinafter stated.

In the month of June, 1880, the Minister of Railways presented to his Excellency the Governor General in Council a report in the terms following :—

OTTAWA, 21st June, 1880.

The undersigned has the honor to report that a letter has been received from Mr. Sandford Fleming wherein he states that for reasons given he is under the necessity of declining the position of Chief Engineer of the Intercolonial Railway and Consulting Engineer of the Canadian Pacific Railway to which by Order in Council of the 22nd May last he has been appointed.

The undersigned accordingly recommends that authority be given for the appointment of Mr. Frank Shanly, C.E., as Chief Engineer of the Intercolonial Railway for the purpose of investigating and reporting upon all unsettled claims in connection with the construction of the line, and that his salary while so engaged be fixed at $541.66 a month, the engagement being understood to be of a temporary character.

Respectfully submitted,

(Signed) CHARLES TUPPER,
Minister of Railways and Canals.

This report was approved by His Excellency in Council on the 23rd June, 1880, and thereupon Mr. Shanly became Chief Engineer of the Intercolonial Railway for the purpose above stated.

At this time the only question pending between the

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respondent and the Government was whether there was any, and if any what, amount remaining due by the Government to the respondent under his contract for the construction of the Intercolonial Railway which had been in possession of and operated by the Government for some time.

A mere certificate given by Mr. Shanly that the work had been completed to his satisfaction would have had, as already shewn, no operation in itself, nor would it have been of any use for the purpose of determining the point in difference between the respondent and the Government, namely, whether there was any, and if any what, sum still remaining due to the contractor under and in accordance with the provisions of his contract.

Assuming the Government to have been willing to accept Mr. Shanly's own calculation made in accordance with the provisions of the fourth paragraph of the contract in substitution for the approval and decision of the Commissioners as required by that paragraph, or that the Minister of Railways was competent to do what by that paragraph was submitted to the decision of the Commissioners, still Mr. Shanly never did, in point of fact, make any calculation such as was directed to be made by the above fourth paragraph. Indeed, from his report it is obvious that he never understood that he was appointed for the purpose of giving, and that in point of fact he never contemplated giving and never did give, any certificate for the purpose of entitling the respondent thereunder to recover any part of the amount claimed by him as being due to him under the terms and provisions of the contract. So far from contemplating giving a certificate either that the work had been completed by the respondent, or that there was any sum remaining due to him under and in accordance with the provisions of the contract, he shews upon his report that the work had

never been completed by the respondent, but that the Government had completed it themselves; and further that his report upon the respondent's claim submitted to him for investigation is not based upon the provisions of the contract, but upon the assumption that those provisions are waived; thus showing the report to be intended as a confidential communication and suggestion to the Government and not as a basis upon which any legal claim of the respondent under the terms of his contract could be rested. In that report, Mr. Shanly says:

> Herewith I submit my report upon the claim made by Mr. McGreevy for extra and additional work done by him under his contract, in the years 1870-1-2-3-4 and 5, which has been referred to me for investigation.

He then proceeds—

> The original lump sum for which he contracted to complete the work was $648,600, being at the rate of $32,430 per mile for 20 miles, subject however to certain additions or deductions as the case might be set forth in the contract. The contract was entered into in July, 1870, and was to be completed in July, 1872, but owing to various causes (amongst others as alleged, the difficulty in procuring men,) it was not finally brought to a close until the end of 1875, and even then not being quite completed the Government after that date expended some $7,000 in addition to the payments previously made as reported by Mr. Brydges in 1877.

Now, it is to be observed that the contractor could substantiate no claim whatever for any extras, nor for any alterations by way of addition to the work as described in the contract, except under the provisions of the above fourth paragraph, which required that an estimate should be made of the value of any alteration which caused a diminution of the work as contracted for, and that the amount thereof should be deducted from the value of any increase or addition in order to arrive at the final amount payable under the contract. No calculation of such a nature was ever made by Mr. Shanly. On the contrary, he suggested that, for

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reasons stated in his report, "the deductions and additions provided for by the contract should be waived," and in accordance with this suggestion he makes a recommendation that sums of money, named in his report, should be paid to the contractor, composed partly of items claimed by the contractor for increased work under paragraph four, without any calculation of, and deduction for, diminution of work caused by alterations as provided by that paragraph, and partly of items which Mr. Shanly pronounces to be for work which he calls extra to and outside of the contract, although the contract expressly provides that no extra whatever shall be charged or claimed for otherwise than under the provisions of the said paragraph four,and he explains why he makes this recommendation in the following paragraph at the close of his report:—

> On the general principles and interpretation of the contract Mr. C. J. Brydges was examined by the Crown. He referred chiefly to a report made by him on this case in June, 1877, in reply to the petition of right, recommending that the strict letter of the contract be adhered to; this doubtless is perfectly correct in law, but I cannot help thinking that the present is a class of cases where a little equity may very properly be introduced.

In this report, which has never been adopted or approved by the Government or by the Minister of Railways, assuming him to be competent by his approval of such a report to give it any binding effect under the contract,Mr. Shanly very clearly shows that he never contemplated giving, and never did give, the contractor any certificate for the purpose of entitling him to recover from the Government any sum of money as remaining due to him under the terms of his contract, but that his report was simply a recommendation or suggestion to the Government that they should for the reasons stated by him, waive the contract altogether, and pay the contractor the sum named by Mr. Shanly in his report, not as being found to be due to the contractor under his

contract, but as an act of grace and favor on the part of the Government.

Such a report, it is obvious, cannot be construed to be a certificate of the Chief Engineer which does or can entitle the contractor to recover any sum as remaining due and payable to him under the terms of his contract, nor can any legal claim whatever against the Government be founded thereon.

The respondent's claim, therefore, as asserted in his Petition of Right, which is and only could be founded upon the terms of his contract, wholly fails.

The appeal, therefore, must be allowed and with costs.

PATTERSON J.—I think Mr. Shanly was Chief Engineer of the Intercolonial Railway for the purposes of the contract. He came literally within the terms of the statute, 31 Vic. ch. 13, s. 4, and I see no reason, in the lapse of time between the completion of the contract work and his appointment, or in the fact that he had not personal cognizance of the work during its progress, for reading any qualification into the language of the statute or of the order-in-council of the 23rd of June, 1880, by which he was appointed Chief Engineer of the Intercolonial Railway.

The same objections might have been taken in case the Chief Engineer who had held that office during the whole progress of the works had died immediately after their completion without having certified that they had been completed to his satisfaction, and Mr. Shanly had been at once appointed.

I do not think it was necessary in order to entitle the contractor to payment of the amount of the final certificate that the certificate should have the approval of the Minister of Public Works or of the Minister of Railways and Canals.

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If I should attempt, as we have been invited to do by counsel on both sides, to form a judgment as to the importance of that certificate, either absolutely or more particularly in comparison with the progress certificates, I should undertake a task for which I confess my incompetence. I can only construe to the best of my ability the contract and the statutes.

The terms of the 11th section of the contract require the approval of the commissioners to the engineer's certificate for payment of the progress estimates, and entitle the contractor to payment of the final estimate, with the 15 per cent. retained from the progress estimates, on the certificate of the engineer, as doubtless the engineer's certificate is meant when it is said, "on the completion of the whole work to the satisfaction of the engineer a certificate to that effect will be given," nothing being said of the commissioners.

The need for the approval by the commissioners depends on the Intercolonial Railway Act, 31 Vic. ch. 13, s. 18, which enacts that

> No money shall be paid to any contractor until the Chief Engineer shall have certified that the work for or on account of which the same shall be claimed has been duly executed nor until such certificate shall have been approved of by the commissioners.

My brother Fournier has given, in his judgment in the Exchequer Court, his reasons for holding that section 18 ought not to be read as affecting this contract, at all events, so far as to require the commissioners to approve of the engineer's final certificate as an essential to the contractor's right to payment. I do not think he goes so far as to consider that the engineer's certificate is not essential though it is not declared in direct and express terms to be essential in section 11 of the contract. Those express terms are only found in section 18 of the statute.

I appreciate the force of my learned brother's reason-

ing while I am not able entirely to adopt it. I think section 18 must be read as governing all payments to contractors for work in the construction of the Intercolonial Railway. It would probably have applied to money payable on progress certificates as well as on final certificates, but, inasmuch as its language is better fitted to final certificates, speaking of *the work* for or on account of which the money is claimed *having been duly executed*, it was prudent in drafting the contract to make it clear that the progress estimates were not to be paid unless the engineer's certificate was approved of by the commissioners, and I should not infer from that that the commissioners intended when they made the contract, or deemed they had power, to dispense with their approval of the final certificate.

But on the 25th of May, 1874, the Act 37 Vic. ch. 15 was passed. It repealed the third section of the Intercolonial Railway act which had declared that the construction of the railway and its management until completed should be under the charge of four commissioners, with so much of any other part of the act as authorised the appointment of any commissioner or commissioners for the construction and management of the railway, or the continuance of any such commissioner in office, or as might be in any way inconsistent with that act. Therefore when the work was finished, in December 1875, it had become impossible to procure the approval by the commissioners of the engineer's final certificate. If the act of 1874 had gone no further the necessity for any certificate except that of the engineer could not have been asserted. But the act went on to constitute the Intercolonial Railway a public work, vested in Her Majesty, and under the control and management of the Minister of Public Works, and to transfer to and vest in the Minister all the powers and

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duties assigned by the former act to the commissioners. Did this act substitute the Minister for the Commissioners for all purposes in relation to this contract? I think not.

To make the Minister's approval of the engineer's certificate a condition precedent to the right of this contractor to demand his money would be to vary the contract. The contractor could properly say *non hæc in fœdera veni*, and it will not be assumed that the legislature intended to add a term to an existing contract without a plain legislative declaration to that effect. There is nothing in this statute of 1874 to indicate such an intention. On the contrary it can much more reasonably be held to be the intention that the provisions of section 16 of the Public Works act, 31 Vic., ch. 12, should afford a sufficient check upon the payment of money on account of the railway as well as on account of other public works. Why should two systems be looked for in the same department? Section 16 provides that no warrant is to be issued for any sum of the public money appropriated for any public work under the management of the Minister, except on the certificate of the Minister or his deputy that such sum ought to be paid to any person named in the certificate in whose favor a warrant may then issue.

This enactment seems to be in the nature of a departmental administrative regulation which does not touch the legal existence or validity of any claim or the claimant's right to be paid. It may not be beyond question that section 18 of the Intercolonial Railway Act, properly construed, was anything more, though, referring as it did to the engineer as well as to the commissioners, while the contract in its turn is expressed to be in all respects subject to the provisions

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of the act, the argument for reading the section into the contract appears to me insuperable.

I agree with my brother Fournier, though I may not reach the conclusion by precisely the same process of reasoning, that the contractor is entitled to be paid on the final certificate of the Chief Engineer without approval of the certificate by the Minister.

The remaining question is whether he has a sufficient certificate.

The certificate is to be to the effect that the whole work has been completed to the satisfaction of the engineer. That is the provision of the 11th clause of the contract, and it is merely repeated without addition by the words of the 18th section of the statute, " duly executed " meaning executed according to the contract, or to the satisfaction of the engineer.

I hold without hesitation that Mr. Shanly's report involves in it, and is, a certificate to the effect that the whole work has been completed to his satisfaction.

By the whole work I do not understand that specified in the contract without omissions or diminution. I mean all that by the contract the contractor undertook to do, which was the specified work varied as it might be under the 4th clause of the contract which provided as follows :—

4. The engineer shall be at liberty at any time before the commencement, or during the construction of any portion of the work, to make any changes or alterations which he may deem expedient in the grades, the line of location of the railway, the width of cuttings or fillings, the dimensions or character of structures, or in any other thing connected with the works, whether or not such changes increase or diminish the work to be done, or the expense of doing the same, and the contractor shall not be entitled to any allowance by reason of such changes, unless such changes consist in alterations in the grades of the line of location, in which case the contractor shall be subject to such deductions for such diminution of work, or entitled to such allowance for increased work (as the case may be) as the commissioners may deem reasonable, their decision being final in the matter.

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But while the certificate thus satisfies the terms of the contract what does it entitle the contractor to receive? The contract price and the allowances in respect of alterations of grade are not left to the arbitrament of the engineer. His final certificate, whether we look at the 11th clause of the contract or the 18th section of the statute, deals solely with the execution of the work. He does not settle the price to be paid.

Mr. Shanly's report relates principally, and as far as fixing prices is concerned may be said to relate altogether, to extra work and materials outside the contract. I do not know that any of the extra cost arose from alteration in the grades of the line, but if it di the commissioners and not the engineer were charged with the duty of settling the allowance for it.

This aspect of the question does not appear, as I gather from perusing the judgment delivered in the Exchequer Court, to have been pressed there,and I do not think it was made prominent on the argument before us. But it cannot be overlooked when we are asked to say if the suppliant is entitled to recover on Mr. Shanly's certificate or report, which is the question submitted to us.

I believe, as I think I have shown, that on the other points discussed I substantially agree with my learned brother, but the question submitted should, in my opinion, for the reason last given, be answered for the crown, and I therefore think we should allow the appeal.

Appeal allowed with costs.

Solicitors for appellant: *O'Connor & Hogg.*

Solicitor for respondent: *A. Ferguson.*

J. B. H. MORIN..... APPELLANT; 1890

AND *Nov. 12.

HER MAJESTY THE QUEEN.....RESPONDENT. *Dec. 9.

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

Error—Writ of—On what founded—Right of crown to stand aside jurors when panel of jurors has been gone through—Question of law not reserved at trial—Criminal Procedure Act—R. S. C. ch. 174, secs. 164, 256 and 266.

When a panel had been gone through and a full jury had not been obtained the crown on the second calling over the panel was permitted, against the objection of the prisoner, to direct eleven of the jurymen on the panel to stand aside a second time, and the judge presiding at the trial was not asked to reserve and neither reserved nor refused to reserve the objection. After conviction and judgment a writ of error was issued.

Held, Per Taschereau, Gwynne and Patterson JJ., affirming the judgment of the court below, that the question was one of law arising on the trial which could have been reserved under sec. 259 of ch. 174 R. S. C., and the writ of error should, therefore, be quashed. Sec. 266 ch. 174 R. S. C.

Per Ritchie C.J. and Strong and Fournier JJ.—That the question arose before the trial commenced and could not have been reserved, and as the error of law appeared on the face of the record the remedy by writ of error was applicable. (*Brisebois* v. *The Queen*, 15 Can. S. C. R. 421 referred to).

Per Ritchie C.J. and Strong, Fournier and Patterson JJ., that the crown could not without showing cause for challenge direct a juror to stand aside a second time. Sec. 164 ch. 174 R. S. C. (*The Queen* v. *Lacombe*, 13 L. C. Jur. 259 overruled).

Per Gwynne J.—That all the prisoner could complain of was a mere irregularity in procedure which could not constitute a mis-trial.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada quashing a writ of error in a case of murder.

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

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The assignment of errors upon which the writ of error was issued is given at length in the judgment of the chief justice hereinafter given.

F. Langelier Q.C. appeared on behalf of the prisoner.

J. Dunbar Q.C. appeared for the crown.

The sections of the Criminal Procedure Act, R. S. C. ch. 174, and the cases cited and relied on by counsel are all reviewed at length in the judgments hereinafter given.

SIR W. J. RITCHIE C.J.—This is an appeal from a judgment of the Court of Queen's Bench for the Province of Quebec (appeal side) dated the 8th of October, 1890, quashing a writ of error to try the validity of a verdict for murder given against the plaintiff in error, Jean Baptiste Hermenegilde Morin, at the session of the Court of Queen's Bench (crown side) held at Montmagny, in the district of Montmagny, on the 26th day of March, 1890, and subsequent days.

The ground upon which the appeal to this court is based is thus stated in the assignment of errors, being in effect the same statement of it as that contained in the record as returned to the writ of error :

" That at the time of the last criminal assizes at the district of Montmagny commenced on the 26th of March last the said Jean Baptiste Hermenegilde Morin was accused of the murder of one Fabien Roy in virtue of an indictment presented by the grand jury of the said district ;"

" That the said Morin pleaded not guilty to the said indictment, and, after trial had before a jury, was found guilty of the said charge of murder and was condemned by virtue of the sentence of the said court passed on the first of April last to be hanged on the 16th May instant ;"

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"That the said verdict, the said sentence, the proceedings at the said trial, the proof made in connection therewith, the swearing and the choosing of jurors, the orders, judgments and action of the said court of Queen's Bench for Montmagny are illegal, null and of no effect, and tainted with legal error, the whole as is hereinafter shown:"

"Because at the time of the swearing of the jurors and the calling of their names according to the panel the crown, by its representative, caused to stand aside the greater part of the jurors called, and thus caused to stand aside, among others, Louis Senéchal, Joseph Pouliot, François Vézina, Augustin Vézina, François Pouliot, Louis Collier, Salomon Brochu, Joseph Labrecque, Evariste Leclerc, Joseph Caron, Adolphe Leclerc and Edmond Duquet, all jurors duly qualified:"

"Because all the said panel of jurors had been gone through and called even to and inclusive of the last name thereon:"

"Because the clerk of the crown recommenced to call the names of the jurors on the said panel who had not been sworn, and called anew the person named Louis Senéchal, who had been caused to stand aside by the crown at the time of the first calling of his name:"

"Because the crown, by its representative, wished again to cause to stand aside the said Louis Senéchal, but the said accused by his advocate objected thereto and contended that the crown could not cause to stand aside and challenge the said Senéchal except for cause:"

'Because, contrary to law, the court dismissed the objection of the said accused, and permitted the crown to cause the said Senéchal to stand aside without giving and showing cause:"

"That the said causing to stand aside of the said Senéchal, and the said decision are illegal and tainted with error:"

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"That the said causing to stand aside of the said Senéchal, objections and decisions were put in writing and made part of the record in said cause :"

"That the same proceedings, objections, decisions and recording thereof were made as to the jurors following: Joseph Pouliot, François Vézina, Augustin Vézina, François Pouliot, Louis Collier, Salomon Brochu, Joseph Labrecque, Evariste Leclerc, Joseph Caron, Adolphe Leclerc and Edmond Duquet."

The assignment of errors was endorsed as follows:

"Original assignment of errors filed this 1st October, 1890. Assignment of errors had and replied to instanter and hearing ordered Saturday next."

"Writ quashed. Tessier J. dissentiente."

The questions which arise in this case turn on the true construction of sections 259, 164 and 266, R.S.C. c. 174, which enact—

Sec. 259. Every court before which any person is convicted on indictment of 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 of the judgment on such conviction, or postpone the judgment until such question has been considered and decided.

Sec. 164. In all criminal trials four jurors may be peremptorily challenged on the part of the Crown ; but this shall not be construed to affect the right of the Crown to cause any juror to stand aside until the panel has been gone through, or to challenge any number of jurors for cause.

Sec. 266. No writ of error shall be allowed in any criminal case unless it is founded on some question of law which could not have been reserved, or which the judge presiding at the trial refused to reserve for the consideration of the court having jurisdiction in such cases.

It is very obvious that while by section 259 of the Procedure Act, R.S.C. c. 174, a judge may reserve any question of law which arises on the trial, there may be, under section 266, questions of law which could

not be reserved, that is, questions not arising on the trial, for which a writ of error may lie. The first question to be determined then is: Was this a question arising on the trial? To determine this we must ascertain when the trial begins. To do this it will be necessary to examine the mode of procedure in criminal cases.

Mr. Archbold in his work on pleading and evidence in criminal cases says as to the arraignment (1):—

Arraignment.—The arraignment of prisoners, against whom true bills for indictable offences have been found by the grand jury, consists of three parts: First, calling the prisoner to the bar by name; secondly, reading the indictment to him; thirdly, asking him whether he be guilty or not of the offence charged. It was formerly the practice to require the prisoner to hold up his hand, the more completely to identify him as the person named in the indictment, but the ceremony, which was never essentially necessary, is now disused; and the ancient form of asking him how he will be tried is also obsolete.

* * * *

Challenge of Jurors (2).—When a sufficient number of prisoners have pleaded and put themselves upon the country, the clerk of the arraigns addresses the prisoners thus: "Prisoners, these good men that you shall now hear called are the jurors who are to pass between our sovereign lady the Queen and you upon your respective trials; (or in a capital case, upon your life and death); if, therefore, you or any of you will challenge them or any of them you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard. The officer then proceeds to call twelve jurors from the panel, calling each juror by name and address. Hereupon, and after a full jury has appeared (R. *v.* Edmonds, 4 B. & Al. 471) the proper time occurs for the defendant to exercise his right of challenge, or exception to the jurors returned to pass upon his trial.

* * * * * *

The usual, and in general the proper course where the panel is exhausted by the challenges of the prisoner and the crown, or of either, before a full jury remains, is to call over the whole panel again in the same order as before, but omitting those peremptorily challenged by the prisoner; and then, as each juror again appears whichever party

(1) Archbold Pl. & Ev. in Crim. Cases, 20th ed. p. 158.
(2) Ibid. p. 169.

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challenges must show cause. If no sufficient cause of challenge be shown the jurors are then sworn. R. v. Geach 9 C. & P. 499.

Then comes the giving the prisoner in charge to the jury, as to which Mr. Archbold says at the next page:

Giving the prisoner in charge of the jury.—In cases of treason and felony the crier (at the assises) makes proclamation in the following form: "If any one can inform my Lords the Queen's Justices, the Queen's Attorney General, or the Queen's Sergeant ere this inquest taken" [this is in my opinion before it is taken] between our Sovereign Lady the Queen and the prisoners at the bar of any treason, murder, felony or misdemeanor committed or done by them or any of them, let him come forth and he shall be heard; for the prisoners stand at the bar upon their deliverance. Cro. Cir. Com. 6 (10th ed.); 2 B. & Ad. 256.

When this proclamation has been read Mr. Chitty in his work on Criminal Law (1). says:

The trial commences in the manner we shall presently consider.

And in the next chapter 14, he treats of the trial evidence and verdict and says:

The jury having been thus assembled in the jury box and sworn the clerk bids the prisoner hold up his hand for purposes of identification this is not now used) and addressing the jury says: "Look upon the prisoner, you that are sworn and hearken to his cause."

He then describes the proceedings on jury trials much as Mr. Archbold does, which commences by giving the prisoner in charge to the jury thus:

The clerk of arraigns then calls the prisoners to the bar and says:—Gentlemen of the jury, the prisoner stands indicted by the name of A. B. for that he on the, &c., (as in the indictment to the end). Upon this indictment he has been arraigned and upon his arraignment he has pleaded that he is not guilty.

Mr. Chitty adds:

"And for his trial hath put himself upon God and the country which country you are. Your charge, therefore, is to inquire whether he be guilty or not guilty and to hearken to the evidence.

Mr. Chitty adds:

(1) Page 553.

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When the prisoner is given in charge to the jury the counsel for the prosecution, or if there be more than one the senior counsel, opens the case to the jury stating the legal facts upon which the prosecution relied.

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Then, and not till then, does the trial, in my opinion, commence.

Lord Campbell in *Mansell* v. *The Queen* (1) says :

After prisoners have had their challenges, the oath of the juryman is : "You shall well and truly try and a true deliverance make, between our sovereign lady the Queen, and the several prisoners you shall have in charge." When the prisoner is given in charge to the jury, by that jury he must be tried, and in felony or treason the jury cannot separate till they have found their verdict. But (as often happens at the assizes) before a particular prisoner who has had his challenges is given in charge to the jury, the court rises and the jury separate. Next morning a new jury is called, when the prisoner again has his challenges ; and possibly there may not be one individual upon the second jury that was sworn on the first ; yet all this is regular.

In *Regina* v. *Faderman* (2) the counsel for the prisoner says :—

By statute 11 & 12 Vic. c. 78 sec. 1 any question of law may be reserved for this court which shall have arisen on the trial. The trial commences as soon as the prisoner is called on to plead.

Parke B. says :—

Properly there is no trial until the issue is joined. This I take to mean until the prisoner is given in charge to the jury.

Alderson B. says :—

You say the trial begins with the arraignment ; how then do you explain the question which is put to the prisoner after arraignment : How will you be tried ? At what point in the proceedings did the trial by battle begin ? Trial is a very technical word.

This being so I think we are, in a case such as this, not to enlarge its signification and treat it in a popular or general sense, but to give the term a strict construction.

It is clear that if the question did arise on the trial, we have no jurisdiction to hear it. In the following

(1) 8 E. & B. 79.

(2) 1 Den. C. C. 568.

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case where a party pleaded guilty it was held it could not be heard on a case reserved. *The Queen* v. *Clark* (1). This case was considered by Cockburn C. J., Martin and Bramwell BB., and Mellor and Montague Smith JJ. No counsel appeared on either side.

Cockburn C. J.:

In this case we have no jurisdiction. It was not a question arising on the trial; for the man pleaded guilty, and he must be taken to know the law. The power to state a case for the consideration of this court only applies to questions of law which arise on the trial.

I have been referred to the case of *Regina* v. *Brown* (2), where the prisoner was convicted upon his own confession. It is not stated in the case that the prisoner pleaded guilty, nor whether he had been given in charge to the jury and had on his trial confessed to offence. The court held that the point did arise on the trial. It is difficult to see how, if the prisoner pleaded guilty when arraigned, the case could be distinguished from *Regina* v. *Clark* (1), but the court thus distinguished it:

"We think therefore that this court has jurisdiction to entertain the case, and we think it notwithstanding *Regina* v. *Clark* (1). It is to be observed that that case is not directly in point, because there the indictment was good, though the facts stated in the depositions did not support it. The prisoner having pleaded guilty to the indictment the court thought that the point did not arise at the trial. The distinction in the present case is, that the objection was not as to the sufficiency of proof, but arose upon the indictment itself. It was an objection which might have been taken without the proof being gone into. We should not have shrunk from differing from the decision in *Regina* v. *Clark* (1) if that case had been directly in point. It is not, and therefore we do not actually differ from it.

We are of opinion, 1st—That we have jurisdiction to entertain this case, and 2ndly—that upon the facts and clearly upon the general law, the boy was properly convicted upon his own confession of an attempt to commit an unnatural offence.

It is to be remarked that this case was decided with-

(1) L. R. 1 C. C. R. 55. (2) 24 Q. B. D. 357.

out the court having the assistance of counsel, and that the case of *Regina* v. *Faderman* (1) was not cited or referred to in which Lord Campbell thus speaks :

> We all think that this court has no jurisdiction to entertain this question. We are asked to review a judgment for the crown given on demurrer and to reverse it if we think it wrong. The only power we have is derived from the statute 11-12 Vic. ch. 78. That act gives us no such power, the word " convicted " there used means convicted by a verdict. Trial means trial before a jury. We have no power in case of a judgment on demurrer. It would be dangerous if we had, for as it is clear that no writ of error lies from our judgment we should by hearing this case be depriving the prisoner of a right which he would otherwise be entitled to.

Until a full jury is sworn there can be no trial, because until that is done there is no tribunal competent to try the prisoner. The terms of the jurymen's oath seem to show this. And as is to be inferred as we have even from what Lord Campbell says that all that takes place anterior to the completion and swearing of the jury is preliminary to the trial.

How can the prisoner be tried until there is a court competent to try him? And how can there be a court until there is a judge on the bench and a jury in the box duly sworn? Until there is a court thus constituted there can be no trial, because there is no tribunal competent to try him. But when there is a court duly constituted the prisoner being present and given in charge to the jury his trial in my opinion commences, and not before. The trial mentioned in the statute is clearly a trial of the prisoner by the jury, as we have seen it held in *Regina* v. *Faderman* (1). No prisoner can be tried except by a jury duly selected and sworn to try him but there may be questions preliminary to the obtaining a competent jury to which the right to reserve a case cannot, in my opinion, apply. Thus if after a full jury appears and the array is challenged

(1) 1 Den. C. C. 569.

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this is tried by the court. In Bacon's Abridgement (1) it is said :—

> Every question of law raised upon a challenge to the array of the jury is to be tried by the court upon an examination of witnesses ; for unless every such question, although it depend upon a matter of fact, be so tried, there would be a delay of justice.

It is said that in *Regina* v. *Manning* (2), where the prisoner's wife applied for a jury *de medietate linguæ* which was rejected on the ground that she was naturalized, the array was challenged, but in that case the array does not appear to have been challenged for the court held the trial must proceed. Mr. Ballantine moved that his application might be entered on the record, the attorney general said that if that were done he would plead that the female prisoner had married said Edward Manning a natural born subject of the realm. After some consultation it was agreed that Mr. Ballantyne should have the option of raising the question on the record or of having the point reserved for the consideration of the Court of Appeal in criminal cases.

So in a case of a challenge to the polls, Mr. Archbold in his pleading and evidence in criminal cases says (3) :

> In the case of a principal challenge to the polls, if the partiality be made apparent to the satisfaction of the court, the challenge is at once allowed, and the juror set aside. But in the case of a challenge to the favor, it is left to the discretion of two triers who are sworn and charged to try whether the juror challenged stands indifferent between the parties. The form of oath to a trier, to try whether a juror stands indifferent or not, is as follows :—
>
> "You shall well and truly try whether A.B., one of the jurors, stands indifferently to try the prisoner at the bar, and a true verdict give according to the evidence. So help you God."
>
> It may be observed, that no challenge of triers is admissible. The form of oath to be administered to a witness sworn to give evidence before the triers is as follows :
>
> "The evidence which you shall give to the court and triers upon this

(1) Vol. 9, p. 555.
(2) 1 Den. C.C. 476.
(3) P. 168.

inquest shall be the truth, the whole truth, and nothing but the truth, So help you God."

If the challenge is to the first juror called, the court may select any two indifferent persons as triers; if they find against the challenge, the juror will be sworn, and be joined with the triers in determining the next challenge; but as soon as two jurors have been found indifferent, and have been sworn, every subsequent challenge will be referred to their decision. 2 Hale 275; Co. Litt. 158 a; Bac. Abr., Juries (E) 12. The trial thus directed proceeds by witnesses called to support or defeat the challenge.

After the decision I have quoted nobody would, I should think, pretend to say that either of these trials was the trial contemplated by the statute as to which any case could be reserved, showing very clearly, I think, that the trial contemplated was, as I have said, a trial by a jury after it was completed, and if no case can be reserved upon such trials of challenges does it not follow that a case cannot be reserved when the judge rules that the crown was not obliged to challenge for cause, assuming the law requires the crown to do so? Why should a case be reserved to compel the crown to make a good challenge by assigning cause when if the crown has assigned cause and its sufficiency was referred to triers a question arising on such a trial could not be reserved?

In *The Queen* v. *Lamb* (1) after the prisoner had been given in charge and before any witness was sworn it appeared that the prosecutrix, a child of four years of age did not sufficiently understand the nature of an oath, and it was admitted on the part of the crown that there was no other evidence to sustain the case. On the part of the prisoner it was insisted that having been given in charge to the jury he was entitled to his acquittal. The judge discharged the jury obliging the prisoner to enter into a recognizance with sufficient sureties for his appearance at the next court. A

(1) Jeb. C. C. 270.

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case was submitted to the twelve judges to ascertain whether, in their opinion, the prisoner was entitled to his acquittal or whether the court was justified, under the circumstances, in discharging the jury, and authorised to bind over the prisoner to appear and take his trial at the next court. The judges unanimously gave their opinion that the prisoner ought to have been acquitted and that he should be recommended for a pardon.

And the case of *Regina* v. *Wade* (1) is to the same effect.

Why was this? Because, having been given in charge to the jury, no legal cause having been alleged or question shown for discharging the jury, the prisoner then being on his trial he must be either convicted or acquitted. As no evidence was offered he was on that trial, therefore, entitled to his acquittal, as he would have been if the evidence offered had been insufficient; but it is very different when a full jury to try the prisoner cannot be obtained, though some jurors have been sworn, but not sufficient to make a full jury, and the jury has to be discharged for default of jurors; but where all were sworn and a good cause shown for discharging them, as the illness of a juryman, etc., a new jury may be impanelled, and the prisoner will be entitled to challenge as in the first instance, showing very clearly the difference where the prisoner has been given in charge and no cause shown for the discharge of the jury. In the first case the prisoner was in jeopardy, in the second he never was, and in the third case he ceased to be, when the jury were legally discharged. But is it not equally clear that if the alleged trial was not a legal trial but a mistrial, and therefore a nullity, if reversed he can again be tried because he never was in jeopardy? It

(1) 1 Moo. C. C. 86.

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is a fundamental principle of law that a man shall not be twice in jeopardy for the same offence, that is, no prisoners shall be prosecuted twice for the same offence. I think the fair test of when the trial begins is: When was the prisoner put in jeopardy? It is to my mind very clear that no jeopardy can attach until a full jury is impannelled, sworn on a plea of not guilty and the prisoner given in charge to such jury, because there can be no trial until there is a jury competent to try. Mr. Bishop, in his work on Criminal Law, states the law as recognised in the United States very clearly, and which in my opinion is equally applicable to this Dominion. He says (1):—

When jeopardy begins. Then on the completing and swearing of the panel the jeopardy of the accused begins and it begins only when the panel is full. Until full the jeopardy is not perfect. In order words, without a jury set apart and sworn for the particular case the individual defendant has not been conducted to his period of jeopardy. But when, according to the better opinion, the jury being full is sworn, and added to the other branch of the court and all the preliminary things of record are ready for the trial the prisoner has reached the jeopardy from the repetition of which our constitutional rule protects him.

citing in support of this very many American authorities.

If, then, this question arose while the preliminary proceedings were in progress and before the trial commenced it could not, therefore, be reserved. Then the next question that arises is: Was it a proper case for a writ of error? I think it most clearly was. The sections of ch. 174 applicable to this I have read. Assuming that this is not a legal trial and no question could be reserved for the reasons stated, and the prisoner is deprived of his writ of error, how can he possibly avail himself of his right to show the validity of his objection? I am aware that doubts have been expressed by

(1) 7 ed. vol. 1, secs. 1014-1015.

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learned judges in England as to a writ of error being proper in such a case as this, but I understand their doubts have been suggested because in England the question of the right of a party to insist that there should be only a challenge for cause after the panel has been gone through has been considered rather a matter of practice than of law, but in this Dominion it is matter of law, and in this case appears on the face of the record; it is a right secured to the prisoner under the statute I have referred to. The practice in England has been by statute recognised to be the law of this Dominion, and as to any error of law appearing on the face of the record the remedy by writ of error if applicable. In Short and Mellor's Practice of the Crown Office (1) as to error it is said:—

> It is a characteristic feature in English criminal procedure that it admits of no appeal properly so called either upon matters of fact or upon matters of law, though there are a certain number of proceedings which to some extent appear to be, and to some extent are, exceptions to this rule.
>
> The first of these exceptions is a writ of error. It is a remedy applicable to those cases only in which some irregularity apparent upon the record of the proceedings takes place in the procedure.

In *Regina* v. *Frost* (2), Sir J. Campbell A. G. says:

> It may be allowed that, in considering this and all other statutes, the intention of the legislature was to be looked for; when that was discovered, courts were bound by it. Whatever form the legislature had clearly prescribed, must be observed; and it may be allowed that it is not for the judges, if that form has been clearly and distinctly prescribed, to consider whether it was or not advantageous to the prisoner. The doctrine of equivalents and equipollents must be discharged. Whatever the prisoner was entitled to by acts of parliament, that specific thing he had a right to demand; and it would be vain to say that something, even more for his advantage, had been conferred. But in ascertaining the meaning of the legislature, it might be most material to see what was the object, and how that object could best be accomplished.

I think we should be most careful not to deprive a

(1) Page 312. (2) Moody's C.C. 210.

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prisoner of his writ of error unless we are satisfied beyond all reasonable doubt that the statute has taken it away from him.

This brings us to the last and really the substantial matter of this case. The practice which I have said our Parliament by statute has recognised to be acted upon is, that after giving the crown in all criminal trials four peremptory challenges it declares that this shall not be construed to affect the right of the crown to cause any juror to stand aside until the panel has been gone through or to challenge any number of jurors for cause. If we look at the practice in England, as to the effect of desiring jurors to stand aside, or that in the provinces previous to the passing of this statute, so far as my experience extends and as I can discover, the practice has been entirely consistent, namely, that the panel shall be gone through, or perused as it is termed, once on which calling or perusal it was the privilege of the crown to require jurors to stand aside until the list shall be gone through. Having been gone through and a jury not secured the clerk proceeds to go over the panel a second time when the right of the crown to require jurors to stand aside ceased, and the crown was bound, if its officers sought to perfect its challenge, to do so by showing some good and sufficient cause or to challenge peremptorily if the peremptory challenges were not exhausted. This practice, in my opinion, as I have said, is recognised and consecrated by the statute I have referred to. I cannot discover on the part of Parliament any intention to alter the law and practice and establish a different mode of procedure. It is abundantly clear that in this case the panel had been gone through and was exhausted and a full jury could not be obtained without those who had been asked to stand aside by the crown being

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again called. Then the period had arrived at which the crown was bound to assign cause and instead of being compelled to do so the crown was on the second perusal of the panel again allowed to cause jurors to stand aside without showing cause. In *Regina* v. *Cropper* (1), the course of proceeding is very clearly pointed out, as follows:

> The jury panel contained the names of forty-eight persons. On its being called over, seven were challenged by the prisoner and five by the crown. Only eight others of the forty-eight juryman were in attendance, besides those challenged, and those eight went into the box.
>
> The panel had been entirely called through. The counsel for the prisoner then proposed that the panel should be again called, which was done, and on the first challenge on the part of the crown, the counsel for the prisoner called upon the counsel for the crown to assign cause of challenge. Cause was assigned, which appeared to the learned baron to be insufficient, and that juryman was sworn. The next juryman challenged on the part of the crown was sworn on the voir-dire, and examined for cause, which cause was not allowed by the learned baron; he was then sworn. The challenges of the next two jurymen were given up by the counsel for the crown, and the jury were thus completed and sworn.
>
> The jury were then charged with the prisoner on the before-mentioned indictment, and the case having been closed and summed up, the jury retired to consider their verdict.

The case of *Mansell* v. *The Queen* (2) has been much pressed upon us, but, so far from sustaining the action of the judge in this case, it is, in my opinion, quite the contrary. The question there was, not the necessity for the crown to show cause on the second perusal of the panel, but whether the panel had been gone through without calling the jurors who were out on another trial, and who came in after the names of the jurors in court had been called, and the court held that they were properly called because the

(1) 2 Moo. C. C. 41. (2) 8 E. & B. 54.

panel had not been exhausted although once called over. Cockburn, C.J. says in this case, page 104:

It appears that before 4 stat. 33 Ed. 1, the crown, either by prerogative or by usurpation exercised the power of peremptory challenge without restriction as to number; and if that power was exercised so that twelve jurors did not remain, the inquest went off for that cause. To meet this evil the act was passed. On the enactment a practice was grafted by which, on the counsel for the crown intimating his intention to challenge one of the jurors, he was not put to assign cause at once, but the juror was set aside until the panel was gone through to ascertain if enough of persons not objected to might not be found to make a jury, If the panel was large this, in effect, was equivalent to a peremptory challenge. In one of the early state trials, Firzharris's case (1), the Chief Justice uses language as if in practice at that time this privilege was not confined to the crown, but that either side might set aside the juror, and afterwards take their exceptions. But, be that as it may, it must he admitted by everyone that it is now settled by overwhelming authority that where it is proposed to object to a juror, the counsel for the crown have the right to have the man set aside until it is seen if without him there will be jurors enough to try the prisoner, and that it is not until the panel is gone through that cause need be shown. That being so, the question is reduced to this: When is the panel gone through? Is it as soon as the names have been called over? Or is it not until every proper attempt has been made to secure the presence of those on the panel whose duty it is to attend? In the present case the panel had been called over, properly omitting the names of twelve who were known to be justifiably absent, the calling of whose names would have been an idle ceremony, and enough persons did not remain to form a jury. Iremonger's name is again called; and before anything more is done the twelve absent jurymen come in. It is not disputed that they were duly qualified jurymen and on the list; but it is contended that the list having been once gone through, it must be gone through again in the same order as before. But it being conceded that the crown is not put to show cause for its challenge till the panel is gone through, it seems to me very clear that the panel was not gone through till those twelve names of available jurymen were called.

The learned Chief Justice then discusses the case of Iremonger which is not applicable to this case.

The meaning of standing aside being a challenge by

(1) 8 How. St. Tr. 243–335.

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the crown, the consideration of the challenge should not proceed until it could be seen whether a full jury can be got without there being others on the panel. in this Dominion it is not now matter of practice or indulgence or concession, but as I have said a right recognised by statute, a right of which no court, in my opinion, can deprive a prisoner. In this case I think there was a distinct abridgement of the rights of the prisoner. If the crown can order a juror to stand aside on a second perusal of the panel, why may they not do it a third or a fourth time, it fact indefinitely until a jury was selected to suit the prosecuting officer, a case similar to what was pointed out by Lord Campbell in the Mansell case as follows (1) :—

Our judgment chiefly depends upon the right construction of the ancient statute, 4 stat. 33 Ed. 1, entitled "An ordinance for Inquests," which was re-enacted by 6 G. 4 c. 50 s. 29. An abuse had arisen in the administration of justice by the crown assuming an unlimited right of challenging jurors without assigning cause, whereby inquests remained "untaken." In this way the crown could in an arbitrary manner, on every criminal trial, challenge so many of the jurors returned on the panel by the sheriff that twelve did not remain to make a jury ; and the trial might be indefinitely postponed *pro defectu juratorum*, to the great oppression of the subject, and contravention of the words of Magna Charta (2). *Nulli differemus rectum vel justitiam.* The remedy was to give to the party accused a right to be tried by the jurors summoned upon his arraignment, if after the limited number of challenges to which he was entitled without cause assigned,there remained twelve jurors of those returned upon the panel to whose qualification and unindifferency no specific objection to be proved by legal evidence could be made. To prevent the trial going off for want of jurors by the peremptory challenges of the crown it is enacted that "they that sue for the King," "shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court." But there was no intention of taking away all power of peremptory challenge from the crown, while that power, to the number of thirty-five, was left to the prisoner. Indeed, unless this power were given under certain restrictions to both sides, it is quite obvious that justice could not be satisfactorily admin-

(1) 8 E. & B. p. 70. (2) 1 stat. 9 H. 3 c. 29.

istered ; for it must often happen that a juror is returned on the panel who does not stand indifferent, and who is not fit to serve upon the trial, although no legal evidence could be adduced to prove his unfitness. The object of the statute is fully attained if the crown be prevented from exercising its power of peremptory challenge, so as to make the trial go off while there are twelve of those returned upon the panel who cannot be proved to be liable to a valid objection. Accordingly the course has invariably been, from the passing of the statute to the present time, to permit the crown to challenge without cause till the panel had been called over and exhausted, and then to call over the names of the jurors peremptorily challenged by the crown and to put the crown to assign cause, so that, if twelve of those upon the panel remain as to whom no just cause of objection can be assigned, the trial may proceed. In our books of authority, the rule is laid down that the King need not show any cause of his challenge till the whole panel be gone through, and it appear that there will not be a full jury without the person so challenged.

Willes J. in Exchequer Court (1), citing 4 Blackstone Com. 353,

The king need not assign his cause of challenge until all the panel is gone through, and unless there cannot be a full jury without the person so challenged, and then, and not sooner, the king's counsel must show the cause or otherwise the juror shall be sworn.

I think, therefore, in this case there was an assumption on the part of the officer of an unlimited right of challenging jurors without assigning cause. The object of the law certainly is to secure the prisoners a fair trial. How can this be accomplished if he is deprived of the privilege the law gives him in the selection of the jury by whom he is to be tried ?

I take the liberty to adopt the language of Lord Campbell C. J. in *Reg.* v. *Bird* (2) where he says :—

I should feel deep regret if a great offender were to escape punishment, but the due administration of criminal justice requires that the forms of judicial procedure should be observed, these forms are devised for the detection of the guilty and for the protection of the innocent.

In the present instance the objection taken is

(1) 8 E. & B. p. 108. (2) 2 Den. C. C. 216.

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not raised on a mere technicality but is that the jury to whom the prisoner shall be given in charge shall be legally selected, chosen and sworn, and that neither the crown nor the prisoner shall have any advantage or privilege other than those conferred by law; but when privileges are conferred by law they shall be rigidly respected.

Believing then as I do, that the prisoner has not had a legal trial I cannot by my voice send him to the gallows. Had I any doubt in the case I should in *favorem vitæ* give the prisoner the benefit of such a doubt.

STRONG J.—In the case of *Brisebois* v. *The Queen* (1) the meaning of section 259 of the Criminal Procedure Act (2), was under consideration, and I there had occasion to consider what constituted a question of law arising on the trial which could be reserved pursuant to the terms of that section. I was then of opinion that any matter or question of law which arose before the judge presiding at a criminal trial, though it might arise before the empanelling of the jury was complete, and therefore before the prisoner was given in charge, was a question of law susceptible of being reserved under the section in question, and the dissenting judgment which I then delivered was based on this view of the construction of the statute.

This opinion was founded upon the English authorities and also upon what I considered to be the meaning properly to be attributed to the word "trial" as used in this section 259. It appeared to me that this word was not to be restricted in its meaning to that portion of the proceedings which strictly and technically constitute the trial, namely, that part of the proceedings which does not begin until after the jury have been (to use a technical expression) "selected, tried and

(1) 15 Can. S. C. R. 421. (2) R. S. C. ch. 174.

sworn," and which is initiated when the officer of the court (in the language of Sir James Stephen) (1) in cases of treason and felony gives the prisoner in charge to the jury, stating the effect of the indictment or inquisition, and the prisoner's plea of not guilty and charging them to determine whether he is guilty or not. The opinion I formed in *Brisebois'* case was that a much larger and more liberal interpretation of the words " which arises on the trial " should be adopted, and that what seemed to be the English practice should be followed, viz., that the word " trial " was not to be confined to its strict technical signification, but that, as in England, the statute should be interpreted as applying to all proceedings on or incidental to the trial, including the preliminaries of the trial as well as proceedings subsequent to the verdict. I confess, so far as my own individual opinion goes, I still remain of the same mind, and if I was unfettered by authority, I should hold that the question of law involved in the challenges, the allowance of which has been assigned as error in the present case, were questions which might have been reserved under section 259.

I am not, however, free to act on this opinion for the reason that a majority of the court in *Brisebois'* case, according to my reading of the reported judgments then delivered, held otherwise. There the objection was that a juror whose name was on the panel had been personated by a person whose name was not on the panel. This personation was not discovered until after a verdict of guilty had been found and recorded, when it was raised for the first time, whereupon the learned judge who presided at that trial reserved it and stated a case under the statute for the determination of the Court of Appeal. It was held that under these circumstances the question

(1) Crim. Proc. 187.

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of law so reserved was not one arising on the trial, and therefore was not properly a matter which could be reserved under sec. 259. I cannot regard this decision of the court otherwise than as overruling my own opinion expressed in *Brisebois'* case to the effect already stated. The judgment in the case referred to is therefore, I conceive, an authority binding me, irrespective of my own opinion, to construe the word "trial" strictly. It is true that there the objection was taken not as here before the trial commenced, but after the verdict had been recorded, and therefore after the trial had in strictness been concluded, and it was therefore held to be too late to be reserved under the act. But if we are to construe the word "trial" strictly as regards objections taken after its conclusion, we must also do the same as regards questions of law which arise before its commencement. Moreover the real objection in *Brisebois'* case, the real question of law which it was held could not have been there reserved, arose before the commencement of the trial though it was not discovered until afterwards.

As I am thus precluded by authority from following my own judgment as to what I consider to be the proper interpretation of sec. 259, I have no alternative but to abide by the only other construction possible, namely, that which has been stated by the Chief Justice in the judgment he has just delivered and which attributes to the word "trial" its strictly legal and technical meaning. I must therefore hold that the question raised by this writ of error was one which could not have been reserved at the trial. It follows that the writ of error in the present case does not come within the prohibition contained in sec. 266.

It remains to be considered whether the decision of the learned judge at the trial in sustaining the objection of the counsel for the crown to

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eleven of the jurors who had on the first calling over of the panel been ordered by the crown to stand aside was erroneous in law. I am of opinion that this ruling, having regard to section 164 of the Criminal Procedure Act, which limits the right of the crown to order jurors to stand aside only until the panel has been once gone through, was substantially an allowance of eleven peremptory challenges, and therefore the crown not having the right to challenge peremptorily that number of jurors, the objections to more than four of those jurors were unwarranted by law and consequently the court erred in allowing them. Upon the authorities and for the reasons already fully stated by the Chief Justice, and which I need not repeat, I am of opinion that the crown upon an indictment for felony is by the 164th sec. of the Procedure Act limited to the challenge of four jurors peremptorily and without cause, a number which was indisputably exceeded in the present case.

There being, therefore, upon the face of the record a judgment, not merely a ruling upon a point of practice within the discretion of the judge, but what is strictly a judgment which is manifestly erroneous as regards seven of the eleven jurors who were ordered to stand aside the second time, I hold that this is a proper subject for a writ of error. Upon this point again I am entirely of accord with the Chief Justice, and adopting the reasons he has given and relying on the authorities he has quoted my judgment must be for the prisoner. I may add that upon this last point I regard a passage in the judgment of Lord Tenterden, Chief Justice, in the *King* v. *Edmonds* (1) as decisive. Lord Tenterden there says:

> It must further be observed that the disallowing of a challenge is a ground not for a new trial, but for what is strictly and technically a

(1) 4 B. & Al. 473.

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venire de novo. The party complaining thereof applies to the court, not for the exercise of the sound and legal discretion of the judges, but for the benefit of an imperative rule of law, and the improper granting or the improper refusing of a challenge is alike the foundation of a writ of error.

I am of opinion, therefore, that there has been a mistrial and that the appeal must be allowed and a *venire de novo* awarded.

FOURNIER J.—Le jugement soumis à la revision de cette cour a été prononcé par la Cour du Banc de la Reine, à Montréal, dans la cause de la Reine contre Herménigilde Morin, sur un bref d'erreur, pour faire déclarer nul le verdict de meurtre, rendu contre le prisonnier dans le terme de mars de la Cour Criminelle, à Montmagny.

Plusieurs moyens ont été assignés pour l'obtention de ce bref, mais il n'en a été invoqué qu'un seul devant cette cour. Il est énoncé comme suit :

" Que lors de la formation du petit jury, les personnes suivantes, savoir : Louis Senéchal, Joseph Pouliot, François Vézina, Augustin Vézina, François Pouliot, Eugène Hamond, Louis Colin, Salomon Brochu, Joseph Labrecque, Evariste Leclerc, Joseph Caron, Adolphe Leclerc, Edmond Duquet et Alfred Fiset furent récusés sans cause, par le couronne " ordered to stand aside."

" Qu'après que la liste des petits jurés eût été appelée une fois, vu qu'il manquait encore un juré pour former le petit jury, la couronne fit recommencer l'appel des noms, et arrivé aux noms des personnes sus-mentionnées, elle les récusa encore sans cause. L'accusé alors objecta à ce procédé, demandant que la couronne fut tenue de montrer cause pour cette seconde récusation.

" Que l'Hon. Président du tribunal décida que la couronne n'était pas obligée de montrer cause, tel que cela appert par le record devant cette cour."

Lorsque le second appel des jurés a eu lieu, l'avocat de l'accusé a fait objection au droit réclamé par la couronne d'exercer une seconde fois la demande de "stand aside," et il a été entré un jugement, ainsi que le fait voir le dossier, rapporté devant cette cour, déclarant que le juré pouvait être mis de côté une seconde fois sur la demande de la couronne. Ce procédé a été répété pour onze jurés de suite qui ont été ainsi mis de côté une seconde fois par la cour, sur la demande de l'avocat de la couronne, jusqu'à ce qu'on arriva au douzième. La même objection fut faite à chaque juré et rejetée à chaque fois par la cour.

La liste des jurés avait été appelée complètement une première fois (gone through) lorsqu'elle le fut une seconde fois et que la cour décida que la Couronne avait droit à un second *stand aside*. Cette décision est-elle légale? C'est l'importante question que soulève le présent appel.

La Cour du Banc de la Reine, appelée à se prononcer sur cette question, s'est abstenue de la juger sur le principe qu'elle n'avait pas de juridiction et a renvoyé le bref d'erreur en se basant sur la clause 266 du ch. 174 des statuts criminels. Cette clause se lit comme suit:

No writ of error shall be allowed in any criminal case unless it is founded on some questions of law which could not have been reserved, or which the *judge presiding at the trial refused* to reserve for the consideration of the court having jurisdiction in such cases.

Maintenant quel doit être l'effet de cette disposition sur le bref d'erreur; est-elle une prohibition absolue de l'émission de ce bref, à moins qu'il y ait eu une question de droit que le juge présidant au procès aurait refusé de réserver, ou encore, à moins que, comme il est dit dans la première partie de la clause 266 que le bref ne soit fondé sur quelque question qui n'aurait pu être réservée. Cette première partie de la section en question ne semble pas à première vue offrir une significa-

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tion bien facile à saisir. On a dit qu'elle ne pourrait jamais recevoir d'application parce qu'il n'y a pas de question de droit soulevée au procès que le juge présidant ne puisse réserver. Cela est vrai dans un sens restreint, et pourvu que le juge en soit rendu au procès, ou *trial.*

C'est évidemment ce que comporte le texte de notre statut dans les deux seules sections où il soit fait mention des questions réservées. Par la section 266, pour qu'il y ait lieu au bref d'erreur, il faut que le refus du juge de réserver une question de droit ait eu lieu *at the trial.* La section 259 du même acte dit que la cour ou le juge présidant au procès peut réserver des questions de droit et s'exprime ainsi :

> 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.

La section 266 me paraît reconnaître deux catégories de cas où le bref d'erreur peut être émis ; les premières, ceux où la question de droit n'a pu être réservée ; la seconde, lorsque le juge présidant au procès a refusé de réserver la question. D'après le texte ce n'est donc que lorsque le juge est au procès *trial* que son refus de réserver une question de droit peut donner lieu au bref d'erreur, autrement il n'en a pas le pouvoir.

Cette loi étant de nature à restreindre les droits du sujet quant au bref d'erreur doit, comme toutes les lois restrictives, être strictement interprétée. Le mot *trial,* dont se sert le statut doit être considéré comme employé dans son sens légal et technique, et signifie cette partie du procès de l'accusé qui commence après l'assermentation du jury, auquel il a été donné en charge, alors que commence l'examen des matières de faits *in issue* en contestation. Cette partie de l'instruction forme le procès *trial* par opposition aux procédures comme *l'arraignment,* l'appel des jurés, les récusa-

tions des jurés et leur procès par des *triers*, qui ne sont que des procédures préliminaires. Ces procédures ayant lieu avant que le "*trial*" ne soit commencé, on ne peut pas dire que les questions de droit qui pourraient s'élever pendant ces procédures préliminaires puissent être considérées comme soulevées au procès-*trial.*

Ce n'est que lorsque le juge en est rendu au *trial* que son refus de réserver une question doit être constaté et qu'il donne alors lieu à la demande d'un bref d'erreur. Cette section 266 consacre une division de la cause criminelle, qui d'ailleurs est reconnue par les auteurs, en deux parties bien distinctes. La première qui consiste en des procédures préliminaires commence à *l'arraignment* et finit à l'assermentation du jury; la deuxième, le "*trial,*" qui commence à l'assermentation du jury et finit à la sentence. C'est pendant cette dernière partie seulement que le refus du juge de réserver une question de droit peut donner lieu à l'émission du bref d'erreur. Comme il n'est nullement question dans la première partie de la section 266, de l'intervention du juge, les questions de droit qui peuvent s'élever alors au sujet des procédés ne sont nullement affectées par la disposition restrictive de cette section. Celles qui peuvent s'élever dans cette partie de la procédure restent soumises aux dispositions du droit anglais quant à l'émission du bref d'erreur, et il peut être émis ici, de la même manière qu'il le serait en Angleterre, sur des questions de droit dans lesquelles il y aurait eu erreur suffisante. Le jugement, qui fait la matière du bref d'erreur, ayant été rendu lorsqu'on en n'était encore qu'à l'appel des jurés, ne pouvait pas être réservé parce qu'il a été rendu avant que le procès *trial* ne fût commencé.

Pour établir la distinction que je fais entre le *trial* et les procédures préliminaires, je me base sur la haute

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autorité de Chitty's Criminal Law. Il décrit ainsi le commencement du procès :

The challenges being then completed and a full jury of unexceptionable jurors, by some of the means we have examined, being ready, the clerk of the arraigns on the circuit proceeds to administer to each of them the following oath : "You shall well and truly try, and true deliverance make between our Sovereign Lady the Queen, and the prisoners at the bar, whom you shall have in charge, and a true verdict give according to the evidence-So help you God." And the clerk of the arraigns directs the crier to make proclamation which is made accordingly in the following form (see form, p. 553.)

Cette proclamation a pour but d'informer tous ceux qui peuvent avoir quelque information à donner sur l'enquête entre Sa Majesté et le prisonnier sur aucune trahison, félonie ou autre crime, d'avoir à se présenter et qu'il seront éntendus, ainsi que tous ceux qui sont obligés par reconnaissance ou obligation de rendre témoignage contre le prisonnier, de se présenter pour donner leur témoignage, sous peine de forfaire leur cautionnement.

Chitty ajoute ce qui suit à propros de cette proclamation :

But it is not necessary that this proclamation, which is only for the benefit of the King, should appear on the record, at least the defendant cannot take advantage of the omission. When this proclamation has been read, *the trial commences* in the manner we shall presently consider.

When the jury have been thus assembled in the jury-box and sworn, the clerk, in case of felony, calls to the prisoner at the bar, and bids him hold up his hand, by saying C.D. and then addresses the jury in these words : "Look upon the prisoner you that are sworn, and hearken to his cause." A. B. stands convicted, indicted by the name of A. B., etc., (reading the indictment). Upon this indictment he has been arraigned, upon this arraignment he pleaded not guilty, and for his trial has put himself upon God and the country, which country you are. So that your charge is to enquire whether he be guilty of the high treason (or felony), whereof he stands indicted, or not guilty."

When the indictment has thus been read and the jury addressed, if it is a cause of any importance, the indictment is usually opened and the evidence arranged and examined and enforced by the counsel for the prosecution, etc., etc.

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On voit que Chitty fixe clairement le moment où commence le procès : C'est après la lecture de la proclamation appelant toutes personnes ayant des informations à donner et tous témoins ou autres ayant des témoignages à rendre contre le prisonnier, à se présenter pour être entendues, sous peine de forfaire leurs cautionnements. *When*, dit-il, *this proclamation has been read, the trial commences in the manner we shall presently consider.* Cette manière est indiquée dans les citations que je viens de lire. En faisant application de cette division de la procédure d'un procès criminel en deux parties, la première consistant dans les procédures préliminaires et la seconde dans le *trial* proprement dit, la sec. 266 devient tout à fait intelligible et l'on comprend que il y a une partie de la procédure où il ne peut y avoir de refus de réserver une question de droit, c'est dans la partie préliminaire. La première partie de la section 266, s'applique évidemment à la question actuelle qui n'a été soulevée au sujet du *stand aside*, que dans la partie préliminaire de la procédure et avant que le procès ne fût commencé. Interprétées de cette manière, les deux parties de cette clause peuvent recevoir leur application. La première n'affecte nullement le droit du prisonnier d'obtenir un bref d'erreur, parceque la question n'a pu être réservée ; la seconde peut aussi recevoir son effet, s'il y a eu refus de réserver au procès *on trial.* Les deux parties ont alors un sens complet et doivent recevoir leur effet.

Dans la cause de *Brisebois* v. *La Reine*, la majorité de cette cour a adopté la distinction des questions réservées au procès *trial* d'avec celles qui n'ont pu l'être. Le juge en chef de cette cour, Sir William Ritchie, C.J. s'est exprimé comme suit à ce sujet (1) :

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

(1) 15 Can. S.C.R. p. 425.

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be determined on a writ of error and could not be reserved and disposed of in a summary manner by affidavits. I am therefore of opinion that as this was not a question 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.

Cette doctrine ayant été proclamée par la majorité de la cour forme un précédent auquel nous devons nous conformer tant qu'il sera en force. En conséquence je crois que c'est avec raison que le procureur général a donné son *fiat* pour l'émanation du bref d'erreur sur le principe que la question du *stand aside* n'avait pu être réservée.

Pour qu'un bref d'erreur puisse être émané, il y a d'abord une formalité essentielle à remplir, c'est d'obtenir le *fiat* du procureur général qu'il peut accorder ou refuser à sa discrétion. Dans l'exercice de ce pouvoir il n'est en aucune manière sujet au contrôle de la cour.

The court cannot control the exercise of the discretion left to the attorney general on this subject (1). The court will not interfere with the discretion of the Attorney General when he has granted the writ (2.)

La restriction imposée par la section 266 ne devrait-elle pas être plutôt considérée comme adressée au procureur général et non à la cour. N'a-t-elle pas plutôt pour seul objet de servir de direction au procureur général dans la considération de la question de savoir s'il accordera ou refusera son *fiat*. Mais ayant jugé à propos de permettre l'émission du bref sans y avoir imposé aucune condition ou restriction, ne doit-on pas conclure qu'après un mur examen des faits de la cause, le procureur général a trouvé dans les refus répétés du juge d'obliger la couronne à montrer cause pour les récusations répétées, un refus certainement équivalent au refus de réserver la question. Il a sans doute satisfait sa conscience que ce refus d'ordonner de montrer

(1) Archbold, 188; Dunlop *v.* Notman *v.* R. 13 L. C. Jur. 255.

(2) Short & Mellor's Crown Practice p. 317.

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cause était un refus suffisant de réserver la question, surtout lorsque ce refus a été tant de fois répété.

It cannot issue (the writ of error) now without a *fiat* from the Attorney General, who always determines whether it be sought merely for delay, or upon a probable error (1).

Maintenant que le bref est émis et qu'il est devant la cour sur une contestation régulièrement liée et mettant directement en issue les défauts qu'il y a eu dans l'appel des jurés et dans les récusations, et sans qu'il y ait eu de réponse en droit aux griefs d'erreur, ni aucune objection particulière relativement au défaut de question réservée par le juge, la cour peut-elle éviter de décider la question soulevée, lors de la formation du jury sur la prétention de la couronne à un second *stand aside* ? Elle ne le peut pas, d'après toutes les autorités du droit anglais. Lorsqu'elle a le dossier devant elle, elle doit non-seulement décider les questions d'erreur particulièrement invoquées, mais elle doit aussi prendre connaissance de toute question apparaissant par le dossier qui serait suffisante pour faire mettre de côté le verdict, lors même qu'il n'en aurait pas été pris avantage par les griefs d'erreur. La cour n'est pas déchargée de ce devoir par la section 266, qui n'a pas eu l'effet d'annuler ces dispositions concernant le bref d'erreur.

La cour du Banc de la Reine a plusieurs fois agi d'après ce principe en maintenant des brefs d'erreur pour des moyens non-assignés par le demandeur, et qui n'avaient été ni réservés ni refusés en première instance.

Dans la cause de *Régina* v. *Ling* (2), le bref d'erreur a été maintenu pour une erreur qui n'avait pas été assignée et au sujet de laquelle partant nulle question n'avait été réservée. Il s'agissait :

D'un indictement pour parjure allégué avoir été commis dans une certaine cause où un nommé Adrien Girardin, du township de Kingsey,

(1) 4 Bur. p. 2551.

(2) 5 Q. L.R. p. 359.

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dans le district d'Arthabaska, commerçant, et un nommé Thomas Ling, du même lieu, *farmer*, était défendeur, l'omission des mots *était demandeur* à la suite de la description de Girardin, fut déclarée fatale et la conviction annulée. Cette omission n'avait pas été mentionnée dans les griefs d'erreur ; elle ne fut signalée que par la cour elle-même.

La cour fonda son opinion sur l'autorité suivante :

> The court is not limited to the errors assigned, the whole record is before the court, and the prisoner has the right to the benefit of all substantial defects in it and the conviction will be quashed if such defect exists. *Regina* v. *Fox* (1).

Puisque la cour, nonobstant la section 266, est obligée de prendre connaissance de toute erreur apparaissant à la face du dossier, suffisante pour faire mettre de côté le verdict, la question se réduirait donc à décider si l'erreur commise lors de l'appel du jury était de nature à affecter les droits du prisonnier.

La seconde récusation, ou *stand aside*, accordée à la couronne était-elle légale ? Peut-elle à son gré faire repeter l'appel des jurés et les faire mettre de côté non seulement une fois, mais deux et même indéfiniment, de manière enfin, vu le nombre limité que le prisonnier peut récuser, à le forcer d'accepter son procès devant un jury qui n'aurait pas le caractère d'impartialité voulu par la loi.

La loi a donné à la couronne des garanties suffisantes pour assurer la bonne administration de la justice, en lui permettant d'abord de demander le *stand aside* des jurés jusqu'à ce que la liste ait été entièrement appelée, *gone through* ; elle a en outre droit à quatre récusations péremptoires qu'elle peut exercer sans en donner de motif, en outre de celles pour lesquelles elle peut montrer des causes suffisantes. Il serait donc injuste et illégal de lui accorder un privilège comme celui du *stand aside* répété qui aurait l'effet d'anéantir le droit de récusation du prisonnier, et, de laisser pratiquement

(1) 10 Cox 510.

à la couronne le pouvoir de former le jury à sa guise, ou suivant l'expression anglaise *to pack the jury*.

Cette question s'est déjà présentée devant nos cours. La seule cause où l'affirmative du *stand aside* répété ait été maintenue est celle de la *Reine* v. *Lacombe* (1). La cour était composée de quatre juges, un seul, l'hon. juge Drummond a différé d'opinion. En référant au rapport on voit que cette décision est fondée sur le précédent anglais dans l'affaire de *Mansell* (2), qui a été interprété comme ayant décidé que la couronne avait droit à un second *stand aside*. Ce n'est certainement pas la portée de la décision, et elle n'est nullement applicable au cas actuel.

Dans la cause de Mansell le rôle des jurés n'avait pas été épuisé, *gone through*. Onze jurés avaient été assermentés, et il en manquait un douzième. Alors on recommença l'appel de la liste, et à l'appel du nom de Ironmonger l'avocat de la couronne demanda encore une fois le *stand aside*, pour ce juré déjà mis de côté une fois. Dans le même moment douze jurés qui délibéraient sur un autre procès, formant partie du même *panel*, rentrèrent en cour pour donner leur verdict, et se trouvèrent disponibles. La question du droit à un second *stand aside* était actuellement en discussion devant la cour. Le *stand aside* de Ironmonger ne fut maintenu que temporairement, parce qu'il fut alors représenté que la liste n'avait pas été épuisée, *gone through*. En effet les douze jurés qui venaient d'arriver en cour et qui n'avaient pas été appelés le furent alors. Jusque là la liste n'avaient pas été épuisée, mais elle le fut après l'appel des noms de douze jurés qui avaient été absents.

Dans le jugement de Lord Campbell C.J., après avoir exposé tous les faits, il s'exprime ainsi :

But we are of opinion that the panel is not to be considered as gone

(1) 13 L. C. Jur. p. 259. (2) Dears & B. p. 375.

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through so as to require the crown to assign cause of challenge till it is exhausted, *i.e.*, according to the usual practice of the court and what may reasonably be done, the fact is ascertained that there are no more of the jurors on the panel whose attendance may be procured, and that, without requiring the crown to assign cause of challenge the trial could not proceed. In the present case the panel had not been exhausted, although once called over, and the twelve jurors who had served on *Chapman's* jury came into court when only nine jurors had been elected and sworn for Mansell's jury, and when the remaining three might be taken from these twelve as conveniently and as much for the advantage of the prisoner as if they had all been in court and had answered to their names when the panel was first called over.

Plus loin, page 397, Lord Campbell ajoute :

Accordingly the course has invariably been from the passing of the statute to the present time, to permit the crown to challenge without cause till the panel has been called over and exhausted, and then to call over the names of the jurors peremptorily challenged by the crown, and to put the crown to assign cause, so if twelve of those upon the panel remain as to whom no just cause of objection can be assigned the trial may proceed. In our books of authority the rule is laid down that "The King need not show cause of his challenge till the whole panel be gone through and it appear that there will not be a full jury without the person so challenged."

Cockburn C.J., après avoir fait allusion aux différentes manières d'appeler la liste des jurés, dit :

Here they were called in the order on the panel ; but the twelve absent jurymen were not called, because it was known where they were and that it would be useless to call then. The panel then was not gone through so far as those twelve jurors were concerned, it was not exhausted as to them. Now it being conceded that the Crown was not bound to assign cause of challenge till the panel was gone through it seems to me that it cannot be said that the panel was gone through till those twelve jurymen had been called, and the Crown and the prisoner respectively had said whether they challenge them or not.

Willes J., dit au sujet de la seconde demande de *stand aside* (1) :

The application by the crown that Iremonger should stand by the second trial was a continuance of a previous objection, a demand for further time to show cause rather than a fresh challenge ; and in my opinion the panel had not then been gone through, so as to make it incumbent on the crown to show cause of challenge.

(1) P. 421.

Chamell B., dit: (1).

The main question is whether the panel was perused when Ironmonger was called the second time; I think it was not, and that the time to put the crown to show cause of challenge had not then arrived.

Chitty, Crim. Law, (2).

But it is agreed that under this statute, the crown is not compelled to show any cause of challenge until the panel is gone through, so that it may appear that there will not be sufficient to try the prisoner, if the peremptory objection is admitted to prevail.

Lors de l'arrivé des douze jurés qui n'avaient pas été appelés le *stand aside* de Ironmonger n'avait pas été décidé, et au lieu de décider cette question, le juge qui présidait permit d'appeler les douze jurés qui venaient d'entrer et le jury pût être complété. C'est donc dans ces circonstances que s'éleva la question de savoir si le *challenge* de Ironmonger n'aurait pas dû être décidée et la couronne obligée de montrer cause. Mais le juge décida que la liste n'avait pas été épuisée, *gone through*, vu l'arrivée de douze nouveaux jurés. Cette décision fut confirmée par les juges de la cour du Banc de la Reine dont l'opinion est citée ci-dessus. Il ne fut nullement décidé que la couronne avait droit à un second *stand aside*. On voit au contraire que l'opinion des juges est contre cette proposition; ils ont admis le principe énoncé par le premier juge que la liste des jurés devait être épuisée, *gone through*, avant de forcer la couronne à montrer cause pour ses récusations. Ce précédent qui a servi de bâse à la décision de la *Reine* v. *Lacombe*, n'a donc nullement décidé que la couronne avait doit à plus d'un *stand aside*, tout au contraire, l'opinion des juges a été qu'une fois la liste épuisée, *gone through*, au deuxième appel des jurés, la couronne doit donner ses causes de récusation. C'est donc à tort que la cour du Banc de la Reine s'est appuyée sur

(1) P. 425.

(2) P. 534.

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ce précédent pour maintenir dans la cause de Lacombe que la couronne avait droit à un deuxième *stand aside.* Ce précédent étant encore en force lors de la décision de l'hon. juge dans cette cause, il n'est pas surprenant qu'il s'y soit conformé, car c'était une décision de sa propre cour. Mais ce précédent est isolé ; il n'en existe pas un seul de ce genre en Angleterre. Cockburn C. J. dit à ce sujet :

> There is no case in the books by which it appears that a juror who has been once set aside at the instance of the crown, has been again set aside at the instance of the crown without cause of challenge being shown.

Dans la cause de *Regina* v. *Dougall* (1), la moitié ne peut seulement de la liste avait été appelée, et la décision s'appliquer au cas actuel où toute la liste avait été appelée.

Il n'existe pas non plus dans Ontario de cas où il ait été décidé que la liste pouvait être appelée deux fois avant que la Couronne pût être obligée à donner ses causes de récusation. Dans *Regina* v. *Benjamin* (2), on attribue à M. Richards qui représentait la Couronne le langage suivant à ce sujet :

> Then in going over the panel a second time the crown must assign a cause certain, which is then inquired of by the court.

Il semble avoir exprimé l'opinion dominante sur cette question, dans la province d'Ontario, car on ne trouve nulle part la contradiction de cette doctrine.

"Bishop on Criminal Procedure" (3), résume bien la doctrine comme suit :

> The course of things is, therefore, in England and in those States of the Union in which the English practice prevails, for the court, when the list of jurors is being called over and the prisoner is being required to accept or challenge each juror, to direct such jurors to stand aside as are objected to on behalf of the prosecution. The panel is thus gone through with..... But if a full jury is not thus obtained, then the

(1) 1 18 L. C. Jur. 85. (2) 4 U. C. C. P. 185.
(3) Vol. 1 No. 938, note a.

panel is called over a second time, omitting those whose cases have been finally disposed of, yet including both those who did not answer and those who were set aside at the instance of the prosecution, and on this second call, the Government can challenge only for cause.

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Ici sont cités plusieurs précédents anglais, et entr'autres *Régina* v. *Mansell.*

Toutes les autorités font clairement voir que la Couronne doit au deuxième appel des jurés, après avoir exercé le *stand aside* une fois, montrer cause pour ses récusations. C'est ce que le juge a positivement refusé de faire en cette cause onze fois de suite. La liste des jurés avait alors toute été appelée une première fois tel que le constate le record. L'absence de ceux qui n'avaient pas répondu à l'appel fut régulièrement notée et il n'y a aucune preuve qu'aucun de ces jurés fut présent en cour lors du second appel. Il n'y avait donc absolument aucune raison de faire le second appel si ce n'est pour donner à la Couronne le privilège du second *stand aside* auquel elle n'avait aucun droit.

Cette erreur commise dans la constitution du jury peut avoir eu les plus graves conséquences pour le prisonnier. Elle est en violation de la loi qui exige la plus stricte impartialité dans la formation du jury, et est une cause suffisante d'erreur pour faire annuler le procès. S'il en était autrement, je dirais avec Cockburn C.J., dans la cause de Mansell:

> It would be monstrous to common sense to affirm that where it is admitted that there has been an improper selection of the jury, the prisoner shall have no remedy; and if it is not a ground of error there is no remedy, as a bill of exception will not lie in a case of felony.

En conséquence je suis d'avis que le bref d'erreur doit être maintenu.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed on the ground taken by the Court of Queen's Bench, that the question raised by the prisoner on the order given by the learned judge, at the trial, to eleven

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jurors to stand aside a second time at the instance of the crown could have been reserved, and that, consequently, under section 266 of the Procedure Act, as the judge did not refuse to reserve it the writ of error does not lie. The proposition that the question is one that could have been reserved has been so elaborately treated by my brother Patterson that I might content myself with concurring in his remarks. In fact, were it not for the opinions expressed here to-day I would have thought the point free from any doubt. And, I venture to say, if the learned judge at the trial in this case had reserved the question it would never have been thought of, either at the bar or on the bench, to question his right to do so. The eminent counsel himself who argued the case before us for the plaintiff in error did not feel justified in taking the ground that the question was one which could not have been reserved. And Mr. Justice Tessier, in the Court of Queen's Bench, who dissented from the judgment of the court on other points, far from holding that the question could not have been reserved, on the contrary, assumes that it could have been.

To the cases which will be cited by my brother Patterson on this proposition, I add the following: *Levinger* v. *The Queen*, in the Privy Council (1); *Reg.* v. *Manning* (2); *Reg.* v. *Burgess* (3); also, *Reg.* v. *Tew* (4) where the question reserved was whether the witnesses before their examination before the grand jury had been properly sworn, a question which, Lord Campbell said, as presented in the case, was unfounded, frivolous and discreditable, but upon which, however, the court assumed jurisdiction.

Now, here was a case reserved on a proceeding before even a bill had been found by the grand jury.

(1) 11 Cox 613.
(2) 1 Den. C. C. 467.
(3) 16 Q. B. D. 141.
(4) Dears. C. C. 429.

It is an extreme, and perhaps a questionable one. I cite it, however, to show how far the courts in England have gone in the construction of the court of crown cases reserved act. See also *Reg.* v. *Key* (1); and *Reg.* v. *Shuttleworth* (2); in which questions were reserved on the mode of arraignment where a previous conviction is charged.

In New Brunswick the case of *The Queen* v. *Morrison* (3); and in Quebec, amongst others, the cases *R.* v. *Lacombe* (4), *R.* v. *Fraser* (5), and *R.* v. *Chamailard* (6), may also be referred to.

Then, in this court itself, there are two cases in point. In *Abrahams* v. *The Queen* (7) the prisoner had moved to quash the indictment on the ground that it had been submitted to the grand jury without proper authority, it being one falling under the vexatious indictments clause, now sec. 140 of the Procedure Act. It appeared that the indictment purported to have been authorised by the attorney-general, but that this had been done, not by the attorney-general himself but by the counsel who represented him at that term of the court. After conviction the presiding judge reserved the question so raised on the motion to quash. The Court of Queen's Bench, in Montreal, held that the objection was not well founded. But on appeal to this court, that judgment was reversed, and the indictment was quashed.

Now that was clearly an objection not only arising but also taken before a jury was made up, nay, even before the prisoner pleaded to the indictment, as it must necessarily have been under section 143 of the Procedure Act. Yet it was never questioned, either at

(1) 2 Den. C. C. 347.
(2) 2 Den. C. C. 351.
(3) 2 P. & B. 682.
(4) 13 L. C. Jur. 259.
(5) 14 L. C. Jur. 245.
(6) 18 L. C. Jur. 149.
(7) 6 Can. S. C. R. 10 S. C. 1 Dorion, Q. B. 126.

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the bar or on the bench, either in the Court of Queen's Bench, or in this court, but that the case was one which was properly reserved. Are we here to-day to hold that we had no right to quash the conviction in that case as we did ? A question precisely similar in England, I may add, in *R.* v. *Fuidge* (1) was reserved, and the indictment also quashed by the full court ; and there also it was nowhere doubted that the question was one which was properly reserved.

The other case in this court I have alluded to is *Theal* v. *The Queen* (2). One of the points reserved by the judge who had presided at the trial in that case was upon a motion to quash the indictment, which had been moved by the prisoner, upon arraignment, before pleading. The case went through the full Court of New Brunswick and then was appealed here, and not a doubt either in New Brunswick or here was expressed as to the jurisdiction of the court of crown cases reserved upon the point raised by the motion to quash.

It has been suggested that by the giving to the word "trial" in section 259 of the Procedure Act the wide interpretation that it has to the present day unquestionably received in England and in Canada, prisoners in criminal cases by section 266 of this same Act will be deprived in many cases of the beneficial right to a writ of error. That is so, undoubtedly, but in my opinion such is the clear intention of the statute. It was thought expedient not to allow the two remedies to a prisoner, the writ of error and the reservation for the court of crown cases. Neither one nor the other, it must be observed, is grantable as a matter of right. The attorney general, it is true, would not refuse his fiat for a writ of error where a serious ground of error is assigned, though he

(1) L. & C. 390. (2) 7 Can. S. C. R. 397.

should be careful not to grant it where it is expressly taken away by the statute. But it is equally true that the judge presiding at the trial not only would not refuse to reserve, but even of himself and *ex proprio motu* would reserve, any question of law upon which he might have serious doubts. And a reference to the cases in the court of crown cases reserved, both in England and in Canada, since its establishment fully shows that the judges presiding at trials of criminal cases have, as the full court itself, given the widest interpretation to the statute, and liberally exercised in favor of accused parties the powers it conferred upon them whenever serious doubts arose on any question of law. And then, in the case now before us how could it be said that a question, whether the prisoner has had his trial according to law or by a jury lawfully constituted, is not a question arising at the trial ?

In a late case, 1889, *Reg.* v. *Brown* (1), Lord Coleridge reserved a case not only after the trial, but even after the term of the court had ended, and after he had left the assize town, and this where the prisoner had pleaded guilty, and the full court held that they had jurisdiction. Referring to a previous case, *Reg.* v. *Clark* (2), where it had been held that no case can be reserved when a prisoner pleads guilty, the Chief Justice, for the court, said :—

> If that judgment intends that because a man pleads guilty—the judge who tried the case cannot state a case asking for the opinion of this court as to the validity of the conviction, we must respectfully differ from it. In this case the indictment was read to the prisoner, and if, upon it being read, he had taken the objection, it would clearly have been a point arising at the trial ; and the mere fact that he did not take it, but that it arose in the mind of the judge afterwards does not render it any less a point which arose at the trial. Whether it was taken by the prisoner or not, it existed, and the point was there. We think, therefore, that we have jurisdiction to consider this case.

(1) 16 Cox 715. (2) 10 Cox 338.

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Now, we have in that case the latest instance, and I may say perhaps one of the most illustrative, of the liberality with which in England the statute applying to the court of crown cases reserved has been interpreted. And when we are asked here to-day, by the construction sought to be given to curtail the jurisdiction of that court, and to put upon this highly remedial statute a narrower construction than it has received for over forty years, I think we should pause before coming to that conclusion. We should be loath to abridge rights and remedies which have proved so effectual in the administration of the criminal law and so well calculated to ensure to accused parties the protection the law of the land entitles them to on their trial.

A reference has been made to *Brisebois* v. *The Queen* (1), as a decision by this court from which it could be inferred that we had refused to adopt the large construction given to the word "trial" in sec. 259 of the Procedure Act in prior cases. Now, I am sure that neither his lordship nor my brother Gwynne, who with myself composed the majority of the court in that case on the question, whether the question there submitted had legally been reserved or not, intended to question *Abrahams* v. *The Queen* (2) and *Theal* v. *The Queen*, (3) which I have referred to, or in any manner throw the least doubt upon the jurisdiction of this court in those cases.

That case of Brisebois has no application whatever to the present one. There the learned judge presiding at the trial, after the verdict, on a motion in arrest of judgment had illegally, as we thought, tried, upon affidavits, a question of fact, which not only did not appear on the record but which was in direct contradiction of the record. The error assigned there, if any there was or could be legally proved, was error in fact.

(1) 15 Can. S. C. R. 421. (2) 6 Can. S. C. R. 10.
(3) 7 Can. S. C. R. 397.

Now, we held that this was irregular, that no motion in arrest of judgment lies upon a fact not appearing on the record, and that the learned judge had no power after verdict to receive affidavits and try an issue of fact to contradict the record as he had done (1), and that consequently he could not, assuming these facts as proved, reserve a question of law upon them. *Bowsse* v. *Cannington* (2). I need only refer to the remarks of my brother Gwynne who gave the judgment of the court upon this point, at page 454 of the report, to show that this was all that was determined in that case.

I have also great doubts if an order to a juror to stand aside, which merely means that the juror being challenged by the crown the consideration of the challenge shall be postponed till it be ascertained whether or not a full jury can be made without him (3), raises a question of law upon which the writ of error lies. I refer on this point to *Gregory* v. *Reg.* (4), *Mansell* v. *Reg.* in the Court of Exchequer Chamber (5), *Whelan* v. *Reg.* (6), and the cases there cited, also to Chief Justice Harrison's judgment, *in R.* v. *Smith* (7). Section 124 of the Criminal Law Procedure Act, it has been suggested, would have the effect now to make in Canada such a question one of law. But, as it would seem to me, the only new enactment in that section is the allowance of four peremptory challenges to the crown; the subsequent words, " but this shall not be construed to affect the right of the crown to cause any juror to stand aside until the panel has been gone through," import no changes in the law or practice as to the order to " stand aside." I read the clause as

(1) *In re* Sproule, 12 Can. S. C. R. 140; *Reg.* v. *Newton*, 16 C.B. 97; *Reg.* v. *Carlile*, 2 B. & Ad. 362.
(2) Cro. Jac. 244.
(3) *Mansell* v. *Reg.* 8 E. & B. 54.
(4) 8 Q. B. 85.
(5) Dears & B. 409.
(6) 28 U. C. Q. B. 108.
(7) 38 U. C. Q. B. 218

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if it said : The crown shall have four peremptory challenges, but this shall not interfere with the right of the crown to cause any juror to stand aside which right shall continue to exist as it has existed heretofore. I am confirmed in this view by section 170 of the same act which enacts that :

> Nothing in this act shall alter, abridge or affect any power or authority which any court or judge has, when this act takes effect, or any practice or form in regard to trials by jury, jury process, juries or jurors, except in cases where such power or authority is expressly altered, or is inconsistent with the provisions of this act.

The order given by the judge at the trial which the plaintiff in error impugns, it must be remembered, is not an allowance of a peremptory challenge at the instance of the crown to which a demurrer raising a question had been pleaded by the prisoner but merely an order on a challenge for cause by the crown, which postponed the consideration of the challenge till it was ascertained whether a full jury could not be had without the juror so challenged, and to which the prisoner had objected in the only way he could do, by asking that the crown be ordered to show cause forthwith, and I find it difficult to say that this raised a question of law that could be the ground of a writ of error.

However, it is unnecessary for me to determine this point, as upon the ground I first mentioned I am of opinion that the judgment appealed from, which quashed this writ, was right, and that the appeal by the plaintiff in error should be dismissed.

Having come to this determination it seems to me that I should not enter into the consideration of the merit of the ground of error assigned by the plaintiff in error. As we are equally divided in this court the result is that the judgment of the Court of Queen's Bench, which held that the writ of error does not lie, stands. It follows, it

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seems to me, that anything I would say here on the merits would be *obiter* and extra judicial. If the writ of error does not lie, as results from the judgment of this court, I do not see how I would be justified in giving a judgment on the errors assigned, and assume jurisdiction after our judgment determines that we have no jurisdiction. The course pursued in the court below where the learned judges refrained from going into the merits is the proper one, in my opinion (1). However, as a majority of my brother judges have expressed their opinions that the error assigned as to the order to certain jurors to stand aside a second time at the instance of the crown is a good ground of error, I deem it right to make an observation as to the course pursued by the learned counsel who acted for the attorney general, and by the learned judge who presided at the trial in this case. In 1869, in a case of *Reg.* v. *Lacombe* (2) the full Court of Queen's Bench, in Montreal, upon a case reserved, held that on the second calling over of a jury list under circumstances precisely similar to the present one the crown had the right to have a juror stand aside a second time without showing cause. Now, it is obvious that with this ruling of the highest court of the province before him the learned counsel for the crown in this case was perfectly justified to take the course he did at the trial, and that the learned judge who presided could not have been expected, acting there as he was in the capacity of a judge of the Court of Queen's Bench, to assume the responsibility of reversing a jurisprudence settled by that court over twenty years before, and which had remained unchallenged ever since. I can see nothing on this record to create the least doubt but that this prisoner got a fair trial. The right of challenging is given to reject, not

(1) See *Owen* v. *Hurd* 2 T. R. 644. (2) 13 L. C. Jur. 259.

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to select, and as seven of his peremptory challenges were not taken he must be assumed to have been tried by a jury composed of twelve men indifferent, properly qualified, and to none of whom he had any objection.

GWYNNE J.—The objection taken in this case, if it should prevail, must do so upon the ground that there was such a substantial defect in the formation of the jury as constituted a mis-trial, such a defect, therefore, as would have entitled the crown to have avoided the verdict if it had been one of acquittal. This consideration makes it a matter of the gravest importance, in the interest of the accused parties, that whenever a question of mis-trial is raised care should be taken that mere irregularities not working any prejudice to the accused upon his trial shall not be magnified into nullities avoiding a trial. It is not every irregularity upon the trial of a person upon a criminal charge that will constitute a mis-trial. It would be most disastrous as well to the due administration of the law as to the interest of the accused parties themselves if it should do so. The language of several of the learned judges in *Mellor's Case* (1) is very applicable to the present case. Crompton J, referring to the point in that case, says :

> It would be very mischievous if every irregularity of this nature would necessarily vacate a verdict ; if it would necessarily have that effect the same principle would apply in the case of an acquittal even though the irregularity were caused by the prosecution. The extreme mischief should make us cautious in seeing that the strict rules of law are not extended in such a manner that at every assizes and sessions we should be in danger of hearing of verdicts being set aside by accidental or contrived irregularities like those in question.

Crowder J. says :

> Verdicts found at the assizes and quarter sessions after the most

(1) 4 Jur. N. S. 222-3-4.

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patient and careful investigation where the trials have been with the utmost impartiality, and the results have been most satisfactory to the ends of justice, might be set aside and the prisoners, if convicted, might have another chance of escape, or if acquitted might have their lives and liberties again imperiled by another trial, for if such a mistake is fatal to the trial it is equally so whether the verdict pass for or against the prisoner, and whatever the nature of the crime may be with which he is charged.

Willes J. says :

If this was a mistake, the prisoner being 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.

And Byles J. says :

A mere possibility of prejudice cannot vitiate the trial. * * * A mistake of this nature is no mistrial. * * * If a mistake of this nature vitiates a verdict against a prisoner, it equally vitiates a verdict for him. The crown may at any time and at any distance of time take similar objections, and the validity of all acquittals is put in jeopardy.

Now, what is objected to in the present case is simply this : Upon the panel of 40 jurors being once called three did not answer to their names when called and twelve having been peremptorily challenged by the prisoner, and fourteen required to stand aside by the crown when eleven jurors only were obtained and sworn, the clerk then, instead of calling again the three who had not answered to their names, proceeded to go through the panel again in the same order as before, only omitting those who had been peremptorily challenged, when the crown, upon the persons they had required to stand aside being again called in their order as before, again prayed that the period for assigning cause might be further postponed until the panel should be once again thus gone through, and the learned judge decided in favor of the crown, against the contention of the prisoner's counsel that the crown should be compelled to assign cause of challenge upon each of those who had been required to stand aside being called again ; in this manner, accordingly, the

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panel, excluding those who had been peremptorily challenged by the prisoner, was once again gone through, until at length, when it appeared that the three jurors who had been absent when first called were still absent when called a second time in the order in which they were upon the panel, the twelfth juror was obtained by the crown no longer requiring him to stand aside. To this juror so obtained the prisoner, although he still had several challenges or rights of challenge remaining, offered no objection, and it is not alleged that in point of fact he had any objection to him, and thus a complete jury was obtained. Now, if in such a case the crown upon a verdict of acquittal being rendered should demand a *venire de novo*, upon the grounds of there having been such a defect in the formation of the jury as constituted a mis-trial, the language of Willes J. in *Mellor's case* (1) may not inaptly be applied: "To order a *venire de novo* in such a case would be scandalous and oppressive;" and if the crown could not obtain a *venire de novo* in the present case if a verdict of acquittal had been rendered the prisoner cannot upon a verdict of guilty. So likewise I may adopt the language of Crowder J. in the same case as eminently appropriate to the present, where he says:

> Before I can arrive at the conclusion that a verdict found by such a jury so empanelled is a nullity, I 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, but I can find no such rule of law.

If a procedure such as that which is objected to in the present case constituted a mis-trial, the apprehensions entertained by Byles J., as expressed by him in the same case, may be said to be fulfilled, and henceforth, in this portion at least of the British Empire—

> New trials in criminal cases will come in like a flood. A mere pos-

(1) 4 Jur. N. S. 224.

sibility of prejudice cannot vititiate the trial. If a procedure of the nature in question here vitiates a verdict against a prisoner it equally vitiates a verdict for him. The crown may at any time and at any distance of time take a similar objection, and the validity of all acquittals is put in jeopardy.

It is in the interest of those accused of crime, therefore, that we should hold that the procedure which is objected to in the present case did not constitute a mis-trial.

The language of Bramwell B. in *Mansell's* case (1), and which was not dissented from by any of the learned judges in that case, has also an important bearing upon the objection taken in the present case.

He there says :

> According to my judgment the matter relied on to found the objection ought not to have appeared upon the record, and if it is examinable it is not error.

Willes J. was of the same opinion, although he abstained from pronouncing judgment upon it, because, as he said :

> Assuming that a court of error ought to pronounce an opinion, and that it is a matter properly upon the record, I am of opinion that the judgment below ought to be affirmed.

Again, Bramwell B. says :

> It is now an application to the discretion of the judge whether or not the showing of cause of challenge on the part of the prisoner should be adjourned, and that is so reasonable that, I think, it ought to be admitted. But the delay in showing cause on the part of the crown, which was wholly discretionary at first, has in accordance with the practice become a right, and the judge would do wrong if he did not admit it as matter of right to the crown. In my view, consistently with that, although the panel had been gone through once, the judge might the second time, on reasonable ground, grant the application of the crown to adjourn the showing cause of challenge, or rather continue, at the request of the crown, to postpone the obligation of the crown to show cause of its challenge. Still, I think that the application that a juryman should be ordered to stand by is an application to the discretion of the judge at the trial. Therefore, I am compelled

(1) 4 Jur. N. S. 438

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to say that the story of it ought not to appear on the record, nor can the discretion of the judge be reversed in a court of error.

And again he says :

So long as there are men in court on the panel who were called before and had not answered, the necessity for the crown showing cause has not arisen. The rule must at least be this—that until each man who could answer has answered, and there are still not twelve men in the box, the crown need not show cause.

That the crown was entitled to have called a second time the three men who had not answered when the panel was first called cannot, I think, admit of any doubt; the objection, therefore, is reduced to this, that the judge permitted the panel to be gone through again in the same manner as he had been before, omitting those peremptorily challenged, in order to have the three who had not answered called again in this manner before putting the crown to show its cause of challenge. This mode of proceeding, if at all objectionable, can only be objected to as a mere irregularity in procedure which did not deprive the prisoner of any legal right, or do him any prejudice. It did not result in putting upon the jury an unqualified person or one against whom the prisoner had, or is suggested to have had, any objection whatever, and did not, in my opinion, constitute a mis-trial in whatever form the objection should be raised. It is, however, sufficient for the determination of the present case to say that the point raised involved a question of law, which, upon the English authorities and practice, I entertain no doubt whatever could have been reserved as a point of law arising on the trial for the consideration of the court for crown cases reserved, under sections 259, 260 and 261 of ch. 174 of the Revised Statutes of Canada. With great deference to my brother Strong, the case of *Brisbois* v. *The Queen* (1) has, in my opinion, no applica-

(1) 15 Can. S. C. R. 421.

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tion whatever in the present case. The points in judgment there were, that matter which arose after verdict and was brought to the notice of the judge by affidavits, and in such a manner that he could have rendered no judgment upon it, was not matter raising a question of law arising on the trial; and, moreover, that the objection taken was one which the statute expressly declared could not be taken in any shape. In the *Queen* v. *Burgess* (1), before plea pleaded, and therefore before ever a juror was sworn or called to try the case, the prisoner's counsel moved to quash the indictment, upon the contention that though it professed to charge the prisoner with the offence of compounding a felony it did not disclose any offence. The Recorder of London, in whose court the case was, overruled the objection, whereupon the prisoner pleaded, was tried, and had a verdict of guilty rendered against him, and thereupon the learned recorder reserved for the consideration of the court of crown cases reserved the question:

Whether the indictment was bad on the face of it as not disclosing any offence at law and ought to have been quashed?

The court of crown cases reserved entertained the case, and adjudicated upon it. The question was deliberately argued upon the merits and it never occurred either to counsel or to the court that the question was not one which, within the meaning of the act which gave the court jurisdiction, arose on the trial, and that the court therefore had no jurisdiction to entertain the case. In *Regina* v. *Brown* (2), Lord Coleridge C. J., reserved a case for the consideration of the court for crown cases reserved under the following circumstances: The prisoner had pleaded guilty at assizes to an indictment charging him with having attempted to com-

(1) 16 Q. B. D. 141. (2) 24 Q. B. D. 357.

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mit unnatural offences with domestic fowls and was sentenced to a term of imprisonment. After the judge left the assize town his attention was called to an unreported case which was said to have decided that a duck was not an animal within the meaning of 24 & 25 Vic. ch. 100 s. 51, and he thereupon stated a case requesting the opinion of the court for crown cases reserved whether or not the conviction was good? When pronouncing the judgment of the court, referring to *Reg.* v. *Clark* (1), Lord Coleridge said :

> If it is intended by that judgment that because a man pleads guilty any difficulty with respect to the statement of the case against him is immaterial,—that he is absolutely concluded for ever after from taking any point upon it, and that the judge who tries him cannot state a case for the opinion of this court, we respectfully differ from that view, and inasmuch as the prisoner in the present case was indicted, and the indictment was read to him, and he might then have taken the objection we think the objection was in effect taken. The point was there existing ; it might have been taken, and it was a point which in our view did arise on the trial.

The court accordingly entertained the case and adjudicated upon it. Without over-ruling these cases it is impossible, in my opinion, to hold that no question can be reserved for the consideration of the court for crown cases reserved as one arising on the trial within the meaning of the statute in that behalf, unless it be in respect of some matter arising after the jury is selected and sworn. Such a construction would be little short of making null the statute. In the present case no case was reserved, and as the judgment of the court appealed from proceeded upon the ground that, and substantially is an adjudication that, in point of fact, as was also admitted in the argument, the judge who tried the case never was asked or did refuse to reserve a case upon the point for the consideration of the court for crown cases reserved, section 266 of ch. 174

(1) L. R. 1 C. C. R. 54.

enacts that no writ of error shall be allowed in such a case, and so in effect that the objection cannot be now raised in error.

The appeal therefore should, in my opinion, be dismissed and the judgment of the Court of Queen's Bench, at Montreal, affirmed.

PATTERSON J.—The writ of error has been quashed by the judgment of the court below on the ground that it is founded on a question of law arising at the trial which could have been reserved for the consideration of the justices of the court for crown cases reserved under the 259th section of the Criminal Procedure Act (1), but which the judge presiding at the trial did not reserve, and not having been asked to reserve it, cannot be said to have refused to reserve. The decision proceeds upon the 266th section, which, unlike the 259th, is not taken from the English law, and which declares that in those circumstances no writ of error shall be allowed.

The alleged error is in the selection of the jury. When the panel, which contained the names of forty jurors, had been once perused, twelve men had been challenged by the prisoner, fourteen had been ordered on the part of the crown to stand by, eleven had been sworn on the jury, and three were absent. One juryman was still wanted, and he had to be obtained from among the fourteen men who were standing aside, unless all of the fourteen should happen to be challenged either by the crown for cause, or, to the number of four, peremptorily, as permitted by section 164 of the Criminal Procedure Act, or by the prisoner who was still entitled to eight peremptory challenges. On again going through the panel, one of the men was challenged by the prisoner, and the crown was permit-

(1) R. S. C. c. 174.

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ted, against the objection of the prisoner, to cause eleven of them to stand by a second time. We obtain these facts from the return to the writ of error, where it is further stated that one man of the fourteen was sworn on the jury, completing the twelve jurymen, and one, Augustin Vézina, does not appear to have been called the second time.

I see no reason to doubt that the permission to cause the jurors to stand by the second time was unauthorized. The right of the crown to postpone the assignment of cause for challenging jurors until the panel had been gone through, which has been discussed and explained in several cases the explanations given by judges of eminence not always entirely agreeing, is recognised by section 164 of our Criminal Procedure Act, and is preserved notwithstanding the new right of four peremptory challenges which is created by the statute represented in that section, and is of course beyond question. But when the panel has been gone through and the power to cause a juror to stand aside in place of showing cause for challenging him is asserted a second time, what is done is not easily distinguishable in its effect from a peremptory challenge, and is not warranted by the authority of any English decision or (beyond the number of four) by section 164. The first four of the eleven might, perhaps, be held in this view to have been properly excluded from the jury as being peremptorily challenged, but the other seven should not have been set aside except for cause.

The only English authority cited to the contrary is a dictum of Bramwell B. in the important case of *Mansell* v. *The Queen* (1) where he expresses the opinion that the judge might, after the panel had been perused, "in his discretion for sufficient cause, further postpone the time of assigning cause, either for the crown or the prisoner, but

(1) 8 E. & B. 54; Dears & B. 375.

not as a matter of right on a mere request without sufficient cause." Mansell's case did not require a decision of the point. The contest there arose on the facts, which are set out in the return to the writ of error (1) that a juror who had been called a second time after the panel had been gone through, with the exception of twelve jurymen who were out of court considering another case, was again required on the part of the crown to stand by, and the twelve men just then returning into court, what was asked and allowed was that the crown should not be put to assign cause for the challenge until after those twelve men had been called. Bramwell B. further explains his opinion, saying :

> I think, therefore, that even if the twelve whose names had not been called over had not come into court when they did, it might have been right to set aside Iremonger for a longer time, as long as there was reasonable ground for thinking that any one might be brought into court who was liable to serve and had not yet been objected to. The true rule is to postpone the time for assigning cause till all reasonable endeavors to make all answer who ought to answer have been exhausted. Then, if twelve jurors have not been obtained the crown must show cause, but not till then.

There is no suggestion that in this case the attendance of the three defaulting jurymen could by any reasonable effort have been obtained, and under the rule laid down by Bramwell B. applied to the facts that we have before us, the crown could not, in my judgment, object again to any one of the fourteen men who were set aside on the first perusal of the panel except by way of challenge for cause, though there was of course the limited peremptory challenge allowed by section 164. The prisoner was deprived of a legal right in respect of the constitution of the tribunal by which he was to be tried, and I agree with the opinions that have been expressed that the matter is proper to

(1) 8 E. & B. 59.

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appear on the record. It would, therefore, be examinable in error unless that proceeding is excluded by the 266th section of the act.

At the same time I have no idea that under the circumstances the prisoner suffered any actual prejudice or that his trial was not fair and impartial, having regard to the fact that he could have challenged peremptorily every one of the seven jurors who were, in my opinion, improperly ordered to stand by.

I think the court below was correct in holding that the case came within the 266th section, and in, therefore, quashing the writ of error.

One essential to the allowance of the writ is that the question of law could not have been reserved under section 259, which authorises the reservation of any question of law which arises on the trial. It is contended that the objection to the right of challenge having been taken before the prisoner was given in charge to the jury the question arose before the trial and not on the trial. This construction which confines the term "trial" to the trial of the issues by the jury, in which sense the word may be, no doubt, and often is properly used, seems too narrow to give full effect to the intention of the section. In my opinion "the trial," within the meaning of the section, embraces all the proceedings before the judge who is called in section 266 the judge presiding at the trial, whether those proceedings are, as in the present case, preliminary to the investigation by the jury ; or, as in the instance of a prisoner pleading guilty, result in a conviction without the intervention of a jury; or relate to the evidence, or the directions or ruling of the judge; or to the reception or recording of the verdict ; or arise after the conviction, as for example, with regard to the appropriateness of the sentence or to the punishment assigned by law to the offence ; and whether any such

questions are actually mooted while the trial is in progress or have not suggested themselves until the trial is over, the prisoner convicted, and sentence passed upon him.

These views are, as I gather from reported cases, those generally acted upon in England under the statute 11 & 12 Vic ch. 78 sec. 1, which is followed by our section 259.

I am not aware of any direct English decision upon the immediate point as to when the trial commences within the meaning of the act, but that is because it was never really in dispute.

My brother Taschereau has cited a number of cases bearing on the point which I do not think it necessary to refer to again.

In *Reg.* v. *Faderman* (1) the point was raised in argument shortly after the passing of the English act (2).

Parke B. said: "Properly there is no trial till issue is joined;" and Cresswell J. asked a question which received an affirmative answer in later cases: "Is a prisoner tried who pleads guilty?" The decision did not touch the question, being that the Court of Crown Cases Reserved had not jurisdiction to review the decision, which was on demurrer, because there had been no conviction. It may be noticed, however, that whatever opinion may have been implied by the observation of Parke B., and whether or not the impression he had at the moment of the signification of the word "trial" would have given the proper force to the expression as used in the statute, his dictum does not reach the present case because the joinder of issue takes place before the jury is called. In the 8th edition of Trials per Pais, which bears the date of 1776, there is this passage at p. 595, which deals with the joining of issue:

(1) Den. C. C. 568.

(2) 8 Feb., 1850. The act was passed in 1848.

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When the defendant hath pleaded to the indictment "not guilty," the clerk on behalf of the king or attorney general, by way of replication says "culprit," *i.e. culprist*, which is an averment of his guilt, and a taking of issue thereupon, as much as *paratus est verificare quod culpabilis est* ; the like as in civil actions *et hoc paratus verificare*, *prist* in French signifying the same with *paratus* in Latin ; then the prisoner being demanded how he will be tried, answers: "By God and the country," which is the same with a rejoinder and joining issue in a civil action concluding *et de hoc ponit se super patriam.* So that upon all arraignments there is a formality of pleading observed, in effect the same as in civil actions.

A year earlier than Faderman's case Rolfe B. had, in *Reg.* v. *Martin* (1), laid down a principle which has prevailed in most, if not in all, subsequent cases. He said :—

I think that the word "trial" in the 2nd section of 11 & 12 Vic. c. 78 ought to have a very liberal construction, and I think it applies to any proceeding in the court below.

The question whether the matter of law for the time in debate arose at the trial has been discussed in several cases, but the objection has usually been that the question was not raised until the trial was over. That was so in *Reg.* v. *Mellor* (2), in 1858, where the complaint related to the constitution of the jury, but the fact that one juryman had been sworn in place of another was not discovered till after the trial. The jurisdiction of the court for Crown Cases Reserved was discussed on other grounds with considerable divergence of opinion among the fourteen judges who composed the court. On the point as to the question having arisen at the trial there was not much difference. No one suggested that the empanelling of the jury was before the trial. Williams J. thought that the point, as it came before the court, must be regarded as a point occurring after verdict and therefore not a question of law which had arisen at the trial within

(1) 2 C. & K. 952.

(2) Dears & B. 468 ; 4 Jur. N. S. 214 ; 7 Cox 454.

the meaning of the first section of the statute. That opinion, which is discredited by later cases and notably by one decided as late as last year which I shall notice presently, does not appear to have been entertained by any other of the judges, while decided opinions to the contrary were expressed. Lord Campbell C. J. thus dealt with the question :—

Although the question was not discussed, the facts upon which it arises had occurred during the trial, and the judge while still acting under the commission, respited the execution of the sentence and reserved the question for the opinion of this court. It therefore seems to me to be a question of law which arose on the trial. The salutary operation of the statute would be greatly impaired if it were confined to questions of law which had been openly discussed during the trial. Since the statute passed, judges have usefully reserved under it questions as to the admissibility of evidence which had not been discussed during the trial ; and if the question might have been discussed before the sentence was pronounced, I think the judge, acting under the commission, has authority to reserve it, and to respite the execution of the sentence.

Coleridge J. said :

We are bound to give this Act of Parliament a liberal construction ; and I think that when the subject matter of dispute or question is connected with, or took place at the trial, whether it is considered at that time or at a later period, it must be said in point of law to have arisen at the trial.

Wightman J., by whom the case had been reserved, and who was speaking rather of the merits of the objection than of the question of jurisdiction, remarked :

It may be that if the mistake had been discovered before the verdict, I might have discharged the juror with respect to whom the objection had arisen, and called another juror, and then have heard the witnesses over again, or I might have given the prisoner the liberty of challenging the juror, with the consent of the counsel for the prosecution. The mistake, however, was not discovered until after the verdict. It appears to me, therefore, that this was a case of mis-trial, and that if the privilege of challenge be of any value at all it might be utterly defeated if this objection is not allowed to prevail.

And Martin B. said :

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I have always understood that this Act of Parliament was passed for the purpose of amending one of the greatest scandals of the law, that whilst, in civil cases, the most trivial objection entitled the parties as of right to a new trial, a prisoner whose life, as in this case, depends on the result, was prevented from getting his case reviewed, as to any error of fact, without he adopted a most circuitous and expensive course. I agree that we ought to give the most liberal construction to this Act of Parliament, for the purpose of giving to a prisoner an opportunity of asserting every right which he legally possesses.

In *Reg.* v. *Martin* (1), decided in 1872, we have a decision upon a case stated on the application of counsel for the prisoner after verdict and sentence.

In *Reg.* v. *Brown* (2), in 1889, before Lord Coleridge C.J., the prisoner pleaded guilty and was sentenced. After the Lord Chief Justice had left the assize town he was informed of a decision which created in his mind a doubt as to the offence coming within the statute under which the prisoner was charged, and he therefore stated the case, which was considered by the court. The case of *Reg.* v. *Clark* (3) was referred to with disapproval as a decision that a case cannot be reserved after a plea of guilty. That had been so held in *Reg.* v. *Clark*, on the ground that the question did not arise at the trial, not, however, from any suggestion that the arraignment and the plea did not take place at the trial, but because the court considered that the prisoner having pleaded guilty without taking any objection to the legal sufficiency of the charge, it could not be said that the question whether the act charged was an offence within a certain statute, on which question the judge asked the opinion of the court, was a question arising on the trial. I shall read the concluding remarks of Cockburn C. J. from the Jurist where the language is given more fully than in the regular report:

(1) L. R. 1 C. C. R. 378, 12 Cox 204.

(2) 24 Q. B. D. 357.

(3) L. R. 1 C. C. R. 54; 12 Jur. N.S. 946.

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But inasmuch as the power to state a case only applies where a question arises on the trial we have no jurisdiction. The prisoner having pleaded guilty, no question arose on the trial. A man who pleads guilty must be taken to know the law.

Patterson J.

Thus the decision in *Reg.* v. *Clark*, whether sound or unsound, is foreign to the present discusson.

The question reserved and disposed of in *Reg.* v. *Yeadon* (1) was respecting the verdict.

Among the cases in which the question reserved related to the sentence, it will be sufficient to note *Reg.* v. *Summers* (2), in 1869, in which case the sentence was held to be correct; *Reg.* v. *Willis* (3), in 1872 where the sentence was amended by reducing the term of imprisonment from seven years to five; *Reg.* v. *Denne* (4), in 1877, in which the sentence was left undisturbed; and *Reg.* v. *Horn* (5), in 1883, where the court amended the sentence.

In Ontario the courts have acted on the principle which I have quoted from the language of Lord Cranworth when Baron Rolfe.

In *Reg.* v. *Patteson* (6) the question reserved was respecting the right of the crown to cause jurors to stand aside at the trial of an indictment for libel, and the conviction was annulled on the ground that the right accorded to the crown at the trial was not well founded.

In *Reg.* v. *Smith* (7) there was an objection to the constitution of the jury. The judge reserved the question at the request of the prisoner after the close of the assize. It was held to be properly reserved.

In *Reg.* v. *Kerr* (8) a question was reserved and decided, touching the right to have a special jury.

(1) 1 L.& C. 8; 17 Jur. N. S. 1128.
(2) L. R. 1 C. C. R. 186.
(3) L. R. 1 C.C.R. 363; 12 Cox 192.
(4) 13 Cox 386.
(5) 15 Cox 205.
(6) 36 U. C. Q. B. 129.
(7) 38 U. C. Q. B. 218.
(8) 26 U. C. C. P. 214.

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I am not sufficiently familiar with the jurisprudence of the other provinces to venture to say what its course has been in this matter, but if the jurisprudence of Quebec is correctly stated by Mr. Justice Ramsay in *Reg.* v. *Feore* (8), as I assume it to be, it is to give the fullest possible scope to the provisions of section 259.

No question was reserved in this case, and it must, I think, be held, as was held in the court below, that the mere fact that the judge did not reserve a case, is not tantamount to his refusing to reserve one. The refusal must be in answer to a request. The legislature would doubtless have used language of more direct force, or have employed some such term as "fail," or "omit," or "neglect," if it was intended that a writ of error should always be allowable whenever no case was reserved.

These are the grounds on which I am of opinion that the judgment of the court below should be affirmed. I believe my views are substantially the same as those expressed by my brother Strong on one branch of the case of *Brisbois* v. *The Queen* (1), which was argued shortly before I became a member of the court, and held also in that case by my brother Fournier.

Those views were not concurred in by the other members of the court, who considered that the circumstance that the objection to the constitution of the jury, which was the subject of the case reserved, was not suggested until after the conviction took it out of the statute as a question of law arising on the trial. That opinion does not directly meet the present case, in which the point taken is that the objection arose before the trial and not on the trial. But the decision in Brisbois' case did not rest on the one ground that the question had not arisen on the trial. It proceeded also upon another ground, which was, by itself, quite suf-

(8) 3 Q. L. R. 219.

(1) 15 Can. S. C. R. 421.

ficient to sustain the judgment of the court, namely, that the jurisdiction was excluded by section 246 of the act. The point was thus concisely put by my brother Taschereau:

> 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.

It is plain, to my mind, that my opinion in this case is not in conflict with the judgment of the court in Brisbois' case. Other grounds which distinguish that case from the present have now been noticed by my brothers Taschereau and Gwynne.

Reverting to Mellor's case, it may be worth noting that of the fourteen judges seven held that the statute authorised the reservation of the case, and that there had been a mis-trial. The other seven were not unanimous on the question whether upon the facts of that case, which differed materially from those now before us, there had been a mis-trial, but they all agreed that the court had not jurisdiction to entertain the case. I have already referred to the position taken by Williams J. The other six based their opinion on a different line of argument, the strong point of which was that the statute, while it authorised the court to reverse, confirm or amend the judgment. gave no power to order a new trial or a *venire de novo.* The argument is elaborated in the judgments of Pollock C. B., Erle J. and Channel B.; Crompton J. expressed his concurrence, and Crowder and Willis JJ., who had doubts on the subject, inclined to the same view. The answer given to this argument by Coleridge J. seems to have been that the court could declare the trial a nullity and that without any formal award of a new trial the prisoner must necessarily be tried again. Other judges con-

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sidered that the power given by the statute to "make such other order as justice may require" authorised the order for a new trial. Our legislation leaves no room for the question. The act of 1869 (1), provided in section 80, while repealing some provincial enactments which had authorised new trials, and declaring that no writ of error should be allowed in any criminal case unless founded on some question of law which could not have been reserved or which the judge presiding at the trial refused to reserve for the consideration of the court having jurisdiction in such cases, that nothing in that section should be construed to prevent the subsequent trial of the offender for the same offence in any case where the conviction should be declared bad for any cause which made the former trial a nullity, so that there was no lawful trial in the case. This provision took a somewhat more distinct form in section 268 of the Criminal Procedure Act (2), which declared that :

> A new trial shall not be granted in any criminal case unless the conviction is declared bad for a cause which makes the former trial a nullity, so that there was no lawful trial in the case.

This enactment retains the same form in the act of 50–51 Vic. ch. 50, which amends section 268.

It may be safely assumed that if there had been legislation of this character in England in 1858, the opinions of the Chief Baron and the judges who took his view of the *venire de novo* question would have coincided with that of the seven judges who held that the statute covered the case. Indeed that opinion was very soon recognised as the undisputed rule of construction to be applied to the statute, as we find from *Reg.* v. *Yeadon* (3), in which case a *venire de novo* was

(1) 32–33 Vic. ch. 29.
(2) R.S.C. ch. 174; 50–51 Vic. c. 50. 1128.
(3) L. & C. 81 ; 7 Jur. N.S.

ordered in 1861, by a court composed of five judges, all of whom had taken part in Mellor's case, Pollock C.B. delivering the judgment of the court, and the other judges, including Channel B. and Williams J. concurring.

The language of our section 259 being the same which, as found in the English Act, had received this definite construction, it would be proper to hold, if necessary to resort to that principle, that our parliament had adopted the language in view of the construction it had received.

I am of opinion that we should dismiss the appeal.

Appeal dismissed without costs.

Attorney for prisoner: *F. X. Lemieux.*

Attorney for the crown: *Hon. A. Turcotte.*

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*Jan. 30, 31.

*Dec. 9.

A. WILLIAMS, JAMES A. VANWART AND P. SLAVEN (DEFENDANTS) ..... APPELLANTS.

AND

ARTHUR JAS. BALFOUR (PLAINTIFF) AND CHARLES S. DRUMMOND & OTHERS (DEFENDANTS) RESPONDENTS.

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

Mortgagor and mortgagee—Mortgage by trustee—Personal liability—Right of mortgagee to enforce equities between trustee and cestui que trust.

Where lands held in trust are mortgaged by the trustee, the mortgagee is not entitled to the benefit of any equities and rights, arising either under express contract or upon equitable principles, entitling the trustee to indemnity from his *cestui que trust*. Fournier and Taschereau JJ. dissenting.

APPEAL from a decision of the Court of Queen's Bench, Manitoba, affirming the judgment of Dubuc J. at the hearing in favor of the plaintiff.

The original proceedings in this case were taken by the plaintiff against the defendant Drummond on a mortgage made by the latter for a sale of the mortgaged premises and a personal order against said defendant for payment of the amount secured. The defendant by his answer to the bill of complaint averred that at the time of the negotiation of the loan, it was distinctly understood and agreed between him and the plaintiff, that he was not to become personally responsible for the payment of the mortgage money, and he prayed for a reformation of the mortgage so as to make same conform with the intention of the parties. He also

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

set up that he was simply trustee for the members of a syndicate who were owners of the land mortgaged, and submitted that they were necessary parties to the suit. The plaintiff thereupon amended his bill with the evident intention of making the members of the syndicate or those representing them parties. By this amendment the appellants became defendants in the suit.

It appeared that after the syndicate purchased the land and appointed Drummond their trustee a mortgage was given to secure the payment of the purchase money, and a bond of indemnity was given by a number of the members of the syndicate to Drummond, and the amended bill charges that the members of the syndicate agreed with the trustee to share with him the responsibility of and incident to the purchase of the lands in question, and the execution of mortgages for $11,700 given or assumed for the balance of purchase money thereon, and that such last mentioned mortgages having become overdue, the trustee borrowed from the plaintiff $12,500 to pay same off, and gave as security the mortgage upon which the bill herein is filed. The bill prays that the members of the syndicate may be ordered to contribute to the payment of the said mortgage moneys for which the said trustee is liable, "as the said Charles S. Drummond may be entitled to require and to this honourable court shall seem proper."

The amended bill further charges that for the better securing of the payment of the mortgage money thirteen members of the syndicate executed a bond in favor of the plaintiff, whereby each of them bound himself to pay the plaintiff $390 for each and every undivided share to which they were entitled in said lands, and prays that the said members so signing may

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be ordered to forthwith pay to the plaintiff the moneys so covenanted to be paid by them.

This bond is not taken into account in the following judgments as its execution by the appellants was not proved.

The cause was heard before Mr. Justice Dubuc, who found that the defendant, Drummond, was not entitled to a reformation of the mortgage, and that the plaintiff could properly claim the personal security of the other defendants in payment of this mortgage. On a re-hearing before Chief Justice Taylor and Mr. Justice Dubuc, the other two judges having been concerned in the cause while at the bar, the Chief Justice dissented from the decision at the hearing but Mr. Justice Dubuc adhering to his opinion his decision was affirmed. An appeal was then taken to the Supreme Court of Canada.

S. H. Blake Q. C. and *Wilson* for the appellants referred to *Nichols* v. *Watson* (1); *Clarkson* v. *Scott* (2); *Real Estate Loan Company* v. *Molesworth* (3); *Gandy* v. *Gandy* (4).

McCarthy Q. C. and *Howell* Q. C. for the respondents cited *Wenloch* v. *River Dee Co.* (5); *Blackburn Benefit Building Society* v. *Cunliffe* (6).

Sir W. J. RITCHIE C.J.—If the plaintiff cannot get at his right without trying and deciding a case between co-defendants the court will try and decide that case, and the co-defendants will be bound, but if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants the co-defendants will not be bound as between each other, by any proceeding which may be necessary only to the

(1) 23 Gr. 606.
(2) 25 Gr. 373.
(3) 3 Man. L.R. 116.
(4) 30 Ch. D. 57.
(5) 19 Q.B.D. 155.
(6) 29 Ch. D. 902.

decree the plaintiff obtains. *Cottingham* v. *Earl of Shrewsbury* (1).

There is no ground whatever shewn for reforming the mortgage. The plaintiff in this case lent his money on the security of the land, the personal security of the mortgagor, and the bond of the mortgagor and Ross, and not on the security of the parties for whose benefit the mortgagor held the property and therefore has no claim he can enforce against these latter parties, notwithstanding any claim the mortgagor may have against them should the property prove insufficient to meet the amount of the mortgage and interest. "The liability arises from the instrument only, and the extent of the obligation must be measured by the terms of the instrument only." Per Baggallay J. A. in *Beresford* v. *Browning* (2).

STRONG J.—In the early part of the year 1882 there were great speculations in real estate in the City of Winnipeg. Persons from all parts of Canada went there for the purpose of engaging in the purchase and sale of lands, among others the three appellants, Williams, who lived in Welland, Ontario; Vanwart, who lived in Fredericton, New Brunswick; and Slaven, who lived in Napanee, Ontario. These three and a number of others met together in February 1882, and formed themselves into a syndicate to purchase a large block of land fronting on the Assiniboine River in the residence portion of Winnipeg, with a view of laying the same out into 60 building lots, and offering them for sale at once. They purchased the block for $30,000 and paid $18,300 in cash, the balance $11,700 was to remain on mortgage bearing interest at 8 per cent per annum and payable one half in six months and the remainder in twelve months. Prior to the completion

(1) 3 Hare 638.

(2) 1 Ch. D. 37.

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of the formation of the syndicate Williams and Slaven returned to their respective homes and shortly after such completion Vanwart left for Fredericton.

The respondent C. S. Drummond was appointed trustee for the syndicate and a conveyance of the land was made to him and he assumed a mortgage then existing upon the land in favor of one Wilson for $5,500 and executed a mortgage for $4,000 to A. W. Ross, the vendor of one portion of the property, and another to his brother H. M. Drummond, the vendor of the remainder, for $3,500, making in all $13,000.

The day before he executed the two mortgages last referred to the trustee had obtained from a number of the members of this syndicate a bond of indemnity which recited that he had executed a mortgage on behalf of the syndicate upon the lands purchased for the sum of $11,700 to secure the balance of purchase money thereon.

This bond was ostensibly executed by Vanwart by attorney, but the learned judge at the hearing, Mr. Justice Dubuc, found that it was not proved to have been executed by Slaven and Williams.

The intention of the members of the syndicate was that the property should be sold at once, and the proceeds applied first in payment of the expenses connected with the sale, and the trustee's commission, and then in discharge of the mortgage for $11,700, and the balance was to be distributed among the members of the syndicate. This appears from the declaration of trust given by the trustee to Vanwart. It appears, however, by the evidence of Mr. Vass, the trustee's book-keeper who had charge of the matter, that the first proceeding to his knowledge taken to obtain a sale of the property was about the 18th November, 1882.

The first instalment of the mortgage given to Ross and H. M. Drummond fell due without the trustee

having realized anything to meet the same. An arrangement was then come to with an agent of the plaintiff to make the loan to secure which the mortgage which is the subject of the present suit was given.

Considerable delay took place in completing the loan owing to the trustee declining to alter the mortgage as executed so as to make himself personally liable, both mortgagor and mortgagee being under the impression that as executed the trustee incurred no personal liability thereunder, but certain bonds having been obtained to make up for this the matter was finally concluded and the money advanced by the plaintiff.

The bill as originally framed was for a sale of the mortgaged premises, and for a personal order against the trustee for payment. The trustee answered that at the time of the negotiation of the loan it was distinctly understood and agreed between him and the plaintiff that he was not to become personally responsible for the payment of the mortgage money, and he prayed for a reformation of the mortgage so as to make the same conform to the intention of the parties. He also set up that he was simply trustee for the members of the syndicate, and submitted that they were necessary parties to the suit. The plaintiff thereupon amended his bill and made the members of the syndicate or those representing them parties to the suit.

The amended bill further charged that the members of the syndicate agreed with the trustee to share with him the responsibility of and incidental to the purchase of the lands in question, and of the execution of the mortgages for $11,700 given or assumed for the balance of purchase money thereon, and that such last mentioned mortgages having become overdue, the trustee, in November, 1882, borrowed from the plaintiff $12,500 to pay the same off and gave as security the mortgage upon which the bill in this suit is filed. The bill as to the

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members of the syndicate prays that they may be ordered to contribute to the payment of the mortgage moneys for which the trustee is liable.

The amended bill further charged that for the better securing of the payment of the mortgage money thirteen members of the syndicate executed a bond in favor of the plaintiff, whereby each of them bound himself to pay the plaintiff $390 for each and every undivided share to which they were entitled in the lands, and prayed that the members so signing might be ordered forthwith to pay to the plaintiff the moneys so covenanted to be paid by them.

As neither of the appellants Williams or Slaven signed this bond its existence does not affect them. As to the appellant Vanwart, he not only did not sign the bond but never heard of it until after the commencement of this suit. One Deacon purported to sign the bond for him but, for the reasons set forth in the judgment of Taylor C. J., he had no authority so to do, and same was not binding upon Vanwart. So far, therefore, as the appellants are concerned this bond may be left out of consideration.

The cause came on for hearing before Mr. Justice Dubuc. The decree made by him directs a sale of the mortgaged premises, and that in case the proceeds, after deducting the plaintiff's costs, be insufficient to pay the amount due upon the plaintiff's mortgage all the defendants except Molesworth and Cruthers should severally contribute towards payment to the plaintiff of such deficiency in proportion to their respective shares according to the syndicate agreement of the schedule thereto annexed.

The bill was dismissed with costs as against Molesworth, who was a party to both of the agreements.

The three appellants caused the decree to be reheard before the court *in banc*, consisting of Chief

Justice Taylor and Mr. Justice Dubuc, the latter learned judge being obliged to sit owing to the two remaining judges of the court having been engaged in the case while at the bar. The Chief Justice pronounced a judgment in favor of the present appellant, but as Mr. Justice Dubuc adhered to his original judgment the court was equally divided and the rehearing was dismissed with costs. From this last judgment the appellants now appeal.

The learned Chief Justice of Manitoba has written a very full judgment in this case, and I so entirely agree with him that I do not feel called upon to do more than deal very briefly with the principal points which have been the subject of debate both here and in the court below.

There is no direct privity of contract between the respondent Balfour and the appellants. The appellants, Williams and Slaven did not execute the indemnity agreement and, of course, were not liable upon it in any way ; and, as the Chief Justice of Manitoba, has shewn, Vanwart is in exactly the same position, Deacon who assumed to execute it in his name having no authority whatever to do so. This being the state of facts I know of no principle which entitles the mortgagee to a personal decree against them. No case directly in point has been cited and the cases referred to are contradictory, and such of them as the plaintiff relies upon are of very doubtful authority, so much so that before I acted upon them I should require much stronger reasons for the practice they sanction than any I have heard advanced in argument or found stated in any reported decision. The weight of authority in Ontario is altogether against such an order ; the case of *Campbell* v. *Robinson* (1), as Chief Justice Taylor has pointed out,

(1) 27 Grant 634.

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is clearly distinguishable, the personal order there made being for the benefit of the mortgagor who had become a mere surety for the purchasers of the equity of redemption, and was, therefore, considered on that distinct ground entitled to indemnity from them. I should not, however, be inclined to follow even that case, as I do not see how the question could, on the pleadings, have been properly raised between the co-defendants. The liability of a party defendant to a foreclosure suit to have a personal order made against him by the Court of Equity is to be ascertained by an inquiry as to what his liability would have been in a common law action before, by statute or by general orders made under statutory authority, jurisdiction to entertain the legal personal remedy was conferred on the equity court, the object of such statutes and orders having been merely to avoid circuity and multiplicity of suits, and not in any way to enlarge the liabilities of the mortgagor or owner of the equity of redemption.

Such cases as *Campbell* v. *Robinson* do not, however, apply at all. What the plaintiff seeks is to be placed in the position of Drummond, the trustee, as regards his right to indemnity from his *cestuis que trust* No authority is produced warranting such relief. But be that as it may, it appears that Drummond having deliberately taken an express formal indemnity from the other members of the syndicate in the shape of the covenant to which the appellants were not parties, he has thereby shown his intention to rely on that express indemnity, and is therefore restricted to it; see *Mathew* v. *Blackmore* (1). Therefore, even if we were to put the plaintiff in Drummond's shoes, that would not entitle him to a personal order against the appellants. Moreover, as Chief Justice Taylor has demonstrated,

(1) 1 H. & N. 762.

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such an order as is sought here, giving a third party the benefit of equities and rights, arising either under express contract or upon equitable principles, entitling a trustee to indemnity from his *cestui que trust*, would be not only unsupported by authority but in direct opposition to numerous authorities, both at law and in equity, establishing that a third person is not entitled to enforce such rights and equities even in the very plain case of a covenant entered into between two to pay money into the hands of such third person, or to do some other act for his benefit. *Colyear* v. *Lady Mulgrave* (1). In the United States it may, as regards some of the States, be different for the doctrine that a stranger to the covenant, or to the consideration, cannot sue does not prevail there except in a few States, and the courts of the State of New York especially hold a contrary doctrine.

As regards the right of Drummond to enforce any equitable claim for relief against his co-defendants the present appellants, independently of the ground for refusing such relief already adverted to,(namely that by taking the express covenant he impliedly relinquished all claims upon the other *cestuis que trust)* it is very clear that he could have no such relief in this suit, in which the appellants have had no apportunity to answer his demand, and in which no issue has been raised as between them and Drummond.

For these reasons, I am of opinion that we have no alternative but to allow this appeal with costs. The appellants are also entitled to the costs of the court below on the re-hearing as well as on the original hearing.

The case for reformation of the mortgage on the ground of mistake set up by Drummond requires no observations ; it entirely fails on the evidence, as the

(1) 2 Keen 81.

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Chief Justice in his judgment in the court below has conclusively shown.

FOURNIER J. – I am of opinion that the appeal should be dismissed.

TASCHEREAU J.—I would dismiss this appeal and hold the appellants personally liable on the grounds taken by Mr. Justice Dubuc in the court below.

PATTERSON J.—Concurred in the judgments allowing the appeal.

Appeal allowed with costs.

Solicitors for appellants : *Aikens, Culver & Co.*

Solicitors for respondent Balfour : *Vivian & Dodge.*

Solicitors for respondent Drummond : *Hough & Campbell.*

HOBBS, OSBORNE & HOBBS (DEFENDANTS) ..... } APPELLANTS ;

AND

THE ONTARIO LOAN AND DEBENTURE COMPANY (PLAINTIFFS)..... } RESPONDENTS.

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*Mar. 17.
*Dec. 10.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Landlord and tenant—Creation of tenancy by mortgage—Demise to Mortgagor—Construction of—Rent reserved—Intention to create tenancy.

A mortgage of real estate provided that the money secured thereby, $20,000, should be payable with interest at 7 per cent. per annum as follows: $500 on December 1st, 1883 ; $500 on the first days of June and December in each of the four following years ; and $15,500 on June 1st, 1888 ; and it contained the following provision : "And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured, undisturbed by the mortgagees or their assigns, he, the mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso, without any deduction. And it is agreed that such payments when so made shall respectively be taken, and be in all respects in satisfaction of the moneys so then payable according to the said proviso." The mortgage did not contain the statutory distress clause, or clause providing for possession by the mortgagor until default and it was not executed by the mortgagees. The mortgagor was in possession of part of the premises and his tenants of the remainder and such possession continued after the mortgage was executed. The goods of the mortgagor having been seized under execution the mortgagee claimed payment of a year's rent under the Statute of Anne.

Held, per Strong, Gwynne and Patterson JJ. (Ritchie C.J. and Taschereau J. dissenting,) the mortgage deed failed to create between

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

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the mortgagor and mortgagees the relation of landlord and tenant, so as to give the mortgagees the right to distrain for arrears of rent, under the provisions of 8 Anne c. 14, as against an execution creditor of the mortgagor; because, even if the deed could operate as a lease although not signed by the mortgagees, the rent reserved was so unreasonable and excessive as to show conclusively that the parties could not have intended to create a tenancy and that the arrangement was unreal and fictitious.

The right to impugn the validity of a lease between a mortgagor and mortgagees on the ground that it is merely fictitious and colorable is not to be confined to any particular class such as assignees in bankruptcy, but may be exercised wherever the interests of third parties may be involved.

Per Strong J. The excution of the deed by the mortgagor estopped him from disputing the tenancy, and the mortgagees were also estopped by their acceptance of the mortgagor as their tenant, evidenced by their accepting the deed, advancing their money upon the faith of it and permitting the mortgagor to remain in possession.

The mortgage deed, although executed by the mortgagor only, operated in any event to create a tenancy at will, at the same rental as that expressly reserved by the demise clause. Sec. 3 of 8 & 9 Vic. c. 106, (R.S.O. c. 100, sec. 8,) has not the effect of repealing the words of the statute of frauds which make the lease required by that statute to be in writing signed by the lessor so far effectual as to create a tenancy at will.

Per Gwynne and Patterson JJ. The mortgage deed not having been signed by the mortgagees failed to create even a tenancy at will.

Per Gwynne J. The form adopted for the demise clause is such that by the mortgagees executing the deed it would operate as a lease, and by their not executing it the clause would be simply inoperative.

Per Ritchie C.J. and Taschereau J. The execution of the mortgage by the mortgagor and continuing in possession under it amounted to an attornment and the relation of landlord and tenant was created. The deed was intended to operate as an immediate lease with intent to give the mortgagees an additional remedy by distress and was a *bonâ fide* contract for securing the payment of principal and interest, and in the absence of any bankruptcy or insolvency laws there was nothing to prevent the parties from making such a contract.

APPEAL from a decision of the Court of Appeal for

Ontario (1) reversing the judgment of the Queen's Bench Division (2) in favor of the defendants.

The facts of the case are sufficiently set out in the head-note and in the following judgments of the court. At the trial judgment was given for the plaintiffs, the learned judge holding that while the rent would be unreasonably excessive if the tenancy was treated as for the whole term of five years, yet that the term was divisible and there was a good lease for four and a-half years at $1,000 a year. The Divisional Court reversed this decision and held that no real tenancy was created. The Court of Appeal, in turn, reversed the decision of the Divisional Court and held in favor of the tenancy. The defendants appealed to this court.

Gibbons for the appellants cited *Trust and Loan Co.* v. *Lawrason* (3); *Ex parte Voisey* (4); *Ex parte Jackson* (5).

Moss Q.C. for respondents referred to *Ex parte Punnett* (6); *Alton* v. *Harrison* (7).

SIR W. J. RITCHIE, C.J.—I think there is nothing in this case to lead one to doubt the *bona fides* of this transaction, or to lead to the conclusion that as a matter of fact the partners did not intend to create the relationship of landlord and tenant; the mortgagor was, at the time of the execution of this mortgage, in perfectly solvent circumstances, and the mortgagee advanced his money by way of loan on the security of this mortgage and the provisions contained therein. The mortgagor was the owner of this land in fee and he conveyed it by way of mortgage to the mortgagee. I cannot understand why the redemise clause cannot be treated as a lease, or as creating a tenancy. The

(1) 16 Ont. App. R. 255.
(2) 15 O. R. 440.
(3) 6 Can. S.C.R. 286.
(4) 31 Ch. D. 442.
(5) 14 Ch. D. 125.
(6) 16 Ch. D. 226.
(7) 4 Ch. App. 622.

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mortgagee was at law the owner of the land in fee, what then prevented him from making a lease for the term mentioned in the mortgage?

I think the payments made must be taken to have been made as rent payable in accordance with the terms of the mortgage. Why should this clause be eliminated from the mortgage, what right have we to say that the mortgagee would have advanced his money without the security of this clause, and does not this very litigation show that such a relationship was for the better securing the payment of the mortgage money?

What right have we to say, contrary to the express language of the redemise clause, that that was a provision merely that the mortgagor shall remain in possession until default? Why, if that was the intention, was it not so treated and plainly expressed? Why should we be called on to say that the parties intended that the contract should be different from that expressed in the deed by which his right to remain in possession rests on the express demise creating the relation of landlord and tenant?

I think that after the execution of the mortgage and continuing in possession under the mortgage amounted to an attornment and the relation of landlord and tenant was created.

I think the deed was intended to operate as an immediate lease with intent to give the mortgagee an additional remedy by distress.

There was no bankruptcy law in existence when this deed was excuted. In the absence of any bankrupt or insolvent laws, what was to prevent the parties making this contract? What right have we to say it does not express the true bargain and that a tenancy was not created which the parties expressly say shall be created?

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The mortgagor agrees that a tenancy shall exist on the terms mentioned in the mortgage and this deed is delivered to the mortgagees who accept and assent to it, and the mortgagor pays rent under it. What more perfect attornment could there be? What stronger language could be used to show that a tenancy was created and the mortgagor assumed the position of tenant at the rent specified.

I think there is no ground for saying that this was a mere device for evading the bankruptcy or insolvent laws, in fact it could not be, for there were no bankrupt or insolvent laws to evade nor to defraud or interfere with any others, and therefore the rent reserved, even if out of proportion to the annual value, is no objection to the demise.

I think the contract in this case was a *bonâ fide* contract a reality and no sham by which the relation of landlord and tenant was established for securing the payment of principal and interest on the mortgage security. I will only cite one authority which I consider conclusive; other cases bearing on this question have been so fully discussed in the court below that I do not deem it necessary to refer to them, all of which, in my opinion, fully justify the decision at which the Court of Appeal have arrived. It is the case of *Ex parte Voisey* (1).

Jessel, M.R. says:

> But some other points have been taken. It was said that there was no tenancy at all, because you cannot make a tenancy except by agreement, and that, as the mortgage deed was not executed by the mortgagees, there is no agreement. The fallacy of that argument appears to me to be in confounding agreement with evidence of agreement. Certainly there must be an agreement, or else you cannot have a tenancy, but an attornment may be evidence that the landlord has entered into an agreement for a tenancy. In this case we have an attornment to the legal owner by deed executed by the

(1) 21 Ch. D. 456.

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tenant in possession and delivered to the legal owner—very good evidence of a tenancy—evidence, therefore, of an agreement for a tenancy, and as was said in *Ex parte Punnett* (1) that is an estoppel in pais which would prevent the tenant from denying the tenancy. Therefore, there is in this case a well created tenancy.

Page 457. Brett J. says:

Now the stipulation which is called an attornment, if it be a *bonâ fide* and honest transaction, is a contract in writing between the two parties to it. It is signed by only one of them, if you please, but it is delivered by that person to the other, and kept by him, and the intention of it is that it shall form a contract and, if that be so, it is a contract. If it is a contract, it is a contract in writing, and if it be a *bonâ fide* contract, and is in writing, the effect of it depends entirely upon the construction of the writing.

And at page 459:

That raises the question whether the contract was a *bonâ fide* one. Now, in what sense can it be said that it is not *bonâ fide?* Whatever may be its terms, and however excessive the rent, it is not a fraud as between the parties, because nothing was concealed by the one from the other, and both agreed to the terms. Therefore it could not be a fraud as between the parties. It was not intended to defraud any known individual. It cannot, therefore, in the ordinary sense of the term, be a fraud at all. The only way in which it can cease to be a *bonâ fide* contract is if it was not intended to be acted upon between the parties at all, and was only a device to evade the bankruptcy laws. That would not be what is ordinarily called a fraud, but it would be what is called a fraud upon the bankruptcy laws, that is, an attempt to evade the bankruptcy laws in case of a bankruptcy. Now that attempted evasion, that want of *bonâ fides* with regard to the bankruptcy law, must exist, if at all, at the moment when the contract is made. Therefore what we have to consider is this (and this is the real meaning of *Ex parte Williams* (1) at the time when the contract was made it was made for the purpose of its being acted upon between the parties, whether there should be a bankruptcy or not, or, although in terms it appears to be made between the parties with the intention that it should be acted upon whether there is a bankruptcy or not, were their minds really then fixed upon this, that it was to be acted upon only if there should be a bankruptcy? In other words, they must have had bankruptcy in their contemplation at the time of making the contract, they must have contemplated evading or attempting to evade the fair distribution of the mortgagor's property in case

(1.) 16 Ch. D. 226. (2) 7 Ch. D. 138.

of his bankruptcy. That seems to me to be the true proposition and the true principle of the law which is laid down in *Ex parte Williams* (1).

And at page 461 he says :

I take it that the question is whether there was a real honest stipulation between the parties, intended to be acted upon whether there should be a bankruptcy or not, or whether it was a stipulation which they intended to be acted upon only for the purpose of defeating the bankruptcy law.

Cotton J. at page 464 says :

Of course the question is, was the transaction a sham or a reality ? and I think we ought in the present case to take it to be a reality and not a sham. And, if we come to this conclusion, there being nothing to prevent a mortgagee and a mortgagor from agreeing together that the relation of landlord and tenant shall exist between them, we cannot deprive the mortgagee of the consequences resulting from the legal relation which has been honestly and really constituted by the contract between the parties.

Jessel, M. R. at page 465, says :

I wish to add that I entirely agree in the observations of Lord Justice Brett, as to the principles of law which are te extracted from *Ex parte Williams* (1) and the two subsequent cases.

I think, therefore, that the appeal should be dismissed.

STRONG J.—This was an interpleader issue. The appellants who were the defendants in the issue were execution creditors of David Darvill and under their executions certain goods and chattels, the property of the execution debtor, were seized by the sheriff of Middlesex. These goods were, at the time of the seizure, upon certain lands and premises of the execution debtor which had previously been mortgaged by him to the respondents. The respondents insisted that under the terms of this mortgage the relation of landlord and tenant had been created between themselves and the mortgagor, and that a rent equal to the instalments of principal and interest of the mortgage

(1) 7 Ch. D. 138.

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debt, which the mortgagor had covenanted to pay, had been duly created, and they claimed that the sheriff should not remove the goods seized by him from the mortgaged premises until certain arrears of the rent mentioned should be paid to them, pursuant to statute 8 Anne ch. 14.

The mortgage was to secure the repayment of a loan of $20,000 and interest, and was, by indenture dated the 31st May, 1883, the parties to the deed being David Darvill the mortgagor, and the present respondents the mortgagees. It contained the following proviso for defeasance, viz.:

Provided, this mortgage to be void on payment of twenty thousand dollars of gold coin of legal tender in Canada, or at the option of the mortgagees or their assigns, the then equivalent thereof of lawful money of Canada, with interest of seven per cent. per annum as follows:—Five hundred dollars of the said principal sum to be paid on the first of December next (1883); five hundred dollars on the first day of each of the months of June and December in each of the four following years: 1884, 1885, 1886 and 1887, and fifteen thousand five hundred dollars, being the balance of the said principal sum, on the first day of June, in the year eighteen hundred and eighty-eight. And the interest at the rate aforesaid, likewise of gold coin or its equivalent as aforesaid, on the unpaid principal from the first day of the month of June, 1883, to be paid semi-annually on the first day of each of the months of June and December, in each year, until the said principal sum and interest shall be fully paid and satisfied. The first of said semi-annually payments of interest to become payable on the first day of December, in the year eighteen hundred and eighty-three.

There was also a power to take possession and sell in case of default in payment conferred by the following words:

Provided, that the said mortgagees, on default of payment for one month may, on one month's notice, enter on and lease or sell the said lands. Provided also that any such sale may be for cash or on terms of credit, and that in case of default of payment as in foregoing proviso mentioned, for three months, the foregoing powers of entry, leasing and sale, or any of them may be exercised without any notice having been given as therein provided.

And there was also in the deed the following clause

purporting to be a demise of the mortgaged property by the mortgagees to the mortgagor:

And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured, undisturbed by the mortgagees or their assigns, he, the mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount, the amount payable on such days respectively, according to the said proviso without any deduction. And it is agreed that such payments when so made shall respectively be taken and be in all respects in satisfaction of the moneys so then payable according to the said proviso. Provided always, and it is agreed that in case any of the covenants or agreements herein of the mortgagor, his heirs, executors, administrators or assigns, be untrue, or be unobserved or broken at any time, the mortgagees, their successors or assigns, may without any previous demand or notice enter on the said lands or any part thereof, in the name of the whole, and take and retain possession thereof, and determine the said lease. And no reconveyance, release or discharge from these presents, of any part or parts of the said lands by the mortgagees or their assigns shall cause an apportionment of the said rent, but the whole thereof shall be payable out of the remainder of the said lands.

The mortgage deed was duly executed by the mortgagor but not by the mortgagees. The sheriff having seized the goods of the mortgagor found upon the mortgaged premises under the execution of the appellants, the respondents on the 8th June, 1887, served him with a notice that there was due to them for rent reserved in respect of the tenancy alleged to have been created by the mortgage, the aggregate amount of $3,180, being composed of the three payments which had fallen due in June and December, 1886, and in June, 1887, and they required the sheriff not to remove the goods until they were paid. The appellants disputed this claim. Thereupon the sheriff obtained the interpleader order, whereby it was directed that an issue should be tried to ascertain the rights of the respective parties. An issue was accordingly framed

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in which the present respondents were plaintiffs and the appellants defendants; whereby the question to be determined was stated to be whether the respondents were entitled as landlords of David Darvill or otherwise under the mortgage from said David Darvill to the plaintiffs dated the thirty-first day of May, A. D. 1883, to be paid out of the moneys realized on the sale of the goods and chattels of said David Darvill, seized on the first day of June, A.D. 1887, in execution by the sheriff of the county of Middlesex, the sum of $1,077.50 and $1,060.00 due to the plaintiffs for arrears of rent or otherwise under said mortgage, and payable on the first day of June, 1886, and the first day of December, 1886, respectively, in respect of the lands upon which the said goods and chattels were at the time of the seizure and sale thereof, or some part thereof, as against the execution creditors.

This issue came on to be tried at the Middlesex assizes before Mr. Justice Rose and a jury, when the learned judge having discharged the jury reserved the case for further consideration and subsequently found the issue in favour of the present respondents and entered judgment for them accordingly. Upon motion to the Divisional Court of Queen's Bench this judgment was set aside and judgment was ordered to be entered in favour of the appellants. The respondents then appealed to the Court of Appeal by which court the order of the Divisional Court was reversed and the judgment of Mr. Justice Rose restored. The judgments in the Divisional Court and in the Court of Appeal were respectively concurred in by all the learned judges who took part in those decisions.

It is well settled by authority that it is competent for the parties to a mortgage of real property to agree that in addition to their principal relation as mortgagor and mortgagee they shall also as regards the mortgaged

lands stand towards each other in the relation of landlord and tenant, the mortgagor thus remaining in possession as the tenant of the mortgagee. It is, however, essential to the validity of such an arrangement that it should be so carried out as to comply with the requirements of the law prescribed for the creation of leases, and further that it should appear that it was really the intention of the parties to create a tenancy at the rental (if any) which may be reserved and not merely under colour and pretence of a lease to give the mortgagee additional security not incidental to his character of mortgagee. If these conditions are complied with the relation of lessor and lessee is considered to be established not merely as between the parties themselves but in respect of third persons also. In such a case it has been held that the mortgagee may distrain for rent in arrear upon the goods of a stranger found upon the mortgaged or demised lands, and it also follows that in a case like the present, he is entitled to insist as against the sheriff and the execution creditors of the mortgagor upon the rights conferred on landlords by the statute 8 Anne ch. 14 and claimed by the respondents in the present instance. It is somewhat remarkable that the right of the mortgagee to distrain the goods of a stranger does not appear to have been finally determined by judicial authority in England until a date so recent as 1883, when in the case of *Kearsley* v. *Philips* (1), it was so decided by the Court of Appeal. Previously, however, to the date of this decision in *Kearsley* v. *Philips* the courts of Ontario had in many cases recognized this right of distress and it may now be regarded as well established, subject however, to the conditions already mentioned.

The questions we have to deal with in the present case are two, namely, 1st, was the mortgage deed, having

(1) 11 Q.B.D. 621.

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regard to the fact that it was executed by the mortgagor only and not by the mortgagees, sufficient to create any tenancy at all between the parties at the rent assumed to be reserved by its terms, three gales of which are claimed by the mortgagees by the notice served on the sheriff; and 2ndly if the instrument was itself sufficient does it appear to have been the real intention of the parties, in good faith, to constitute between themselves the relation of landlord and tenant and that at a real rental or was the arrangement not real but merely a fiction or sham entered into for no other purpose than to obtain for the mortgagees an additional security similar to that which a landlord would have by means of the common law right of distress upon such goods as might be found upon the premises. Upon the first question I am of opinion that the mortgage executed as it was was sufficient to create a tenancy. In support of their position under this head the respondents have relied principally upon two cases, *Morton* v. *Woods* (1) and the same case in the Exchequer Chamber (2) and *West* v. *Fritche* (3). It appears to me, however, that neither of these cases exactly covers the question arising here, though the judgments delivered in *Morton* v. *Woods* do I think contain the enunciation of principles which greatly assist in deciding the point now under consideration. In *Morton* v. *Woods* the clause of the mortgage which was relied on as creating the tenancy was in its terms different from that in the instrument before us; it was in form an attornment clause, by which the mortgagor declared that he attorned to and became tenant to the mortgagees; in the present case the clause (before stated) is in terms a demise by the mortgagee to the mortgagor. It seems, however, that this is an immaterial difference; in this case as in the case of the

(1) L.R. 3 Q.B. 658. (2) L.R. 4 Q.B. 293.
(3) 3 Ex. 216.

attornment clause there is an admission under seal by the mortgagor of the terms of the demise and by force of the words "yielding and paying therefor" a covenant to pay the rent. This coupled with the facts that the mortgagees advanced their money on the faith of all the provisions contained in the deed and that the mortgagor was allowed to remain in possession after the execution of the mortgage and as it must be assumed under the provision in question would it seems to me amount to an estoppel binding the mortgagor as well as the mortgagee, and which would therefore be sufficient to constitute a tenancy unaffected by the provisions contained in the statute of frauds and in the eighth section of the revised statutes of Ontario, 1887 ch. 100 (a re-enactment of the Imperial Act 8 & 9 Vic. ch. 106 sec. 3). These enactments require that when a lease for more than three years depends on the conventional acts of the parties it must be evidenced by a deed; but this in no way interferes with the doctrine of estoppel which proceeds upon the principle not that there is sufficient legal evidence of a demise but that the parties are by their acts debarred from disputing that fact. Therefore I should, if there were no other grounds for so determining, be prepared to hold that the mortgagor's execution of the deed estopped him from disputing the tenancy and that the mortgagee was also estopped by his acceptance of the mortgagor as his tenant evidenced by his accepting the deed, advancing his money upon the faith of it and permitting the mortgagor to remain in possession. This conclusion would, I think, be fully supported by the case of *West* v. *Fritche* (1).

In *Morton* v. *Woods* it was not necessary to have recourse to the doctrine of estoppel for the purpose of establishing that there was a demise, though it was resorted to in order to get over another difficulty there

(1) 3 Ex. 216.

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arising, that from the circumstance of there having been a prior outstanding mortgage there was no legal reversion in the mortgagor.

The objection founded upon the requirements of the statute making a deed essential to the creation of a tenancy for more than three years was got over in a different way. It was there held that inasmuch as it appeared that upon the true construction of the attornment clause the parties did not intend to create a tenancy for a term but a mere tenancy at will, the statutes did not apply; and that all that was requisite for the creation of such tenancy at will was some evidence even by parol to that effect. Further, that there had been an actual present demise by the mortgagee to hold at the will of the latter and that this was to be implied from the execution by the mortgagor of the mortgage deed containing the attornment clause, and from the assent to its terms by the mortgagee to be inferred from his acts in advancing the money on the faith of the deed allowing the mortgagor to continue in possession and otherwise acting on the mortgage. The statutes therefore had no application whatever, and by the agreement of the parties without in any way resorting to the doctrine of estoppel a good parol demise or lease at will was made out. The difficulty occasioned in the present case by the non-execution of the mortgage by the mortgagee might be got over in precisely the same way if it were possible to say that upon the true construction of the mortgage deed the parties intended to create only a tenancy at will. This, however, I am unable to do, for, differing with great respect from Mr. Justice Burton, I have failed to discover from the terms of the deed that any other tenancy was designed to be created than one which was to continue until the expiration of the time

limited for the last payment under the mortgage on the 1st of June, 1888.

There is, however, another alternative by which as it seems to me this technical objection might be surmounted. In the judgment of the Exchequer Chamber, in *Morton* v. *Woods*, (1) delivered by Chief Baron Kelly, the following passage occurs :—

> But even if there were any doubt upon the construction of this instrument as to the intention to create a tenancy at will only, and if as was contended on behalf of the plaintiffs, it be taken to have been the intention to create a term of ten years the operation of the statute puts an end to the question. For if it had been clearly intended to grant a lease of ten years, the lease being by parol only by reason of the non-execution of the deed by the mortgagees, by the express words of the statute of frauds the lease is not absolutely void but has the effect of a lease at will. From the execution of the deed therefore, or on the attornment by the mortgagor he became tenant at will to the defendants and there being a rent of the specified amount of $800, appearing on the face of the deed a distress by them for that specific rent would be lawful.

Although this was a dictum merely and was not required for the purposes of the decision in *Morton* v. *Woods*, it indicates a safe ground upon which to rest the determination of the point now under consideration in the present case. Assuming that I am wrong as to the estoppel, and aside from that principle altogether, there was here an assent by both parties to the demise clause purporting to create a present lease for a term of five years—that is to say, an assent by the mortgagor in signing and sealing the deed and in remaining in possession under it, and an assent by the mortgagees by their adoption of its terms, by acting upon it in the way they did advancing their money, and allowing Darvill, the mortgagor, to continue in possession. There was, therefore, in fact, an actual present lease which would have been a good parol lease at common law for the whole term, though it was not actually valid as such for the reason that it did not comply with statutory requirements.

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(1) L. R. 4 Q. B. 293.

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By the express provision of the Statute of Frauds, however, as the Chief Baron pointed out in *Morton* v. *Woods*, a parol lease for a term exceeding three years is void as to the term, but is, nevertheless, to operate so far as to create a tenancy at will; and there is nothing in the subsequent statute enacting that when the statute of frauds required a writing signed by the lessor a deed should be requisite, and that the lease should be void if not made by deed, which repeals the words of the statute of frauds making the lease in such a case so far effectual as to create a tenancy at will. The later statute is to be read and construed merely as substituting a deed for the signed writing required by the earlier enactment, and the avoidance of the lease has reference only to its nullity as a lease of a term; the tenancy at will arising in such a case is not created by, nor is it dependent on the lease, but is a creation of the statute, a statutory consequence of the attempt to create a lease by parol for more than three years, and of the nullity of such a proceeding declared by the statute. There is, therefore, no more inconsistency between this implied or resulting tenancy at will raised by the statute and the provision that the lease shall be a nullity if not by deed, than there was between the original enactment that the lease should be wholly void unless in writing and signed by the lessor, and the proviso which followed saying that in such a case there should be a tenancy at will. This proviso is still preserved, although the lease for term must now be made by deed. In other words, it is apparent that the tenancy at will in such a case did not arise from the agreement of the parties, but was the effect of the statute which has never been repealed.

Then to apply this principle to the present case it must be held that the parties having attempted to

create a term of five years by a parol lease, which, as I have said, must be the result of the mortgagor having signed and sealed the deed, and of the mortgagees having assented to its terms by acting upon it in the way before mentioned, the consequence follows that this parol demise being void under the statute as a lease for five years operates as a tenancy at will under the provision of the statute of frauds. And if there was a tenancy at will it must have been a tenancy at the same rental as that expressly reserved by the demise clause in respect of the void lease. For these reasons the objection to the judgment of the Court of Appeal based on the non-execution of the mortgage deed by the mortgagees wholly fails.

The language of the Master of the Rolls (Jessel) in the case of *Ex parte Voisey* (1), is applicable to both points on which, as it appears to me, the objection founded on the non-execution of the deed by the mortgagee fails, on estoppel and agreement. As I have already shown, agreeing in this respect with Mr. Justice Osler, there can be no material difference between the demise clause in the deed before us and what is called the attornment clause generally found in the mortgages which have come in question in the English cases, and the execution by the mortgagor alone of the demise clause in the present mortgage, its acceptance by the mortgagee was just as effectual as an acknowledgment of tenancy, as would have been the execution by the mortgagor alone of an attornment clause. This being so the following language of the Master of the Rolls in *re Voisey* seems conclusive. Sir George Jessel there says :—

> But some other points have been taken ; it was said that there was no tenancy at all, because you cannot make a tenancy except by agreement, and as the mortgage deed was not executed by the mort-

(1) 21 Ch. D. 442.

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gagees there is no agreement. The fallacy of that argument appears to me to be in confounding agreement with evidence of agreement. Certainly there must be an evidence or else you cannot have a tenancy, but an attornment may be evidence that the landlord has entered into an agreement for a tenancy. In this case we have an attornment to the legal owner by deed executed by the tenant in possession and delivered to the legal owner, very good evidence of a tenancy, evidence therefore of an agreement for a tenancy, and as was said in *ex parte Punnett* (1) that is an estoppel *in pais* which would prevent the tenant from denying the tenancy. Therefore there is in this case a well created tenancy.

Further, I think it would not be difficult to demonstrate that for equitable reasons based on the doctrine of part performance this first objection is not sustainable. I think it unnecessary, however, to enter upon a consideration of them, as I consider what has already been said sufficient for the purpose.

It remains to consider the objection to the clause of tenancy, contained in this mortgage, which is based on the more substantial ground that it was not intended by the parties in reality to constitute by it the relation of lessor and lessee, but merely to give by means of it to the mortgagees a right corresponding to that which in case of a *bonâ fide* lease the lessor has to exercise the common law power of distress, and thus to extend the mortgagees' security to the chattel property which might be found on the mortgaged premises ; in other words, it is insisted that upon the evidence as to the annual value of the property it must be taken as established that the tenancy which the parties assumed to create was not a *bonâ fide* lease but was, to use the expression applied in some of the English cases, a sham, a mere colourable contrivance, to obtain the benefit of the power of distress, which in the case of a real lease the law gives to the landlord as an incident of his reversion and by this means

(1) 16 Ch. D. 226.

to acquire a priority over the creditors of the mortgagor having executions against his chattels, and also to seize and sell the goods of third persons which might be found upon the premises. I confess it is not easy to see for what object these clauses of tenancy, inserted in mortgages, were designed, except for the purpose of conferring on the mortgagor the power of making all distrainable chattel property found on the premises available towards the satisfaction of the principal and interest of the mortgage debt, and as the right of distress must necessarily in every case where it comes in conflict with the rights of assignees in bankruptcy of execution creditors or of a third person owning goods found upon the land, have the effect of prejudicing their rights in a most unjust manner I should have thought that in all cases in which a conflict occurs the right of honest creditors and innocent third parties ought to prevail over an arrangement which could only be attributed to the object mentioned or at least that this should be so in all cases where the security of the land being ample, the mortgagor, if this device of creating a tenancy had not been open to him, would never have thought of taking possession. The authorities, however, have, beyond doubt or question, established the validity of such agreements in all cases where it appears that the intention of the parties was to create a real tenacy at a real rent. The advantage accruing to the mortgagee from such a tenancy must, for some reason, be considered of considerable value, for by it there is conferred upon him a very onerous obligation, viz., the liability to account to subsequent mortgagees not only for rents actually received, but for such as might without wilful default have been received, and th mortgagee is thus compelled for his own protection to be active in enforcing his right as a lessor though his security otherwise may be ample; he is thus as it were

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converted into a bailiff for subsequent incumbrancers, a position which I should have thought not desirable for a mortgagee with a sufficient security, however it might be with one whose security was not ample. However, the practice of conveyancers, both in England and in this country, to insert such clauses seems to have become universal, and the decisions of the courts have now too firmly settled the validity of such provisions in mortgages to admit a doubt of their legal validity in proper cases. It is, however, laid down in several cases lately decided by the English Court of Appeal, that, however binding these claims may be between the actual parties, it is open to third persons affected by their enforcement to impeach them in cases in which it may appear from the evidence that they were not intended to create a real tenancy, but were designed merely as a cloak for an additional security to the mortgagee. The principal authorities in which this has been held or in which the doctrine has been recognized are the following, viz.: *Ex parte Williams* (1); *ex parte Stockton Iron Co.* (2); *ex parte Jackson* (3); *ex parte Punnett* (4); *ex parte Threlfall* (5); and *ex parte Voisey* (6). Perhaps I ought to have omitted from this list the first case mentioned, that of *ex parte Williams*, as the *ratio decidendi* in that case was that well known principle applied under bankruptcy and insolvency statutes, that any provision by a debtor that in the event of his becoming bankrupt or insolvent there shall be a different distribution of his effects from that which the law provides is void [see *Watson* v. *Mason* (7)]; the deed in that case did provide for an advantage to arise to the mortgagee from the tenancy clause in

(1) 7 Ch. D. 138.
(2) 10 Ch. D. 336.
(3) 14 Ch. D. 726.
(4) 16 Ch. D. 226.
(5) 16 Ch. D. 274.
(6) 21 Ch. D. 442.
(7) 22 Gr. 574.

the case of bankruptcy. It is obvious that this doctrine has no application to the present case. Here we have nothing to do with bankruptcy, or insolvency statutes, and I only point this out to avoid confusion. The dicta in this case of *Ex parte Williams* are broad enough to cover the law as laid down in the subsequent decisions. The other cases, however, do establish the law as I have stated it, and are distinct authorities for the proposition that if it appears that the tenancy for which the mortgage deed provides is not intended by the parties to be a real lease, at a real *bonâ fide* rent, but is a mere sham and pretence intended merely to give the mortgagee the extraordinary remedies of a landlord, such a clause is void at least as against the assignees in bankruptcy of the mortgagor; and it has also been held that in case it should appear from evidence that the rent was greatly in excess of the annual value of the mortgaged premises, and such a rent as no *bonâ fide* tenant would think of paying, the fact that such an excessive and unreasonable rent had been reserved was conclusive to show that the parties could not have intended to create a tenancy, and that the arrangement must therefore be considered unreal and fictitious.

In *Ex parte Jackson* (*ubi supra*) Baggallay L.J. says :

> Now as was pointed out by the Master of the Rolls, *in re Stockton Iron Furnace Company*, there was nothing unreasonable in the original introduction into mortgage deeds of attornment clauses in cases in which the mortgagor was in possession of the mortgaged premises. If the mortgaged premises had been occupied by a stranger the mortgagee could at any time have demanded from him payment of his rent in arrear and he could have applied any rent paid to him under such a demand in discharge in whole or part of the interest in arrear on his mortgage and if the rent received by him was more than sufficient to discharge the interest it could be applied in discharge or satisfaction *pro tanto* of the mortgage debt. Now so far as any inference can be drawn from the practice of inserting attornment clauses it appears to me that the benefit to be derived by the attornment clause was in-

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tended to be an equivalent for that which the mortgagee would have derived from the rent if the tenant had been a stranger. What would that equivalent be? Would it not be the right to the payment of a fair and reasonable rent such as an ordinary tenant would be willing to give for the property under ordinary circumstances. That as it seems to me, is the rent for which a properly prepared attornment clause should make provision; not necessarily the exact amount which a tenant would pay for the property, but such an amount as a willing tenant would probably pay as a *bonâ fide* rent. If the rent so reserved is clearly in excess of what would be a fair and reasonable rent it appears to me though that you may call it rent, it is no longer a real rent but a fictitious payment under the name of rent.

In this same case of *Ex parte Jackson*, we find the following passage in the judgment of Cotton L. J.

Undoubtedly a mortgagor and a mortgagee have a right to insert in their mortgage deed a clause making the mortgagor attorn as tenant to the mortgagee and thus by contract constituting the relation of landlord and tenant between them. Under such circumstances when it is a real and not a fictitious and sham arrangement the ordinary consequences of a tenancy follow and there can be a distress for the rent agreed upon which will be valid and effectual in the case of bankruptcy. As has been pointed out by Lord Justice Baggalley, this is quite reasonable for the mortgagee has a right to take possession and to turn out the mortgagor whether he be in possession by himself or his tenant. If the mortgagor is in possession by a tenant then the rent which that tenant pays comes into the hands of the mortgagee. If the property is in the possession of the mortgagor himself the mortgagee may turn him out and let the property either to a stranger or to the mortgagor; and, therefore, there is nothing unreasonable or that can be called a fraud in the law of bankruptcy in allowing the parties to make a contract in the mortgage deed which they might validly and effectually make afterwards. If the mortgagee lets to a third party no question can arise as to the amount of the rent; and if the attornment clause is one which really constitutes the relation of landlord and tenant between the mortgagor and mortgagee the court will not be nice in considering whether the rent is too great for the mortgaged property. But it is a very different question which we have now to consider, viz., whether there is a real or only a fictitious or ostensible contract to constitute the relation of landlord and tenant. On that question the amount of the rent created may be most material; it may be so excessive as to afford even of itself, a probability that that which is in form a contract constituting the relation of landlord and tenant and

reserving a return for the use of the property was not so in substance and fact but was a mere colour in order to cover something else. Nor is it material how the rent, if rent is to be applied. No doubt, the rent may be sufficient to cover the interest, but if it is more than sufficient to cover the interest and is received by the mortgagee he must apply it in reduction of the capital, subject to the question whether the interest was in arrear at the time he took possession for as against a mortgagor in possession when the interest is not in arrear an account would be taken with annual rents. Therefore, the stipulation that a rent fairly reserved, a real rent, is to be applied in paying the principal and interest of the mortgage debt, cannot avoid a contract which in other respects is a real contract and not a mere device to cover something else.

Further on the learned Judge says :—

Under these circumstances the conclusion to which I have come is this, that there was no real rent, though a sum was stipulated for under the name of rent. But it was not a rent in respect of which the legal incident of distress arises, and, therefore, on the ground that there was no legal right to distrain the bank under their distress, have not got any title to these goods which, unless there has been an effectual distress, remained the property of the bankrupt. And I go further than that. No doubt, any distress which is exercised does give to a mortgagee, if he is a landlord, something which he would not have got if he had not exercised it. But, yet, it must be a distress for a real rent, to which the law has annexed as an incident the power of distress.

Lord Justice Cotton also says :—

Here there was no real rent and no real relationship of landlord and tenant, and, therefore, there was no power of distress.

In the same case Lord Justice Thesiger holds the following language :—

Therefore although it is clear that persons may bargain with each other as to the amount of rent and the courts will not rightly interfere with bargains so made it is obvious looking at the nature of these uses and the object with which they can be legitimately inserted in mortgage deeds that the amount of the rent may, under certain circumstances, become a matter very important to consider in order to determine whether they are real attornment clauses, whether the rent fixed is a real rent and whether a real tenancy has been created. * * * Granted that these attornment clauses are valid and operative under ordinary circumstances, yet if from the terms of the particular deed or from the amount of the rent fixed by the attornment clause it can

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be concluded by the court that the rent is not a real rent buta mere sham, and that the attornment clause is a mere device to give the mortgagee a hold in the event of bankruptcy over the goods and chattels of the mortgagor which could otherwise have been distributed among his general creditors then the attornment clause is invalid and inoperative because it is a fraud upon the bankruptcy law. * * *

The learned judge also says :

The question is whether for any purpose there was a real rent or real tenancy.

And he adds :

But here the right of distress can only be supported upon the ordinary principles of law which attach that right to a legitimate tenancy with a legitimate rent. If once you arrive at the conclusion that there is no tenancy and no rent, but that the attornment clause creates only a sham tenancy and a sham rent for purposes such as I have described, then it follows that no distress, can by the ordinary principles of law be attached to such a tenancy in respect of such a rent and for that reason it seems to me, that no legitimate distinction can be drawn between a distress levied before and a distress levied after bankruptcy.

In the last reported case, that of *ex parte Voisey* (*ubi supra*) the judges are equally distinct in their enunciation of the same principles of law. Thus Brett L.J. says:

That raises the question whether the contract was a *bonâ fide* one. Now in what sense can it be said that it was not *bonâ fide ?* Whatever may be its terms, and however excessive the rent, it is not a fraud as between the parties because nothing was concealed by the one from the other, and both agreed to the terms. Therefore it could not be a fraud as between the parties. It was not intended to defraud any known individual.

And the Lord Justice then proceeds to point out that it was a fraud on the bankruptcy law. In the same case L. J. Cotton affirms distinctly and emphatically the law as he had laid it down in the previous case and thus expresses himself :

It is undoubted that a mortgagor may enter into a contract with his mortgagee, that the mortgagor shall be a tenant to the mortgagee and it is equally undoubted that the law gives certain rights and priorities to a landlord but the question is whether the contract between the parties was one under which (whatever were the words they used) they really intended to create the relation of

landlord and tenant, or whether, under the mask of certain words, they intended, without any real tenancy, to endeavour to give to the mortgagee all those rights which he could have only if he was landlord and the mortgagor was his tenant. This may be put in other words. It may be said that the question is, whether there was between the parties any real relation of landlord and tenant or whether whatever were the words used it was all a sham. In considering that question we must look at both the amount of the rent or what is called the rent and the other circumstances, and if we find that the so-called rent is so excessive that it never could have been meant to be paid by the occupier to the owner of the land for its use and occupation, that is very strong evidence indeed that there was no real intention to create a tenancy.

And subsequently the learned judge adds, referring to *Ex parte* Jackson :—

In that case there could be no doubt that there was a mere nominal creation of the relation of landlord and tenant, or that in reality the intention was to try and get the benefit which a landlord only can have over any other creditor by using the words landlord and tenant without any intention of creating any such relation.

It is to be observed of all these cases that they are instances in which the validity of the leasing clause was impugned by assignees in bankruptcy, and therefore the language is in some respects confined to the rights of such persons. I am of opinion, however, and the passages I have extracted from the judgments delivered in the Court of Appeal entirely bear me out, that it was not intended to restrict the principles laid down to cases in which the question was raised after a bankruptcy, but that these principles must be generally applied wherever the interests of third persons require their application. Some of the learned judges in the judgments I have quoted from, lay it down generally that when it appears on the face of the deed, or otherwise, that an actual demise at a *bonâ fide* rent was not really intended by the parties, but that the pretended demise was a mere contrivance to enlarge the mortgagee's remedies, the common law incident of a right of distress would not attach at all. The mort-

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gagor himself would be considered as having incapacitated himself from asserting the invalidity of what he had deliberately affirmed to be the true relation between himself and the mortgagee in an instrument under seal, but as regards third parties interested in so doing I know of no reason why it should be confined to any particular class such as assignees in bankruptcy. The avoidance of the fictitious lease at the fictitious rent is not dependent on any principle peculiar to the bankrupt laws, but proceeds on this—that when there is no real tenancy, and therefore no real rent, an extraordinary and very stringent remedy which the common law has made an incident of the reversion for the purpose of recovering a rent service cannot exist. And if it does not "lie in the mouth" of the mortgagor to assert this, it ought nevertheless to be open to all third parties really interested to do so. Therefore I regard the cases in which it has been considered open to assignees in bankruptcy in the interest of the general creditors to set up the colorable character of an attornment clause, as only instances of the application of a general rule which upon every ground of reason and law must also apply to other third parties whose rights ought only to be intercepted by a *bonâ fide* landlord and especially to execution creditors of the mortgagor as well as to persons whose goods are sought to be taken by one who has no real but only a pretended and colourable right to the privilege which he assumes to exercise.

It only remains to enquire whether this mortgage deed does upon its face show that the parties did not really intend to constitute the relation of landlord and tenant. The passages which I have extracted from the judgments delivered in the English Court of Appeal show that upon this enquiry the gross excess of the rent over the actual rental value of the property is

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conclusive. That being so there is no alternative but to pronounce against the validity of the alleged tenancy in the present instance at least so far as it would affect the appellants and make them liable to the claim asserted by the mortgagees. The evidence is conclusive to show that $750 per annum is the highest annual value which can be placed on the mortgaged property. The rent reserved is in the aggregate $20,000 for the five years of the pretended tenancy. This would make a rental of $4,000.00 a year more than four times the actual value. This is sufficient to establish that the parties never intended to create a tenancy at such a rental otherwise than for the indirect purposes to which I have before referred, and it must therefore be adjudged that the respondents have failed to make out their right to the arrears they claim. Mr. Justice Rose thought the difficulty could be got over by excluding the rent for the last year and treating the rental reserved for the first four years as a *bonâ fide* rent, but I do not feel at liberty so to model the contract of the parties; we must take it in its integrity and so taken it shows that for a term of five years a gross rental of $20,000 was reserved and this is so greatly in excess of the real value that we must assume that it never was the intention of the parties to make a true lease at such a rent; and the circumstance that the payments to be made for the first four years were moderate and fair in amount cannot do away with the inevitable inference to be drawn from the payment of $15,500 stipulated to be made for the last year of the term.

The appeal must be allowed with costs to the appellants in all the courts and judgment must be entered in the interpleader issue accordingly.

FOURNIER J. concurred with STRONG J.

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TASCHEREAU J. was of opinion that the appeal should be dismissed for the reasons given by the Chief Justice.

GWYNNE J.—Upon the 31st of May, 1883, one David Darvill executed an indenture of mortgage in pursuance of the Ontario Act respecting short forms of mortgages of certain lands therein mentioned, in favor of the Ontario Loan and Debenture Company, for the purpose of securing re-payments to them of the sum of twenty thousand dollars then lent by them to Darvill, together with interest thereon ; the clause or proviso for redemption contained in the mortgage was that the mortgage should be void on payment of twenty thousand dollars of gold coin of legal tender in Canada, or at the option of the mortgagees or their assigns the then equivalent thereof of lawful money of Canada with interest at seven per centum per annum, as follows :—

> Five hundred dollars of said principal sum to be paid on the first day of December next (1883), five hundred dollars on the first day of each of the months of June and December in each of the four following years, 1884, 1885, 1886 and 1887, and fifteen thousand five hundred dollars, being the balance of the said principal sum, on the first day of June, in the year eighteen hundred and eighty-eight ; and the interest at the rate aforesaid, likewise of gold coin, on the unpaid principal from the first day of the month of June next (1883), to be paid semi-annually on the first day of each of the months of June and December until the said principal sum and interest shall be fully paid and satisfied ; the first of the said semi-annual payments of interest to become payable on the first day of December, in the year eighteen hundred and eighty-three, and taxes and performance of statute labor ; the mortgagor, his heirs or assigns, having the privilege of paying one hundred dollars, or any multiple thereof not exceeding one thousand dollars on account of the said principal moneys in advance on the days of any of the above mentioned half-yearly payments.

There was a proviso that on default of payment for one month the mortgagees might on one month's notice enter upon and lease or sell the said lands, and

further, that in default of payment of any instalment of principal or interest thereby secured the whole of the principal thereby secured should become payable.

The fifteenth clause of the form of mortgage given in the schedule to the act, that is to say, the clause providing that the mortgagee might destrain for arrears of interest, which, as extended in the statutory form, is expressed to be for the purpose of enabling the mortgagee in case the mortgagor should make default in payment of any part of the interest secured by the mortgage at any of the days and times limited for the payment thereof to destrain therefor on the mortgaged premises, and by distress to recover by way of rent reserved, as in the case of a demise, such arrears of interest, was altogether omitted from the mortgage, and a clause not in the statutory form given in the schedule to the act was inserted, in the terms following:—

> And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured, undisturbed by the mortgagees or their assigns, he, the said mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively, according to the said proviso, without any deduction, and it is agreed that such payments, when so made, shall respectively be taken and be in all respects in satisfaction of the moneys so then payable according to the said proviso. Provided always, and it is agreed that in case any of the covenants or agreements herein of the mortgagor, his heirs, executors, administrators or assigns, be untrue, or be unobserved or broken at any time, the mortgagees, their successors or assigns, may, without any previous demand or notice, enter on the said lands or any part thereof in the name of the whole and take and retain possession thereof and determine the said lease, and no reconveyance, release or discharge from these presents, or of any part or parts of the said lands by the mortgagees or their assigns shall cause an apportionment of the said rent, but the whole thereof shall be payable out of the remainder of the said lands.

Upon the first day of June, 1887, the sheriff of the

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county in which the lands were situate seized certain chattel property of the mortgagor upon the mortgaged premises to the amount of about three thousand dollars to satisfy an execution placed in his hands to be executed, which had issued upon a judgment recovered by the above appellants against the mortgagor. Upon the 8th day of the said month of June, a notice, upon behalf of the mortgagees, was served upon the sheriff in the words following:—

To the sheriff of the County of Middlesex, &c., &c. Take notice that the sum of three thousand one hundred and eighty dollars is now due and owing to the Ontario Loan and Debenture Company from David Darvill, of the City of London, manufacturer, for the following payments of rent of the premises in his occupation at said City of London and township of Westminster: $1,077.50 due on the 1st day of June, 1886, $1,060.00 due on the 1st day of December, 1886, and $1,042.50 due on the 1st day of June, 1887, under and by virtue of an indenture dated 31st May, 1883, made by said David Darvill to said company, upon which premises you claim to have seized and taken in execution certain goods and chattels. And you are hereby required not to remove any of said the goods and chattels from off the said premises until the said arrears of rent are paid pursuant to the statute in such case made and provided. Dated this 8th day of June, 1887.

An interpleader issue was sent down to be tried in pursuance of an order in that behalf, dated the 5th day of September, 1887, wherein the said Ontario Loan and Debenture Company were plaintiffs and the said appellants and others execution creditors of the said David Darvill were defendants, and wherein

the said plaintiffs affirmed and the said defendants denied that the said plaintiffs are entitled as landlords of David Darvill, or otherwise under the mortgage from the said David Darvill to the plaintiffs, dated the 31st day of May, A.D. 1883, to be paid out of the moneys realized on the sale of the goods and chattels of the said David Darvill seized on the 1st day of June, 1887, in execution by the sheriff of the County of Middlesex, the sum of $1,077.50 and $1,060.00 due to the plaintiffs for arrears of rent or otherwise under said mortgage, and payable on the 1st June, 1886, and the 1st December, 1886, respectively in respect of the lands upon which the said goods and chattels were, at

the time of the seizure and sale thereof, or some part thereof, as against the execution creditors.

Mr. Justice Rose before whom the interpleader issue was tried without a jury, found, as matters of fact, that at the date of the mortgage a large portion of the mortgaged property was under lease to persons who were tenants of the mortgagor, and as I undertand his judgment that the annual rents of the property so under lease was at the time of the execution of the mortgage about $2,250, and the annual value of the part in the actual occupation of the mortgagor, $1,216; or a total annual value of nearly $3,500. The learned judge was of opinion that in estimating the *bona fides* of the creation of the relation of landlord and tenant he might separate the annual payments to be made in the first four years from the residue, thus, the amounts to be paid under the proviso contained in the mortgage appears to have been for the first year, terminating on the 1st June, 1884, $2,382,50; for the second year, terminating 1st June, 1885, $2,312.50; for the third year, terminating 1st June, 1886, $2,242.50; for the fourth year, terminating 1st June, 1887, $2,172.50. These amounts the learned judge was of opinion would not be an excessive rent if he was at liberty to compare such annual payments alone with the annual value of the whole of the mortgaged property, including that already under lease to the mortgagor's tenants, but if such four annual payments, as above, should be regarded as issuing only out of the land in the actual occupation of the mortgagor, then he was of opinion that even these amounts would be so excessive, having regard to the actual annual value of the land in such actual occupation of the mortgagor, as to prevent the transaction being held to be one in which a *bonâ fide* lease at a rent reserved was in reality intended, and that, therefore, the relation of landlord and tenant

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had not been created, and he came to the conclusion that he might determine the *bona fides* of the transaction by such comparison of the first four annual payments with the annual value of the whole property instead of with the value only of that part which was in the actual occupation of the mortgagor, but he was further of opinion that if he was bound to take into consideration the $15,500 of principal, together with the interest on the unpaid principal made payable at the expiration of the term, amounting together to the sum of $16,042.60, he must hold that to be so excessive as to exclude all idea that a real rent was intended to be reserved; he came, however, to the conclusion, upon the authority of *Kitching* v. *Hicks* (1), that he could exclude from consideration such last mentioned reservation and that, therefore, he could hold the lease to be good as to the rent reserved payable up to 1888, and so he held the plaintiff to be entitled to recover on the issue upon the authority of *Morton* v. *Woods* (2), *Ex parte Jackson* (3), and *In re Stockton Iron Furnace Company* (4), which cases, he considered, governed the present. The Queen's Bench Division upon appeal reversed this judgment, and held the clause as to the lease of the premises by the mortgagees to the mortgagor to be void, as it was for a term exceeding three years and was not by deed, the mortgagees never having executed the deed—and that the relation of landlord and tenant was never in reality intended to be created—that there was no tenancy at a rent reserved on a lease for years at will or otherwise, so as to entitle the mortgagees to claim as landlords under statute 8 Anne ch. 14 the amounts claimed by them as due for rent for any lands leased by them to the mortgagor.

The Court of Appeal for Ontario, upon appeal to

(1) 6 O. R. 739.
(2) L.R. 3 Q.B. 658; 4 Q.B. 293.
(3) 14 Ch. D. 725.
(4) 10 Ch. D. 335.

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them from the Queen's Bench Division, were of opinion that the case was governed by *West* v. *Fritche* (1), *Morton* v. *Woods* (2), *In re Threlfall* (3), *Ex parte Voisey* (4), *Walsh* v. *Lonsdale* (5), *Allhusen* v. *Brooking* (6), and other cases, and they reversed the judgment of the Queen's Bench Division and restored the judgment of Rose J.

In this conflict of opinion, I find myself compelled to concur substantially with the judgment of the Queen's Bench Division, that this is not a case of a rent reserved on a lease for a term of years, at will or otherwise, within the provisions of the statute 8 Anne c. 14, and for the following reasons: In *West* v. *Fritche* (1), the mortgage deed, although executed by the mortgagor only, contained the ordinary attornment clause, whereby,

> for the better and more effectual recovery of the interest of the said sum of £800 by and out of the rents, issues and profits of the said messuage, hereditaments and effects, the mortgagor did attorn and become tenant to the said G. Fritche, his executors, &c., of the same premises, at the yearly rent of £40, to be paid half-yearly on the 9th day of June and the 9th day of December in every year, during so long time as the said sum of £800 or any part thereof shall remain secured upon said premises.

Now, it is to be observed that in this case no question under the statute of frauds, or 8 & 9 Vic. ch. 106, arose. The mortgagor did not attorn as tenant for any term of years at all—the tenancy might not have lasted for three years, and the statute of frauds, as decided in *Ex parte Voisey* (4), applies only where the tenancy, if good, must, of the necessity of the contract, last more than three years, or that the case was one simply of a tenancy

(1) 3 Ex. 216.
(2) L. R. 3 Q. B. 658; L. R. 4 Q.B. 293.
(3) 16 Ch. D. 274.
(4) 21 Ch. D. 442.
(5) 21 Ch. D. 9-14.
(6) 26 Ch. D. 559.

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for a term not required to be in writing by the statute of frauds; and the decision merely was that in such a case continuance in occupation by the mortgagor under the covenant involved in his express attornment to the mortgagees as their tenant, did create the relation of landlord and tenant, and did entitle the mortgagees to destrain. Parke B. giving the judgment of the court said:

> We all think that the subsequent occupation coupled with the covenant constituted the relation of landlord and tenant.

Morton v. *Woods* (1), raised a question merely of intention on the construction of the deed. There a mortgagor in possession executed a second mortgage of the mortgaged premises to the defendants to secure repayment with interest of certain advances. The mortgage was by indenture between the mortgagor and the defendants, but was not executed by the latter. The mortgagor conveyed to the defendants all the premises comprised in the first mortgage, which was recited, upon trust that the defendants should either immediately, or at any time, sell the premises, and should apply the purchase money to arise from such sale in the manner therein mentioned:—

> And as further security for the principal and interest moneys for the time being due from the mortgagor under and by virtue of the indenture, he did thereby attorn and become tenant to the defendants, their heirs and assigns, as and from the date thereof of such of the said hereditaments and premises thereby granted or otherwise conveyed as was or were in his occupation for and during the term of ten years, if that security should so long continue, at and under the yearly rent of £800 to be paid yearly on every first day of October, in every year, the first yearly rent to be paid and payable on the first day of October then next, provided that notwithstanding anything therein contained, and without any notice or demand of possession, it should be lawful for the defendants, their heirs, executors, administrators or assigns, before or after the execution of the trusts of sale therein contained, to enter into and upon the said mortgaged premises or any part thereof and to eject

(1) L. R. 3 Q. B. 659.

the said grantor and any tenant claiming under him therefrom, and to determine the said term of ten years, notwithstanding any lease or leases that might have been granted by the grantor.

It appears, then, that by the deed in that case the grantees were empowered to execute the trusts of sale either immediately or at any time at their will and pleasure, and they were empowered before or after the execution of the trusts of the deed to evict the grantor and all persons claiming under him. This was a power also to be exercised at the sole will and pleasure of the grantees. It was held, therefore, that upon the true construction of the deed these provisions, notwithstanding the attornment clause being for a term of ten years, showed plainly the intention of the parties to be that the grantor, by his attornment, should become tenant at will of the grantees paying rent for ten years, if permitted by the grantees to remain so long in possession. That was not the case of a lease which, if good, was intended to last f ten years, and therefore neither the statute of frauds, nor 8 & 9 Vic. ch. 106, requiring leases for more than three years to be by deed, applied. Cockburn C J. giving judgment, says: (1).

With reference to the intention to create a term, and the failure by reason of the non-execution of the deed, any tenancy for a term not beyond three years may be created without any deed or writing, and in my opinion it is plain that all the tenancy the parties intended to create was a tenancy at will, no more and no less. The primary object of the parties was to secure to the mortgagees the amplest remedies to enforce the repayment of the mortgage money and interest, and though the term of ten years is mentioned it was intended, on the one hand that the lessors should be fully empowered to turn the mortgagor out at any moment, and so to realize their security by sale, while on the other hand the mortgagor should be empowered to get rid of his tenancy by paying off the mortgage money. That, I conceive, amounts to all intents and purposes to no more nor less than an intention to create a tenancy at will, which might be created without any deed.

Then Blackburn J. said: (2).

(1) At p. 667.

(2) At p. 669.

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When we look at the instrument to ascertain the intention of the parties, is it the true construction that they intended to create a term of ten years? I cannot think they intended that: the intention was that the mortgagor should become tenant at will to the mortgagees, with the understanding that he should be permitted to remain for ten years, should the will not be determined before.

And it is upon this construction that the case of *West* v. *Fritche* was applied. Miller J. says:

> I cannot help thinking that upon the true construction of this deed it was the object of the parties that John Brown should become tenant at a fixed rent to the defendants so as to give them the power of distress, and that it could not have been the intention to create a term of ten years when he was liable to be evicted at any moment, but they intended to create a tenancy at will only.

And Lush J., says: (1)

> The first question is, what term did the parties intend the mortgagor should take from the mortgagees so long as the mortgage money remained unpaid? If a term of ten years, then the intended demise failed; if a term less than three years then the mere assent of the parties amounted to a demise. It is plain that there was no intention that the mortgagor should remain in possession any given length of time, but that he should remain on the premises at the will of the mortgagees, he binding himself to pay £800 for a term not exceeding ten years, if left in possession so long. That being the intention the intended demise did not require a deed for its validity, and the objection that the mortgagees did not execute the deed falls to the ground.

This construction put upon the deed by the Court of Queen's Bench was affirmed in the Exchequer Chamber (2) and the result is that but for these provisions in the deed which showed that the true intention of the parties was to create a tenancy for an indeterminate period, which might have been less than three years and not a term for ten years certain, the attornment clause would have failed to create the relation of landlord and tenant between the mortgagor and mortgagees In *re Stockton Iron Furnace Company* (3) the

(1) At p. 671.
(2) L. R. 4 Q.B. 293.
(3) 10 Ch. D. 365.

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question was, whether the sum of £5,000 reserved as an annual rent by an attornment clause in a mortgage was so unreasonable as to demonstrate that the attornment clause was inserted as a sham and not with the intention of creating a tenancy in reality. No question arose as to whether the tenancy was void as being for more than three years. In point of fact it was not for a term exceeding three years and so did not require a deed for its validity. The attornment clause was in the following terms :—

And this indenture further witnesseth that in pursuance of the said recited agreement, and for the consideration aforesaid, the said company do hereby attorn and become tenants from year to year to the the said parties hereto of the second part, their heirs and assigns, for and in respect of the said mortgaged premises at the yearly rent of £5,000, clear of all deductions, to be paid by equal half-yearly payments on the 23rd day of August and the 23rd day of February in every year, the first half yearly payment to be made on the 23rd day of August next. Provided always, and it is hereby declared, that it shall be lawful for the said parties hereto of the second part, their heirs and assigns, at any time after the said 23rd day of August next, without giving previous notice of their intention so to do to enter upon and take possession of the hereditaments and premises whereof the said company have attorned and became tenants as aforesaid, and to determine the tenancy created by the aforesaid attornment and put out and expel the said company from the said hereditaments and premises without any ejectment or other legal process as effectually as a sheriff might do in case the landlords had obtained judgment in ejectment for the recovery of such possession and a writ of *habere facias possessionem* had issued on such judgment.

The tenancy created by this atttornment was one from year to year, determinable, however, at the will of the mortgagees at any time after the expiration of the first six months. In *Ex parte Jackson* (1), in the Court of Appeal, no question arose either as to the validity or invalidity of the tenancy purported to be created by the attornment clause in a mortgage, by reason

(1) 14 Ch. D. 725.

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of its having been for a period in excess of three years and not created by deed. The question was whether the amount reserved as rent was not so excessive as to demonstrate that no tenancy was, in reality, intended to be created. In it, however, the cases of *Morton* v. *Woods* and *In re Stockton Furnace Company* underwent much consideration, and the principle involved in them was explained. The attornment clause in the mortgage was as follows:

> The mortgagor doth hereby attorn and become tenant to the said company and their assigns of the hereditaments hereinbefore expressed to be hereby granted and assigned, or such part thereof as is in the possession of the mortgagor, as tenant, from year to year, from the date hereof at the annual rent of £800,&c.

Lord Justice Baggallay giving judgment in that case says: (1).

> Now, so far as any inference can be drawn from the practice of inserting attornment clauses, it appears to me that the benefit to be derived from the attornment clause was intended to be an equivalent for that which the mortgagee would derive from the rent if the tenant had been a stranger. What would that equivalent be? Would it not be a right to the payment of a fair and reasonable rent such as an ordinary tenant would be willing to give for the property under ordinary circumstances. That, as it seems to me, is the rent for which a properly prepared attornment clause should make provision, not necessarily the exact amount which a tenant would pay for the property, but such an amount as a willing tenant would probably pay as a *bonâ fide* rent. If the rent so reserved is clearly in excess of what would be a fair and reasonable rent, it appears to me that although you may call it rent, it is no longer a real rent, but a fictitious payment under the name of rent.

And referring to *Morton* v. *Woods*, he says: (2).

> Now, the case of *Morton* v. *Woods* has been referred to on behalf of the respondents, and the view presented by their counsel, as I understand it, is this: that it is quite immaterial what the amount of rent is which you place upon the premises by an attornment clause, you are at liberty to make it as much as you choose—to cover the whole principal and interest if you think fit, and the court will not interfere

(1) At pp. 733-4. (2) P. 738.

with it—but *Morton* v. *Woods* does not decide that. It decides, as a general rule, an attornment clause is not in itself unlawful, provided it is real. The rent need not be limited to the amount of interest from time to time becoming due upon the mortgage debt. It is not introduced for that purpose alone, although it is one way of securing the interest. The measure of the real rent is the leasable value of the property, not the amount of the mortgage debt. In *Morton* v. *Woods* there was no suggestion that the rent fixed by the attornment clause was other than the real and proper rent, and as I read the case all that the court decided was the general principle that effect will be given to attornment clauses when they are real and carry out the true intention of the parties to them, so far as that intention is limited to creating the relation of landlord and tenant in the proper sense.

In the same case Lord Justice Cotton, p. 739, says :

Undoubtedly a mortgagor and a mortgagee have a right to insert in their mortgage deed a clause making the mortgagor attorn as tenant to the mortgagees, and thus by contract constituting the relation of landlord and tenant between the two. Under such circumstances where it is a real and not a fictitious or sham arrangement the ordinary consequences of a tenancy follow, and there can be no distress for the rent agreed upon, which will be valid and effectual in the case of bankruptcy. As has been pointed out by Lord Justice Baggalley this is quite reasonable for the mortgagor whether he is in possession by himself or by his tenant. If the mortgagor is in possession by a tenant then the rent which that tenant pays comes into the hands of the mortgagee. If the property is in the possession of the mortgagor himself the mortgagee may turn him out and let the property either to a stranger or to the mortgagor, and, therefore, there is nothing unreasonable or that can be called a fraud in the Law of Bankruptcy, in allowing the parties to make a contract in the mortgage deed which they might validly and effectually make afterwards.

And again, p. 741, he says :—

Under these circumstances the conclusion to which I come is this, at that there was no real rent although a sum was stipulated for under the name of rent But it was not a rent in respect of which the legal incident of distress arises.

And again :—

No doubt any distress which is exercised does give to a mortgagee, if he is a landlord, something that he could not have got if he had not exercised it. But, yet, it must be a distress for a real rent to which the law has annexed as an incident the power of distress. When there

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is no real rent but something called rent. which in fact is not rent, then, in my opinion, the clause which attempts to give the power of distress incident to rent, in respect of that which is not rent, and thus to give to a mortgagee a right which he would only have as landlord and not as mortgagee, to give it to him as mortgagee and not as landlord is an attempt to alter and disturb the legal distribution of the mortgagor's property in bankruptcy.

And he came to the conclusion, concurring with the rest of the court, that in the case under consideration it was a mere sham calling the sum reserved by the attornment clause rent ; and Lord Justice Thesiger, in the same case, referring to these attornment clauses on mortgages, says on p. 743 :

I can even imagine a case in which the rent reserved may be sufficient to pay both principal and interest. But while that is so it must be admitted that the object of attornment clauses is, while giving any additional security to the mortgagee to place him as regards the mortgagor who is left in possession of the property and in the matter of rent in the same position in which he would have been if the mortgaged premises had been under lease to a third party. Therefore, although it is clear that persons may bargain with each other as to the amount of rent, and the courts will not lightly interfere with bargains so made, it is obvious, looking at the nature of these clauses, and the object with which they can be legitimately inserted in mortgage deeds, that the amount of the rent may, under certain circumstances, become a matter very important to consider, in order to determine whether they are real attornment clauses, whether the rent fixed is a real rent and whether a real tenancy has been created that, I understand to be the rule laid down by the authorities which have been cited. Granted that these attornment clauses are valid and operative under ordinary circumstances, yet, if from the terms of the particular deed, or from the amount of the rent fixed by the attornment clause, it can be concluded by the court that the rent is not a real rent, but a mere sham, that the tenancy is not a real tenancy, but a mere sham, and that the attornment clause is a mere device to give the mortgagee a hold in the event of bankruptcy over the goods and chattels of the mortgagor which would otherwise have been distributed among his general credi tors, then the attornment clause is invalid and inoporative.

In re Threlfall (1), in the Court of Appeal, the attornment clause created a tenancy from year to year deter-

(1) 16 Ch. D. 274.

minable at the will of the mortgagee at any time after the expiration of three months from the date of the mortgage. The contention there was that upon the authority of *Morton* v. *Woods*, the tenancy created by the attornment clause was at will for the purpose of contending that the tenancy was determined by a liquidation petition of the mortgagor, and that, therefore, the distress which was subsequent to the filing of the liquidation petition, and to its coming to the knowledge of the mortgagee was invalid. Lord Justice James delivering judgment there, says :

We are asked in this case not to construe a deed, but to contradict it for the purpose of entirely destroying the intention of the parties to it. The mortgagor was left in possession of the property, and was thereby enabled to give a power of distress to the mortgagee. The attornment clause was in the common form, and was intended to create the relation of landlord and tenant between the parties. The mortgagor, by the express terms of the deed, was to be tenant from year to year at the yearly rent specified. This tenancy was determinable at the will of the mortgagee, but this power the mortgagee would equally have had if the premises were in the possession of a third party, and it is the usual power given to a mortgagee to enable him to take possession. We are asked to say that in spite of the express terms of the deed this was not a yearly tenancy, but a tenancy at will, on account of some expressions of some of the judges in *Morton* v. *Woods*. But in that case there was no actual demise, but for the purpose of giving effect to the manifest intention of the parties it was held that a tenancy at will had been created.

And Lord Justice Lush, who was himself one of the judges who had decided *Morton* v. *Woods*, says, p. 282 :

Although in *Morton* v. *Woods* the expression "tenancy at will" was used by some of the judges while professing to describe the relation between the parties, yet it must not be taken as intended to be an exact legal definition, particularly when we consider the facts and arguments before them. In all cases the words of a judgment must be considered with reference to the arguments adduced. I am rather glad to see that I did not myself describe the tenancy as a tenancy at will. But the argument in that case was that the attornment was for ten years, and if so void because not made by deed, and, therefore, the judges said that it was a tenancy at will, meaning a tenancy for an in-

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definite term not to exceed ten years, determinable at the will of the landlord.

This case is valuable as an affirmation by the Court of Appeal of what had been in effect held in the Court of Queen's Bench, that if that court had not found expressions in the mortgage which showed that the creation of a tenancy for ten years had not been and could not have been intended, and if they had been obliged to construe the deed as intended to create a tenancy for ten years, they must have held that the attornment had failed to create the relation of landlord and tenant between the mortgagee and mortgagor. In *ex parte Punnett* (1) counsel referring to a tenancy under an attornment clause in a mortgage argued that such a tenancy operated by estoppel, " no doubt," they said, " it is a fiction," and referring to *Morton* v. *Woods* they said :

Morton v. *Woods* is a decision that the court will give effect to a fiction against the rights of creditors ;

To which observation Lord Justice Lush replied :

By giving effect to the fiction the manifest intention of the parties was carried out.

Again showing that the judgment in *Morton* v. *Woods* vested on the fact that the clause in the mortgage relied upon by the court in that case showed that the manifest intention of the parties was not to create a term of ten years, but a term determinable at the will of the mortgagee landlord, and so not necessary to be created by deed. In *ex parte Voisey* (2), the attornment clause in the mortgage which was executed by the mortgagor only was in the following terms :—

And for better securing the payments, which by the rules of the society (building society) ought to be made by the mortgagor, it was agreed that if the mortgagees should, at any time, become entitled to enter into possession or receipt of the rents, and if the mortgagor

(1) 16 Ch. D. 232. (2) 21 Ch. Div. 442.

should then or afterwards be in the occupation of the whole or part of the property, he should, during such occupation, be tenant thereof from month to month to the mortgagees at a monthly rent equal in amount to the moneys which ought to be paid monthly by the mortgagor from time to time for subscriptions, interest, fines, and other moneys under the rules, and that the tenancy should commence on the day up to which he should have paid all and every part of such subscriptions, fines and other moneys, and the rent for the period intervening between the commencement of the tenancy and the day on which the trustees should be entitled to enter into possession or receipt of rents should be payable and paid on the day, and the monthly rent due upon and subsequently to that day should become due monthly in advance, and be payable at the monthly meetings, the first payment of rent becoming due on that day on which the mortgagees should first becoming entitled to enter into possession.

Power was also given to the mortgagees to determine the tenancy by fourteen day's notice.

Now, it is obvious that under this attornment clause, the contemplated tenancy might never commence, and if it ever should commence it might not continue (even though not determined by the mortgagees under the power in that behalf vested in them), so long as three years—the term when it should, if it ever should commence was to be a monthly tenancy. It was not a case, therefore, coming either within the Imperial Statute 8 and 9 Vic. ch. 106 sec. 3, from which the Ontario Statute ch. 100, sec. 8 of the Revised Statutes of Ontario is taken, or within the statute of frauds as necessary to be in writing. Jessel, Master of the Rolls there says, p. 456:

> Another objection was taken that there was some provision in th statute of frauds which affects the case. I am not aware of any. It does not appear to me that this was within the statute of frauds at all, indeed it was not even a lease for years, because we do not know how long it may last, it may not last for three years or for one year, and it does not appear to be obnoxious to the statute of frauds.

Again:

> You must construe a deed according to the words used in it, you can only gather the intention of the parties from the words they use,

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and here they have not made it a tenancy at will. It may be put an end to by the mortgagees, no doubt, if they think fit, but it is not a tenancy at will—it is a tenancy from month to month—a monthly tenancy.

Lord Justice Brett says:

This is not a tenancy within the statute of frauds at all. The first section of the statute of frauds applies only where the tenancy, if good, must of necessity last for more than three years. But if at the time of the arrangement, the tenancy may last for less than three years, although it may last for more, it is not within the section of the statute at all, and it is obvious that the tenancy in this case, although it may last for more than three years may last for less, it is in terms a tenancy from month to month.

And Lord Justice Cotton says:

Here the tenancy was to arise only in certain events which might happen (if at all) a very short time before the period of fourteen years (the period within which the principal with interest thereon was to be paid), when of necessity the mortgage must come to an end, I mean of necessity according to the contract between the parties.

The case, however, is chiefly valuable as further elucidating the principle of *Ex parte Williams* (1) and *Ex parte Jackson* (2), and as explaining the principle upon which the court proceeds when the question is whether a tenancy purported to be created by an attornment clause in a mortgage is intended to be a real tenancy at a rent reserved, or is, on the contrary, a mere sham for the purpose of giving the mortgagee in certain events, rights under the name of "rent" which he could only exercise as a landlord, which, in reality, it was never intended he should be. Now, upon the above authorities it cannot, I think, be doubted, that in *Morton* v. *Woods* it would have been held that no tenancy whatever had been created between the parties, if it had not been for the passages above extracted and relied upon as showing the manifest intention of the parties to have been to create a tenancy at will, or at least for a period not requiring a

(1) 7 Ch. D. 138. (2) 14 Ch. D. 725.

deed. Notwithstanding that a term of ten years was mentioned in the manner in which it was, and that if the court had felt bound to construe the instruments as manifesting an express intention to create a tenancy for the term of ten years they would have held the instrument to be void as to the term under 8th and 9th Vic. ch. 106 sec. 8, and so that no tenancy had been created. By the statute of frauds it was expressly enacted that an instrument failing to take effect as a lease under that statute should operate as creating a tenancy at will, but there is no such provision in 8th and 9th Vic. ch. 106, or in the Ontario statute ch. 100 R. S. O. So that if an instrument fails of taking effect according to its expressed intent for non-conformity with the latter statutes, it cannot, contrary to such expressed intent, be construed as creating a tenancy of a wholly different character.

Applying then the language of the Master of the Rolls in *ex parte Voisey* to the present case :—

> We must construe the deed before us according to the words used, we can only gather the intention of the parties from the words they use.

We must not construe it so as to contradict its express terms. Now the deed in which the clause under consideration appears is a mortgage in a printed form prepared by the Ontario Loan and Debenture Company for their own use in the case of all loans made by them. The language used in the clause is not that of the mortgagor as it is in case of an ordinary attornment clause whereby a mortgagor under his hand and seal attorns and becomes tenant to the mortgagees. The form adopted for the clause is such that by the mortgagees executing the deed it would operate as a lease and by their not executing it the clause would be simply inoperative, so that the mortgage without a letter added to the clause would in its printed form

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apply equally to a case in which there was an express agreement between the mortgagor and the mortgagees that the former should accept a lease from the latter for a term of years certain during which the principal should be expressed to be outstanding on the security of the mortgage paying as rent the instalments of principal and interest at the days and times on which they are made payable by the proviso; and to a case wherein there was no agreement or intention whatever that the relation of landlord and tenant should be created; all that was necessary to give effect to the intention of the parties in the former case was that the mortgagees should execute the mortgage deed, and in the latter that they should not. The clause states in express terms that

> The mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured, he the mortgagor paying therefor in every year during the said term on each and every of the days in the above proviso for redemption, appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso without any deduction.

This is the only language in the deed which intimates that either of the parties thereto had any intention that the relation of landlords and tenant, as well as that of mortgagees and mortgagor, should exist between the parties, and the language purports to be that of the mortgagees alone, and to manifest their express intention to be to create a term for the five years certain mentioned in the proviso for redemption in the mortgage. There is not a single expression in the deed which intimates any intention whatever that any term for any less period should be created, or which qualifies in the slightest degree the duration of the term, which is expressly alleged to be granted by the mortgagees. There is no provision for determining

the term, either at the will of the mortgagees or of the mortgagor, or in any way whatever, save only the mode which is incident to, and usually inserted in, every demise, namely, forfeiture for non-payment of rent or non-fulfilment of covenants. The term so purported to be granted, if well granted, that is to say, if the mortgage had been executed under the seal of the company, must have continued for the full term of the five years, unless forfeited for non-payment of rent. This is what the clause expresses, although, of course, a question as to its validity upon the ground of the objection taken in *ex parte Williams* would be still open. A question not unnaturally, perhaps, arises here. What object could the company have had in omitting from the printed form of mortgage, the 15th clause contemplated by the act respecting short forms of mortgages to be used in mortgages made in pursuance of the act, while declaring the mortgage to be executed in pursuance of the act, and inserting in its stead the clause under consideration? The answer seems to me to be clear, and to show that what the company intended was the creation of a demise for a term of years to be granted by them under their corporation seal whenever the relation of landlord and tenant should be agreed upon, namely, that it was because of the division in this court in the case of *The Trust and Loan Company* v. *Lawrason* (1). In that case three of the judges of this court were of opinion that the 15th clause in the form of mortgage set out in the schedule to the act respecting short forms of mortgages did create the relation of landlord and tenant between the mortgagees and the mortgagor, while three on the contrary, affirming the judgment of the Court of Appeal for Ontario, were of opinion, that it did not—that there was no rent reserved—and that, therefore, the mortgagees had no claim

(1) 10 Can. S. C. R. 679.

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under the statute of Ann, upon a seizure made of the mortgagor's chattels upon the mortgaged premises under execution at the suit of his creditors; and the judgment of the Court of Appeal for Ontario to that effect stood. It was doubtless in consequence of the result of this case that *The Ontario Loan and Debenture Company* resolved to discard the 15th clause in the short form of mortgage adopted by the act, and to adopt in its stead the clause now under consideration in all their mortgages in such a form that when the mortgage should be executed by the company it should take effect, and when the mortgage should not be executed by the company the clause should be merely inoperative; and expressed in the ordinary terms of a lease executed by a landlord to a tenant for a fixed term at a rent reserved, so that when the relation of landlord and tenant was in reality agreed upon, and the mortgage should therefore be executed by the company, there should be no possibility of doubt as to their having granted a lease to the mortgagor for a fixed term at a rent reserved. That the relation of landlord and tenant was not agreed upon, or intended to be created, or deemed necessary in the present case, may well be inferred not only from the fact that the mortgagees did not execute the mortgage, but also from the fact that a large part of the mortgaged premises was, at the time of the execution of the mortgage, in possession of tenants of the mortgagor at an annual rent exceeding the several instalments except the last of the principal and interest made payable under the terms of the proviso for redemption in the mortgage, the benefit of which rents the mortgagees in case of default by the mortgagor could obtain without the creation of the relation of landlords and tenant between the mortgagees and mortgagor by entering into possession under the terms

of the mortgage and giving notice to the tenants; and from this further fact that the mortgagees never assumed to exercise a landlord's right of distress for the instalment which fell due on the 1st of June, 1886, and remained in arrears for more than twelve months, nor for the instalment which fell due on the 1st December, 1886, and remained in arrear for more than six months, nor although the mortgagor's chattels on the mortgaged premises were seized in the month of March, 1887, under executions issued at the suit of some of his creditors do they appear to have asserted any claim as landlords until their present claim was made upon the 8th June, 1887, after the seizure made on or about the first of that month under the execution issued at the suit of the appellants. There is no foundation, in my opinion, for the contention that the mortgage operates as creating a tenancy at will between the mortgagees and the mortgagor indeed to hold the mortgagor in the present case to have been in possession of the mortgaged premises as tenant at will of the mortgagees, and so subject to eviction before default, would be to hold contrary to the plain intent of the parties as expressed in the instrument, would be to contradict the instrument and not to construe it. Applying, then, the judgment in *Morton* v. *Woods* to the very different state of facts existing here; in order that the relation of landlord and tenant should have been created at law between the mortgagees and the mortgagor by the mortgage in the frame in which it is, it should have been executed by the mortgagees. It is contended, however, that although the mortgage by reason of its not having been executed by the mortgagees may fail to take effect as creating a legal demise by the mortgagees to the mortgagor for the term of years expressed, it can nevertheless be construed to be a

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valid executory agreement for a lease for the term of the five years, capable of being enforced at the suit of the mortgagees by a bill in equity for specific performance, and that, therefore, since the Judicature Act the mortgagees are entitled to the same benefit as if the mortgage had been executed by them with their corporate seal.

Walsh v. *Lonsdale* (1) and *Allhusen* v. *Brooking* (2), were cited in support of this contention, and other cases. In *Walsh* v. *Lonsdale*, a person had been let into premises as tenant under an executory agreement in writing, within the provisions of the statute of frauds, signed by both the landlord and tenant for a lease for the term of seven years. By the executory agreement it was provided that the rent to be reserved in the lease was to be made payable yearly in advance, and the question was whether the rent could be distrained for in advance before the lease was actually executed? The contention of the tenant was that until the lease should be executed granting the term for the seven years he was in possession only as tenant from year to year, and that the executory agreement, under which he was let into possession, although enforceable in equity, did not operate as a present demise, and that distress was a legal remedy, are daily applicable to a legale state. The court, however, held that a tenant holding under an agreement, for a lease of which specific performance would be decreed stands in the same position as to liability as if the lease had been executed, and that since the Judicature Act, every branch of the court must now give him the same rights.

Jessel, Master of the Rolls, giving judgment says:

There is an agreement for a lease under which possession has been given. Now, since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly. One

(1) 21 Ch. D. 9. (2) 26 Ch. D. 559.

estate at common law, by reason of the payment of rent, from year to year, and an estate in equity under the agreement. There is only one court and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance, That being so he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if the lease had been granted.

In that case there was no question as to the fact of the person in possession of the premises being in such possession as tenant, under an agreement in writing, executed within the provisions of the statute of frauds, the right to have which specifically performed by a lease executed in the terms of the executory agreement was admitted by both parties, and all these points were relied upon by the Master of the Rolls as the basis of his judgment. It is sufficient to say that the difference between that case and the present is so obvious as not to admit of its application as governing a case like the present.

In *Allhusen* v. *Brooking* the point decided simply was that, upon the true construction of the instrument in that case under consideration, the word "vested," as used therein, was not limited to an actual legal vesting under a lease in possession, but included an equitable vesting of the right in question under an agreement for a lease. *Walsh* v. *Lonsdale* was referred to, it is true, but as deciding merely that a person in possession as tenant, under an executory agreement for a lease, of which specific performance would be granted, holds, under the same terms, in equity as if a lease in accordance with the terms of the executory agreement had been granted.

Then there is the case of *Stratton* v. *Pettit*, decided in 1855. There, by articles of agreement between

(1) 16 C. B. 420.

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A. and B., it was witnessed that A. agreed to let and B. agreed to take certain premises in possession for the term of five years on certain specified terms, and A. agreed to sell and B. agreed to purchase the demised premises at the end of the term. In an action by A. against B., for non-fulfilment by him of a part of the agreement to be performed on his part, the defence was that the agreement purported to be a lease of land for a term of five years and that it was void as not being under seal. Jarvis C. J., delivering the judgment of the court, says (1):

> The question in this case is whether the instrument set forth in the declaration is a lease or an agreement. If it is a lease it is void by the statute 8 and 9 Vic. ch. 106 sec. 3, and the defendant is entitled to judgment; if it is an agreement it is not within the statute and the plaintiff will succeed. It was admitted during the argument that the instrument would have been a lease if it had been made before the statute, but it was contended that it ought, since the passing of the act, to be held to be an agreement only, because if it is a lease it is void and it could not have been the intention of the parties to make a void instrument. The rule to be collected from all the cases is that the intention of the parties as declared by the words of the instrument must govern the construction. The question then is, what was the intention of the parties when the instrument was made? Doubtless they intended to make an instrument which should have some operation; but did they intend to make a lease or an agreement? If the former, they have not done what they intended, because the lease is void by the statute. The intention of the parties must be collected from the instrument itself.

The rule is well explained, he says, in *Morgan* v. *Bissell* (2), as follows:—

> When there is an instrument by which it appears that one party is to give possession and the other to take it, that is a lease unless it can be collected from the instrument itself that it is an agreement only for a lease to be afterwards made

Then he proceeds:—

> It is admitted that before the statute this instrument would have

(1) P. 494. (2) 3 Taunt. 65.

been held to be a lease, and if the true rule would be that the intention of the parties as declared by the words of the instrument must govern the construction, it is clear that the parties intended this instrument to operate as a lease. It is void as a lease and therefore the defendant is intitled to our judgment.

Then there is the case of *Pain* v. *Coombe* in 1857 (1). That was a case of a Bill in Equity filed by a tenant in possession of premises for specific performance of an agreement for a lease made under the following circumstances : The plaintiff and defendant in the presence of a third person (a land agent and surveyor) orally agreed upon all the terms of the proposed lease, and the defendant then directed the plaintiff and such third person to instruct a Mr. Hodding, a solicitor, to reduce the terms so agreed upon to writing. Mr. Hodding did so, and afterwards converted a rough draft first made by him into a fair draft agreement which he sent to the defendant, who afterwards let the plaintiff into possession, and afterwards directed Mr. Hodding to prepare a lease in conformity with such draft agreement. Mr. Hodding prepared the lease accordingly, but the defendant refused to execute it and gave the plaintiff notice to quit, who thereupon filed his bill for specific performance. The case was one founded not upon an agreement signed within the statute of frauds, but upon the equitable doctrine of performance ; taking the case out of the operation of the statute of frauds. I make an extract from the judgment of the Lord Chancellor on the case in appeal from the report in 3 Jur. N.S. 847, as being more full than that in 1 DeG. and Jones. At p. 848 he says, and in this his judgment, the Lords Justices concurred :

I confess that looking to this case merely upon the evidence before me I have not the smallest hesitation in coming as a juror to the conclusion that Mr. Coombs put Mr. Pain into possession on the 3rd of

(1) 3 Jur. N.S. 847 ; 1 DeG. & J. 84.

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January, having in his hand the document B, and that he meant to say, therefore, "take possession upon the terms of the articles of that agreement." If I am asked why I came to that conclusion,it appears to me to follow irresistibly from a fair attention to what the witnesses say. I am not going through the evidence of Mr. Ewer, the surveyor, but speaking of the meeting which took place on the 24th October, between himself, the plaintiff and the defendant, he says, expressly: "the terms of letting were definitely settled and agreed upon between the plaintiff and the defendant at the interview,and it was also agreed upon (this appears to be important) between the plaintiff and defendant, that the plaintiff and himself should instruct Mr. Hodding to commit the terms to writing and prepare a formal agreement for a lease according to them, accordingly on the following day, he, (Mr. Ewer) with the plaintiff, went to Mr. Hodding, and by their instructions Mr. Hodding took down the memorandum marked A. Then what says Mr. Hodding : Mr. Hodding says he was to prepare a formal agreement for both parties. Mr. Hodding appears to be solicitor ordinarily for the plaintiff, but for this purpose Mr. Combs desired him to act for him also. He says, having received these statements which induced him to draw out these heads called exhibit A a day or two afterwards he caused a draft agreement for a lease of the said farm to be prepared, being the draft agreement mentioned in the 7th paragraph of the bill, exhibit B, which he sent to the defendant. Now, I infer from Mr. Ewer's evidence that it certainly was not the intention of Mr. Coombs to act in so hasty and unguarded a manner as to put Pain in possession until he had before him in writing the terms upon which the possession was to be taken, and those instructions having been conveyed to Mr. Hodding, he prepared first of all in a rough way the exhibit A, then in a more formal way exhibit B, and sends that agreement to the defendant. It is said there is no proof when he got it—that appears to be so, but when he says he prepared it two or three days afterwards and sent it to him, the natural and almost irresistible inference is, that he means he sent it to him then and there immediately, or within a day or two afterwards, and when we find Mr. Coombs a couple of months afterwards put Mr. Pain into possession, and some months afterwards desires a lease to be prepared according to that agreement, the inference, to my mind, is irresistible, that he had the agreement before him.

And again:

This (the agreement, exhibit B) is put into his (Mr. Coomb's) hands, and with that he puts Mr. Pain into possession. That appears to be the solution of this case, and, therefore, upon the terms of that paper Mr. Coombs is bound to grant a lease.

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Mr. Fry, in his work on specific performance, sec. 577, refers to this case simply as an illustration of the equitable doctrine that

> the acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has therefore, constantly been received as evidence of an antecedent contract.

Between that case and the present there is such an obvious difference as to divest *Pain* v. *Coombs* and the above doctrine which it illustrates from all application in the present case.

In *Parker* v. *Taswell* (1), an agreement for a lease which contained all the conditions of the proposed letting was signed by an agent of the person named as lessor and by the proposed tenant, under this agreement the tenant had been let into possession of the premises, and the proposed landlord proceeded with the performance of certain acts which, by the agreement, were to be performed on his part, but differences having arisen between him and the tenant, he brought an action of ejectment against the tenant, who filed his bill for specific performance.

The contention of the defendant was that the agreement was expressed in terms that before the statute 8 and 9 Vic. ch. 106 sec. 3, would have been sufficient to operate as a present demise, and that it must therefore, be regarded as a lease and void by the statute as not being under seal. In fact the contention was that it was not a lease because it was not under seal, but, that, as it was expressed in terms sufficient before the statute to operate as a present demise, it should be held to be a lease upon the authority of *Stretton* v. *Pettit* for the purpose of making it void under the statute. Stuart V. C. would not listen to this contention, but granted a decree for specific per-

(1) 4 Jur. N.S. 100 ; 2 DeG. & J. 559.

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formance holding the agreement to be as it was in its terms a good agreement in equity for a lease.

Upon appeal, Lord Chancellor Lord Chelmsford giving judgment (2), says :—

On the part of the defendant it is insisted that this document was intended for a lease, and that, therefore, if it is void for that purpose it cannot be used as an agreement. The case of *Stretton* v. *Pettit* is cited in support of that argument. That case, however, is merely an authority to show that the intention of the parties to be collected from the language of the instrument was that it should take effect as a lease, and that it was void as such by the third section of the 8th and 9th Vic. c. 106, not being by deed. But the instrument now in question could not amount to a lease, because it was not signed by an agent lawfully authorised by writing, nor was it signed in the name of the principal so as to render it a lease binding upon the lessor.

Then he adds :—

Assuming, however, that it had been signed in the name of the lessor, and would, therefore, have amounted to a lease as containing words of present demise. Yet there is nothing in the Act to prevent its being used as an agreement though void as lease because not under seal. The legislature appears to have been very cautious and guarded in language, for it uses the expression "shall be void at law"—that is as a lease. If the Legislature had intended to deprive such a document of all efficiency it would have said that the instrument should be "void to all intents and purposes." There are no such words in the Act. I think it would be too strong to say that because it is void at law as a lease it cannot be used as an agreement enforceable in equity, the intention of the parties having been that there should be a lease, and the aid of equity being only invoked to carry that intention into effect.

The learned chancellor thus appears to refer to the principle involved in *Stretton* v- *Pettit* to show that it was not a decision in support of the contention of the defendant on whose behalf it was cited. The above remarks of the learned chancellor amount simply to this, that assuming the instrument to have been signed by the lessor as required by the statute of frauds expressed in such terms as to have constituted a

(3) 2 DeG. & J. 570.

good lease within the Statute of Frauds, prior to the passing of 8th and 9th Vic. ch. 106 sec. 3, it would be plain that the intention of the parties was that there should be a lease, and to give effect to that intention as by reason of 8th and 9th Vic., the instrument could not operate as a lease, equity would treat the instrument to be an agreement for a lease of which character it was not deprived by 8th and 9th Vic. ch. 106, and, therefore, upon such an instrument so signed, the court could, in aid of the intention of the parties, decree a lease to be executed in accordance with the terms of the instrument. That, however, is far from being an authority that (although neither is this the case before us), a verbal agreement for a lease and possession given thereunder, and so not capable of being enforced under the provisions of the statute of frauds, but enforceable in the discretion of the court according to the circumstances appearing in each particular case, in despite of the statute, is, since the Judicature Act, any more than it was before an actual lease, within the provisions of the statute 8th Anne ch. 14, so as to enable the alleged lessor to invoke the provisions of the statute after the goods of the party in possession have been seized at suit of his judgment creditors. When such a case arises it will be time enough to determine whether *Walsh* v. *Lonsdale* applies to it. In the present case the possession of the party sought to be declared to have been a tenant of the Ontario Loan and Debenture Company, at a rent reserved, is attributable to his title as mortgagor and owner of the equity of redemption in fee of the mortgaged premises, upon which the mortgagees by the 7th and 14th clauses of the mortgage, as they are extended in the act respecting short forms of mortgages, were duly empowered to enter in the event of default being committed by the mortgagor in payment of any of the instalments of principal and

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interest at the times in that behalf mentioned in the proviso for redemption.

There is not a tittle of evidence that in point of fact it had ever been agreed upon by the mortgagor that the relation of landlord and tenant in addition to that of mortgagees and mortgagor should exist between the parties. If it had been so agreed upon, and if at a rent, equal to the instalments payable under the proviso for redemption as expressed in the printed form of mortgage in use by the company, they could, and no doubt would, have executed the mortgage which, as I have already shown, contained a printed clause so framed as to be able to take effect as a lease, if that had been agreed upon by the mortgagees executing the mortgage, and so as to remain inoperative by the mortgagees not executing it when the creation of the relation of landlord and tenant had not been agreed upon. In the present case they have not executed the mortgage, nor have they offered any explanation why they did not do so when, if the relation had been agreed upon, they would, by executing it, have so easily given effect to such agreement.

But if the mortgage had been executed by the mortgagees the case must, in my opinion be governed by *ex parte Williams*, *ex parte Jackson*, and the principle expounded in *ex parte Voisey*. The learned judge who tried the case was of opinion that he must have so held, if he was obliged to take into consideration the amount made payable as the rent for the last half year of the term, amounting to upwards of $16,000, and in that opinion I entirely concur for in such case the sum made payable during the term of five years and expressed to be for rent would be just $26,212.50. It needs no argument that such an amount would be so monstrously excessive that it never could have been intended to become payable as rent for the use and

occupation of the land during the term even if the mortgagor had been in the actual occupation of the whole of the lands in the mortgage. That was an amount which no ordinary tenant—

Would be willing to pay for the use and occupation under ordinary circumstances.

It would not be a real rent, but a payment of the instalments secured by the mortgage under the fictitious name of rent.

The mere nominal creation of the relation of landlord and tenant for the purpose of the mortgagees trying to get the benefit which a real landlord alone could have over any other creditor of the mortgagor without any intention of creating the relation of landlord and tenant in reality.

Now that the whole amount of the $16,042.50, purported to be made payable as rent for the last half year of the term, must be taken into consideration for the purpose of determining a question as to the actual intention which the parties had in introducing into the mortgage deed, a clause purporting to create the tenancy as well as the whole of the period named for the duration of the term expressed to be created must be taken into consideration, cannot in my opinion, admit of any doubt whatever ; the questions being whether the term itself and the tenancy expressed to be created during its continuance was not a mere sham, and whether the amount expressed to be reserved as rent during the term was not so excessive as to demonstrate the tenancy to be a sham, and that no real tenancy was intended it is impossible to read the clause purporting to grant one single term of a fixed duration as creating several terms for distinct shorter periods than the one named, for the purpose of showing that the moneys payable during such shorter periods which are, in fact, but parts of the one term granted, would be fair and reasonable sums to be reserved as rent. That would be to make a wholly new contract for the parties

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which they themselves had never contemplated making, not to construe their intention as appearing on the contract which they did make. No doubt, there might be a *bonâ fide* rent of varying amount reserved, payable in each year during the term, but to arrive at the intention of the parties in naming in the mortgage deed the period for the duration of the term and the amount payable as rent in each year during the term, it is impossible to exclude from consideration any portion of the period named for the duration of the term or any portion of the sums expressed to be payable as rent during its continuance. The case of *Kitching* v. *Hicks* (1) upon which the learned judge proceeded has no application to the present case. There it was held that an instrument by way of chattel mortgage of certain goods and stock in trade and of certain book debts of a debtor contained two distinct contracts, and that the deed passed the book debts as to which it was held that registration was not necessary, although as to the goods and stock in trade the mortgage failed to take effect for want of registration. That is a different thing from cutting up a single term expressed by the contract of the parties to be created, but not so created as to be effectual and valid in law, into several minor terms at distinct rents, and which, by such process of dissection, should be made valid in the interest of one of the parties without any consent of the other. For all of the above reasons I am of opinion that the appeal should be allowed with costs and that judgment should be ordered to be entered in the court below for the defendents in the interpleader issue.

PATTERSON J.—The reality of the tenancy between the mortgagor and the defendant company depends in the first place on the sufficiency of the lease as a matter

(1) 6 O. R. 739.

of conveyancing, and in the next place on the *bonâ fides* of the transaction.

The latter point has usually been tested in England in the light of the bankruptcy law. Here we have no bankruptcy law at present, but it does not therefore follow that the intention with which the lease is made is to be disregarded. Creditors may be taken advantage of in other ways than those expressly forbidden by the bankruptcy laws, and the right to challenge one of these leases is not confined to creditors. Some of the ordinary incidents of the relation of landlord and tenant are fitted to produce injustice, and the person affected by them must have the right to question the reality of the relationship. A notable example is the right to distrain the goods of a stranger, which still exists in Ontario though modified by statute, R.S.O. 1887, ch. 102, s. 16, 17.

Kcarsley v. *Philips* (1) is an instance of the exercise of that right under the attornment clause in a mortgage, and in the case *Re Willis* (2) one of the lords justices refers to that power as a reason why an attornment is more beneficial to a mortgagee than a mere power to enter and distrain.

It cannot be denied that a mortgagor competent to contract will be bound by whatever bargain he voluntarily makes with his mortgagee, and, in attorning tenant to him, may, if he please, agree to pay him rent at a higher rate than a stranger would be likely to give for the premises, but when the question is whether there is an honest intention to create the relationship of landlord and tenant, or whether a tenancy is ostensibly created in order to cover some other purpose, we can properly, and without interfering with the freedom of contract, consider the terms of the lease as a part of the evidence bearing on the fact of intention.

(1) 11 Q.B.D. 621. (2) 21 Q.B.D. 384, 395.

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On the question of conveyancing the deed differs from, I think, all of those on which the English cases which have been cited were decided, by not giving the mortgagees a right to immediate possession. There is not the old redemise clause which provided in direct terms for the mortgagor retaining possession until default, but there are equivalent stipulations. There is a proviso that the mortgagees, on default of payment for one month, may, on one month's notice, enter on and lease or sell the lands. That is the statutory short form, and a modification is added dispensing with notice if the default lasts three months. This is quite inconsistent with a right in the mortgagees to enter before default. A mortgage similar in this respect was before the Court of Queen's Bench in Ontario, in *Superior Loan and Saving Society* v. *Lucas* (1) in 1879. That was an action of ejectment in which the society, failing to establish a default on the part of the mortgagor, sought to recover possession of the land because of the absence of the formal re-demise. The court held that notwithstanding the omission of the re-demise clause, it sufficiently appeared from the provisions of the mortgage itself and the rules and regulations of the plaintiff company, that it was the intention of the parties that the defendant should retain possession until default. I think that decision was correct. It would be so *a fortiori* under the rules of equity which prevail since the passing of the Judicature Act.

There is in the clause which is relied on as a lease, and which has inaccurately been spoken of as an attornment clause, another proviso:

> Provided always, and it is agreed, that in case any of the covenants or agreements herein of the mortgagor, his heirs, executors, administrators or assigns, be untrue, or be unobserved or broken at any time, the mortgagees, their successors or assigns, may, without any previous

(1) 44 U. C. Q. B. 106.

demand or notice, enter on the saids lands or any part thereof in the name of the whole, and take and retain possession thereof and determine the said lease.

The term is described in the clause as from the date of the deed until the date therein provided for the last payment of any of the moneys thereby secured, or in other words, for five years.

It cannot see any grounds for holding it to be at will.

It is not unusual in England, though very unusual in this country, to give a mortgagee the right to immediate possession. The right was not given I believe in some of the cases which have been discussed on the argument, *e. g.*, *Ex parte Williams* and *Ex parte Voisey* (1), but it was given by the deed in question in *Morton* v. *Woods* (2), and the effect may be concisely expressed by borrowing the words of Cockburn C.J. :

> The primary object of the parties was to secure to the mortgagees the amplest remedies to enforce the repayment of the mortgage money and interest, and though the term of ten years is mentioned, it was intended, on the one hand, that the mortgagees should be fully empowered to turn the mortgagor out at any moment, and so to realise their security by sale, while, on the other hand, the mortgagor should be empowered to get rid of his tenancy by paying off the mortgage money.

Here, as I have shown, the mortgagors were not empowered to turn out the mortgagor at any time, and the utmost privilege accorded to the mortgagor, in the way of paying off, was the right to pay $100, or any multiple of $100 not exceeding $1,000, in advance, on the day of the date of any half-yearly payment.

The lease, then, being for upwards of three years, is required to be in writing by the statute of frauds, and is void at law for not being by deed under the Ontario statute (3).

It has been suggested that the position and rights of

(1) 7 Ch. D. 139, 21 Ch. D. 442. (2) L.R. 3 Q.B. 685, 687.
(3) R.S.O. 1887, ch. 100, s. 8.

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the parties to this deed may be explained, and the right of the mortgagee to distrain maintained, on the ground that the deed contains an agreement for a lease, and that on doctrines of equity, the mortgagor must be regarded as holding under the same terms as if a lease had been granted ; and some cases have been referred to in which that doctrine has been recently applied to agreements for leases. *Swain* v. *Ayers* (1), per Lord Esher; *in re Maughan* (2), per Field J.; *Walsh* v. *Lonsdale* (3), per Jessel M.R., and other cases.

It may be that this deed contains an agreement for a lease. I am not sure that it does ; but assuming that it does, I am not prepared to hold without more direct authority than is furnished by the cases cited, that the enactment of the Judicature Act (4), that in matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail, has so completely done away with distinction between a lease and an agreement for a lease, as to render lands which are the subject of an agreement only " lands or tenements which are or shall be leased for life or lives, term of years, at will, or otherwise," which are the words of the statute. Nor do I see my way to hold that there has been any attornment by the mortgagor. The clause in the deed is not in form an attornment. In every one of the late precedents which have been brought to our attention the mortgagor " doth attorn tenant," except only *ex parte Voisey* (5), and in that case he covenants to become tenant upon a certain event. In every case he is the person who speaks. Here it is the mortgagee who purports to lease. It has been said that there is an attornment to be

(1) 21 Q. B. D 289, 293.
(2) 14 Q. B. D. 956.
(3) 21 Ch. Div. 141.
(4) Ont. J. A. 1881, 1, 17 subs. 10.
(5) 21 Ch. D. 442.

found in the words : " He, the mortgagor, paying, &c.," in this passage from the lease :

And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any moneys hereby secured, undisturbed by the mortgagees or their assigns, he, mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso, without any deduction.

I understand the argument to be that this is a covenant by the mortgagor to pay the rent, just as, in an ordinary lease, a covenant by the lessee is involved in the *reddendum*, " yielding and paying, &c.," and that the agreement to pay rent is an attornment. A case is cited, *Cannock* v. *Jones* (1), where the doctrine that no technical words are necessary to constitute a covenant was illustrated in an action by a tenant against his lessor, the words held to be a covenant being " the farm-house and buildings being previously put in repair and kept in repair by the said Elizabeth Jones."

I am afraid the reasoning is more subtle than sound. " He, the mortgagor, paying therefor in every year during the said term, &c.," is the *reddendum* " yielding and paying, etc." Debt for rent, or covenant, lay from early times on this word " yielding." See note 2 under *Thursby* v. *Plant* (2). But you cannot detach the words " yielding, &c.," from the *habendum* and *tenendum*. It is only in connection with the grant by the lessor that it has the force of a covenant. The rule is shortly laid down in *Bush* v. *Coles* (3):

That upon a reservation an action of covenant will lie, as where rent is reserved covenant will lie upon the words of reservation without any expressed words of covenant.

That is a different thing from implying a covenant

(1) 3 Exch, 333.
(2) Wm. Saund, p. 280.
(3) Carth. 232.

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where, as in this case, there is no reservation and no demise.

The divisional court decided this case on the one ground, that what was done was not sufficient to create the relationship of landlord and tenant. My opinion is that that decision is correct. I do not feel pressed by any of the English decisions, because I think they turn on facts that differ radically from those presented in this case. I have given the general views in which my opinion inclines to the conclusion reached by the divisional court rather than that of the Court of Appeal. I believe I am in substantial accord with my brother Gwynne, whose exhaustive and elaborate judgment I have seen; and I should have to give effect to my opinion by holding that the appeal should be allowed. Still I should not do so without some feeling of want of certainty on more than one point. But, if the conveyancing difficulty were surmounted, I should hold without hesitation that there was no reality in the alleged tenancy.

The question is one of fact.

The learned judge who tried the action did not, and properly felt that he could not, sustain the lease as a whole; but he satisfied himself that he was at liberty to separate the last instalment of rent from the others, and then finding that each instalment of those due before the sheriff seized was reasonable in relation to the value of the land, he held that the landlord was entitled to recover in respect of the two of the reasonable instalments which were all that were claimed for. This mode of disposing of the matter must have been taken in misapprehension of what was the question to be tried, a misapprehension that may easily have been induced by the form of the issue, which if an interpleader at the instance of the sheriff, as I suppose it to be, is a mistaken proceeding.

The right of a landlord under the statute of Anne is to have the goods remain on the premises until the execution creditor pays the rent which is due, not exceeding a year's rent. He is not entitled to have the rent paid out of the money realized by the sheriff from the sale under the execution, although in practice there may usually be a tacit understanding that it will be paid by the sheriff out of that money. Under the statute there is no question between the sheriff and the landlord in respect to that money, and the issue on the record ought to be found against the plaintiffs without any regard to the question of tenancy which is the whole subject of the contest.

It is not possible, and if it were possible it would not be advisable to attempt, to formulate all the considerations by which the reality and honesty of one of these leases may be tested. It is a question of fact in each case, and you cannot satisfactorily try facts by formulas. The enquiry in the present case turns, as must be the case in the bulk of these mortgage cases, to a great extent on the amount of rent reserved. We may in conducting that inquiry usefully keep in view some general observations made by Lord Justice Baggallay in *Ex parte Jackson* (1) which commend themselves to me as accurate in principle. "So far," the Lord Justice remarked, "as any inference can be drawn from the practice of inserting attornment clauses, it appears to me that the benefit to be derived by the attornment clause was intended to be an equivalent for that which the mortgagee would derive from the rent if the tenant had been a stranger. What would that equivalent be? Would it not be a right to the payment of a fair and reasonable rent, such as an ordinary tenant would be willing to give for the property under ordinary circumstances?

(1) 14 Ch. D. 725, 733.

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That, as it seems to me, is the rent for which a properly prepared attornment clause should make provision; not necessarily the exact amount which a tenant would pay for the property, but such an amount as a willing tenant would probably pay as a *bonâ fide* rent. If the rent so reserved is clearly in excess of what would be a fair and reasonable rent, it appears to me that, though you may call it a rent, it is no longer a real rent, but a fictitious payment under the name of rent."

I adopt that criterion, and it may be applied without in the least trenching on the right of the parties to make what contracts they please. The question is have they made a real contract by which the one intends to become tenant to the other, or is the object to give the mortgagee in addition to the security upon the land (which, as a rule, is all the security stipulated for in the application and agreement for these loans, read apart from the printed form of mortgage), the power to distrain, not for a reasonable rent, for that would be consistent with good faith, but for an amount which may give the mortgagee an undue advantage, in respect of the personal property on the land, over execution creditors of the mortgagor, and even enable him to obtain payment out of the goods of a stranger.

In this case the principal money secured by the mortgage is $20,000 and it bears seven per cent. interest. The payments are half-yearly for five years from the first day of December, 1883, to the first day of June, 1888. Each six months down to the first of December, 1887, five hundred dollars of principal and interest on the unpaid principal are payable, making the half-yearly payments something over $2,000, the amounts diminishing each half year by the amount of half a year's interest on five hundred dollars.

These are payments within the fair annual value of the property, and if the whole had been of the same amount

no inference unfavourable to the reality of the transaction could have been drawn from the amount of rent reserved, but the remaining payment of $15,500 of principal with half a year's interest on that sum, making upwards of $16,000, is considerably over four times the most extravagant estimate. It is impossible to hold that a lease on those terms was arranged with the honest purpose of creating a real tenancy. It is simply incredible. To divide the payments, as was done in the court of first instance, and say that some may stand while it is out of the question to sustain others, is to lose sight of the object of the inquiry. We are not concerned with the reasonableness of this instalment or that as a demand by the mortgagee against the mortgagor, or in relation to the lettable value of the property. The question is the design with which the alleged lease was made, and we look at its terms as part of the evidence upon that question of fact. The right of parties to a mortgage to constitute between themselves the relation of landlord and tenant, with a view to the greater security of the mortgagee or the more convenient realization of the mortgage moneys, is now undoubted, and every reasonable presumption should be made in favour of the *bona fides* of what they profess to do. But while we may go, as seems to have been done in at least one of the reported English cases, as far as credulity can reach, we must not put these transactions on a plane entirely above the practical business of real life. If we find that the lease which is set up by a mortgagee as taken from him by his mortgagor is one which, after every allowance and consideration in its favor, obviously would never have been entered into by any person as a business transaction of letting and hiring, there need be no hesitation in concluding that the object was not the creation of a real tenancy. I repeat that that is the

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question. A mortgagor is at perfect liberty to agree that the mortgagee may distrain for all the mortgage moneys, principal as well as interest, without any regard to the value of the land, and whether the goods are on the mortgaged premises or elsewhere. I believe that in Ontario this power is not fettered even by such safeguards for creditors as are provided in England by the Bills of Sale Act, 1878. See *In re Willis* (1). It may also be said that, as far as liberty of contract is concerned, any one may contract to pay double its value for the house or farm he rents. But to have a legal right to do so is one thing, and intentionally to do so is a very different thing, and the difference is by no means unimportant to bear in mind when the motive of the ostensible transaction has to be inquired into.

There was some discussion in one of the courts below—I am not sure that it was renewed before us—upon the effect of the existence of leases of portions of the property at the time the mortgage was made. Nothing can turn on that subject if my views on the principal questions are correct. I have therefore thought it unnecessary to consider the subject. I think, however, that the doctrine of estoppel as applied in *Ex parte Punnett* (2) would preclude any question between the mortgagor and mortgagee.

In my opinion the appeal should be allowed with costs and the judgment of the divisional court restored.

Appeal allowed with costs.

Solicitor for appellants: *George C. Gibbons.*

Solicitor for respondents: *Albert A. Jeffrey.*

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(1) 21 Q.B.D. 384.

(2) 16 Ch. D. 226.

ROSANNA GRAY..... APPELLANT; 1890

AND *Mar. 17, 18.

CORNELIUS COUGHLIN.....RESPONDENT. 1891

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO. *Jan. 19.

Mortgage—Non-Registration—Priority of subsequent mortgage—Sale under —Bar of dower.

Certain land was devised to the testator's sons charged with an annuity to his widow who also had her dower therein. The devisees mortgaged the land to C. in March, 1879, and the mortgage was not registered until January, 1880. In November, 1879, a second mortgage was given to M. and registered the same month. In this mortgage the widow joined barring her dower and releasing her annuity for the benefit of M. She had had knowledge of the prior mortgage when it was made and had refused to join in it. The second mortgagee, not being aware, when his mortgage was executed, of the prior incumbrance, gained priority, and the land was sold to satisfy his mortgage: the proceeds of the sale being more than sufficient for that purpose the surplus was claimed by both the widow and by C.

Held, reversing the judgment of the Court of Appeal for Ontario, Gwynne and Patterson JJ. dissenting, that the security for which the dower had been barred and the annuity released having been satisfied, the widow was entitled to the fund in the court as representing her interest in the land in priority to C.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Chancellor (2) in favor of the appellant.

The appellant is the widow of one Charles Gray who, by his will, left his real estate to two sons subject to an annuity to the widow, but such annuity not to be in lieu of dower. The sons mortgaged the real estate to the

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

(1) 16 Ont. App. R. 224; *sub-nomine McLellan* v. *Gray*.

(2) 16 O. R. 321.

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respondent, the widow not being a party to such mortgage; subsequently, a second mortgage was given to one Maclennan in which the widow joined, releasing for the purposes of the mortgage her interest in the land both as annuitant and doweress. The respondent neglected to register his mortgage until the second mortgage had been registered and the latter thus obtained priority under the Registry Act. Default having been made in paying the second mortgage the land was sold under it and such sale realised some $1600 over the mortgage. The contest in this case is over this surplus the widow claiming it as annuitant and doweress, the respondent claiming it under his mortgage.

The right to this money was tried out in the master's office who decided that the appellant was entitled to it. On appeal to the Chancellor this decision was affirmed (1). On further appeal to the Court of Appeal the Chancellor's judgment was reversed and the court held that the widow was not entitled to priority over the respondent. She then appealed to the Supreme Court of Canada.

Moss Q. C. and *Bolton* for the appellant. The second mortgage was paid by appellants' interest in the land and she is, therefore, a surety and entitled to an assignment of MacLennan's securities. See *Merchants Bank of Canada* v. *McKay* (2).

On the question of subrogation the following authorities were cited: *Hodgson* v. *Shaw* (3); *Craythorne* v. *Swinburne* (4); *Re Robertson* (5); *McNeale* v. *Reed* (6); Sheldon on Subrogation (7); *Mutual Life Assurance Society* v. *Langley* (8).

(1) 16 O. R.321.
(2) 15 Can. S. C. R. 672.
(3) 3 Mylne & K. 183.
(4) 14 Ves. 160.
(5) 24 Gr. 442.
(6) 7 Ir. Ch. 251.
(7) Sec. 104.
(8) 32 Ch. D. 460.

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Scott Q. C. for the respondent cited DeColyar on Guarantees (1) ; Brand on Suretyship and Guarantee (2) ; *Patterson* v. *Hope* (3) ; *Newton* v. *Charlton* (4) ; *Farebrother* v. *Wodehouse* (5) *Duncan & Co.* v. *North and South Wales Bank* (6) ; *Forbes* v. *Jackson* (7).

Sir W. J. RITCHIE C. J.—It appears that from the first of March, 1879, when Richard and John Gray mortgaged their interest to the respondent, Rosanna Gray was entitled to dower in the mortgaged premises and the property was also subject to an annuity to her of $150 a year. The chancellor has fixed the value of the dower and annuity at $1525. Had there been no second mortgage and had the property been sold under this first mortgage it is fair to assume that it would have sold for what it did sell for under the second mortgage, namely, $7500, less the value of the dower and annuity $1525. This firstmortgage was not registered until the 2nd January, 1880; Rosanna Gray no doubt had notice of its existence as she refused to join in it. On the first of March, 1879, Richard and John Gray mortgaged the same lands to MacLennan for $4,000, the appellant Rosanna Gray joining in the mortgage, releasing for the purposes of that mortgage all her rights and interest in the land as doweress and annuitant for the benefit of the mortgagee and for the better securing the repayment of the advance to Richard and John Gray whereby her property thus became security to answer the plaintiff's testator's claim in case his mortgage was not paid by the mortgagors. But she received no portion of, or benefit from, the money so advanced. This mortgage was duly registered on the 27th November, 1879, thereby gaining priority over the mortgage to Coughlin.

(1) P. 290.
(2) P. 357 sec. 255.
(3) 5 Dana 241.
(4) 10 Hare 646.
(5) 23 Beav. 18.
(6) 11 Ch. D. 88 ; 6 App. Cas. 1.
(7) 19 Ch. D. 615.

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Thus matters stood until default was made in the payment of MacLennan's mortgage when under proceedings on that mortgage the land was sold and after payment of MacLennan's claim a surplus of $1612 was left in court, $1525 of which surplus is the subject of this litigation. The mortgagee, Coughlin, claims to have his mortgage paid out of this surplus.

The first question that naturally suggests itself is: Did the land mortgaged to Coughlin produce this surplus? To my mind it clearly did not. It was produced by the property sold under the second mortgage, namely, the land mortgaged to Coughlin, plus the dower and annuity of Rosanna Gray. I think no question of registration or non-registration arises in this case between Coughlin and Rosanna Gray. It is clear that when Coughlin advanced the money on his mortgage he had express notice of the appellant's outstanding dower and annuity and he did so after an express refusal on her part to join therein. The effect of the decision appealed from appears to me to place the appellant, Rosanna Gray, notwithstanding such refusal, in precisely the same position as if she had actually joined in the respondent's mortgage, which I respectfully think we have no right to do. Had the respondent registered his mortgage he would have had a prior claim on the land but not on the land relieved from Rosanna Gray's dower and annuity. This priority he lost by reason of the non-registration of his mortgage, but how does this give him a claim on the fund produced by the value of Rosanna Gray's dower and annuity which was never pledged to him? Her portion of the fund only escapes liability by reason of the share of her sons in the land being sufficient to pay the first charge on the property, namely, the MacLennan mortgage, and for the security of which or for which purpose alone she included her dower and an

nuity in the mortgage. I am at a loss to see how Coughlin can claim more than the surplus after deducting the value of the dower and annuity fixed as we have seen by the Chancellor at $1,525; otherwise, Coughlin would be getting payment of his mortgage, not out of the lands mortgaged to him, but out of the value of the dower and annuity which were not released for the benefit and security of his mortgage, but alone for the benefit and security of the second mortgage. He lost his priority by his own negligence or default. Had the mortgagor of the second mortgage paid it off at maturity can it be doubted that Rosanna Gray would have been entitled to insist on being restored to her original position with reference to her dower and annuity leaving the Coughlin mortgage to stand against the interest of Richard and John Gray in the land, as it was conveyed by them in that mortgage? Or had Rosanna Gray, instead of her dower and annuity, included in the mortgage a piece of her own land and the mortgaged premises had been sold *en bloc* could Coughlin have claimed the surplus without accounting for the value of the land belonging to her? Or supposing the land had not been sold *en bloc*, but had been sold in parcels and the first parcel sold was the land mentioned in both mortgages and that brought sufficient to pay the mortgage having priority, could Coughlin have insisted that the parcel of land belonging to Rosanna Gray should be sold for the purpose of being applied in payment of his mortgage? I should certainly think not. Surely the property primarily liable to pay the mortgage money is the property of the borrower, not the property of the surety, when the mortgage on the property, having legal priority over all other securities, has paid the debt secured by it. I am at a loss to understand on what principle of law or equity the property of the surety can be sold to pay a mortgage second in pri-

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ority never pledged for its payment. When Coughlin advanced money on the mortgage from Richard and John Gray, he so advanced it on the land and on the land alone subject to the rights of dower and annuity of Rosanna Gray. Had he registered his mortgage and so obtained priority he could only have recovered his advance subject to such rights, but he lost that priority by neglecting to register his mortgage whereby the mortgage to MacLennan's testator gained the priority. Rosanna Gray having joined in the mortgage to MacLennan's testator with a view of adding her dower and annuity to the security of that mortgage and of that alone, why should the proceeds of her dower and annuity be taken to discharge the respondent's mortgage for payment of which such dower and annuity never were made responsible, and as against which the respondent would have had no claim if he had retained his priority, inasmuch as the mortgage was from Richard and John Gray on their interest only in the land subject to those charges. I cannot see how having lost his priority he is in any better position to claim against the fund on which he could not have claimed if he had not so lost his priority. His mortgage interest has not produced the fund in court. I think it will be anything but equitable to allow this surplus to be applied in payment of the mortgage which never covered either Rosanna Gray's dower or her annuity. The prior existing mortgage to Coughlin is postponed to MacLennan's and is not defeated by allowing Mrs. Gray's claim but by reason of the lost priority and because Coughlin, under his mortgage, never had any claim in the dower and annuity, and because Rosanna Gray only released her interest in the land for the purpose of the mortgage to MacLennan, not for the purpose of Coughlin's mortgage. Had the mortgagors paid off the

MacLennan mortgage there can, in my opinion, as I have said before, be no doubt that Mrs. Gray's interest would have reverted to her, and if the mortgage is paid off by means of the sale under the decree of the court, I cannot see why she is not equally entitled to say that the amount having been obtained by the sale of her interest she is equally entitled to the benefit of the amount which her interest realised. Inasmuch as her dower and annuity were solely given as security for the MacLennan mortgage why should they be made security for the Coughlin mortgage likewise?

As I have said I cannot see what the registry acts have to do with this case beyond giving the second mortgage priority over the first, nor can I see why Rosanna Gray's knowledge that the first was in existence before the second was given can be in any way used to increase the security of the first mortgage, nor in any way make her charges on the property given as security for the second available to make good the deficiency on the first. Richard and John Gray never having had any right to or claim on such charges, and the same having been given simply as security for the second mortgage alone, to take Rosanna Gray's dower and annuity or the proceeds thereof to satisfy the first mortgage to which she was no party and in which she was in no way interested and in which she absolutely refused to join, would be, in my opinion, most unjust and inequitable. I therefore cannot see that as surety Rosanna Gray was not entitled after payment of the second mortgage to any surplus that might arise from the sale of the land free from her dower and annuity, that is to say, the value thereof established by the Chancellor, namely $1,525, nor can I discover that Rosanna Gray claims in any way under the registry acts but simply under the general principle of equity that her property shall not be applied to the payment of

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an indebtedness and liability she never incurred and which she expressly refused to incur, simply because the first mortgagee had lost his priority either willingly or by negligence. The registry laws placed the Maclennan mortgage in a better position than the Coughlin mortgage, but why should that operate to give Coughlin a right to take the proceeds of Mrs. Gray's property to pay his mortgage? Under such priority thus obtained over the Coughlin mortgage MacLennan was entitled to be paid out of the fund in court representing the mortgagor's property in priority to Coughlin, leaving the part which represents the property of Rosanna Gray to be appropriated to her and not to Coughlin. It is said, in that case, that Coughlin would be entirely cut out; be it so, but by whose fault but his own. In other words, I do not think that Coughlin having lost his priority in the mortgaged premises secured to him there is any equity in allowing him now to recoup himself out of the fund produced by the property of the surety to another mortgage in which property he, Coughlin, has no interest, and on which he had no claim. The practical operation of the judgment of the appellate court is to remove the Coughlin mortgage from the property of his mortgagors and place it on the property of Rosanna Gray which was never mortgaged to him.

Under these circumstances I think the appeal should be allowed and the judgment of the Chancellor restored.

STRONG J.—The facts which have given rise to this litigation are few and simple and are not disputed. Charles Gray died in 1874, leaving his widow Rosanna Gray, the present appellant, and his two sons, Richard and Charles Gray. By his will he devised the lands which are the subjects of the mortgages to be hereinafter mentioned to his sons Richard and Charles sub-

ject to an annuity of $150 to his wife charged on the same lands. This annuity was not in lieu of dower. On the first of March, 1879, Richard and Charles Gray mortgaged the lands devised to them by their father to the respondent Cornelius Coughlin to secure $700 and interest. The appellant was not a party to this mortgage, having refused to join in it. The mortgage was not registered until the 2nd of January, 1880. On the 1st of November, 1879, Richard and Charles Gray made a second mortgage of the same lands to Donald MacLennan, who was the original plaintiff in this action, the present plaintiffs being his executors by whom the action was revived This second mortgage was to secure $4,000 and interest. To this latter mortgage the appellant was a party, and she thereby released all her right, title and interest as doweress and as annuitant for the purpose of the mortgage ; in other words, she mortgaged her dower and her annuity as a surety for the benefit of her sons, the mortgagors. The mortgage deed contained a clause expressly making these interests of the appellant thus mortgaged by her as a surety for her sons subject to the proviso for redemption. This mortgage to MacLennan was registered on the 27th of November, 1879, and it is not disputed that MacLennan the mortgagee had no notice of the prior mortgage to Coughlin which, as before stated, remained unregistered until the 2nd January, 1880. Mrs. Gray had notice of Coughlin's mortgage when she executed the mortgage to MacLennan.

The money not having been paid according to the tenor of the mortgage MacLennan brought this action for a foreclosure or sale of the mortgaged property. The sale realised sufficient to pay off MacLennan's mortgage, and after doing so there remained a residue of the purchase money produced by the sale amounting to $1,612. In the master's office a

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contention arose between the appellant, the respondent and one Allan, an incumbrancer subsequent to Coughlin, who is not a party to this appeal, regarding the application of this money. The appellant insisted that she was entitled first to be paid out of the fund (so far as it was adequate for that purpose) the equivalent in value of her annuity and dower, whilst the respondent on the other hand insisted that he was entitled to be paid the amount secured by his mortgage in priority to the appellant. The master by his report found that Mrs. Gray was entitled to priority and to be paid $388 as the value of her dower and $1,650 as the value of the annuity.

It was further contended that there was a merger to the extent of a moiety of the annuity by reason of Richard Gray having, on the 4th of August, 1881, conveyed his undivided one half in the equity of redemption in the mortgaged lands to his mother the appellant. The master finding that there was no merger rejected this last mentioned claim. This report of the master was, on appeal, confirmed by the learned Chancellor of Ontario, with the exception that there was a variation of the report by a deduction from the arrears of the annuity, which resulted in the reduction of the aggregate amount due in respect of both the annuity and the dower to the sum of $1,525.

From this judgment of the Chancellor there was an appeal to the Court of Appeal, by which court the judgment of the Chancellor was reversed, and it was adjudged that the respondent Coughlin was, in respect of his mortgage, entitled to priority over the appellant and had therefore a right to be first paid out of the balance of purchase money remaining in court. From this latter judgment the present appeal has been brought.

It is to be remarked that the effect of the judgment

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of the Court of Appeal is to make the property of the appellant Mrs. Gray, who mortgaged her dower and her annuity together with the charge by which it was secured as surety for her sons to secure the payment of $4,000 to MacLennan, liable not merely for the debt which she contracted to secure but also for a debt due to the respondent Coughlin for which she had expressly refused to charge these same interests.

The question which we have to decide is, then, whether she is, upon MacLennan being paid off, entitled to her dower and annuity, or, which is the same thing, to the money which represents them; or are these interests to be sequestrated for the benefit of Coughlin to whom she never in any manner agreed that they should be liable.

The first thing which strikes one is the result of the judgment appealed against, which has the effect of charging the appellant's property with a debt which she never contracted or even contemplated it should be charged with, and that too in the absence of any positive act apart from contract or any omission or failure of duty on her part creating any obligation binding her towards the respondent. The only possible way in which in any event it could even have been plausibly argued that Coughlin's debt could be made a lien on Mrs. Gray's interest as doweress and annuitant would have been that it might have been pretended that if the decree had been for a strict foreclosure instead of a sale Coughlin might have entitled himself to some equity through the dry technical rules which, in the interest of a paramount mortgagee, have sometimes to be applied in working out a decree for redemption by successive incumbrancers, which occasionally operates prejudicially to those interested in a portion only of the equity of redemption. As I shall endeavor to show,

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however, no argument of this kind can prevail; first, because here there are no successive redemptions but the property having been realised and turned into money by a sale no provisions for successive redemptions have been requisite; and secondly because, even if instead of a sale there had been a judgment for foreclosure, thus obliging each successive incumbrancer to redeem or be foreclosed, Mrs. Gray could not have been prejudiced by the adoption of that mode of proceeding. It is true, as I have said, that where in foreclosure actions there were successive incumbrances the rules of courts of equity relating to tacking and consolidation sometimes operated oppressively, and that one of the reasons for substituting the remedy of sale for foreclosure was that some harsh consequences might be avoided, but I do not think that any such rules would have entitled the respondent to the relief he has obtained by the judgment under appeal. It is quite sufficient, however, for the disposition of the appeal to consider the rights of the parties in the event which has happened of the mortgaged property and interests having been converted into money by a sale, thus dispensing with any process of redemption, and only requiring the adjustment according to equitable principles of their rights to payment out of the fund thus produced remaining in the hands of the court.

I will then put a case which is distinguishable as regards its influence on the rights of Mrs. Gray from that which we have actually to deal with. Supposing instead of this property having been all sold, including that belonging to the appellant as well as the lands which the mortgagors had mortgaged, the mortgagors had out of their own moneys paid off MacLennan, the mortgagee, and he had sought the direction of the court as to how he was to dispose of the dower and annuity mortgaged by the appellant as a surety for

her sons, could it for a moment have been pretended that he would have been directed to convey and assign these interests to Coughlin? On what ground could any claim by Coughlin to make these interests a security for the money advanced by him have been based? Not, certainly, on any engagement by way of contract or agreement for the appellant had expressly refused to charge her property for his benefit; and if not in that way, upon what other principle could such a liability have been imposed? There can be no doubt but that in such a case Mrs. Gray would have been held entitled to a re-conveyance of her dower and to a re-assignment of her annuity. Then let us go a step further and suppose that MacLennan, in exercise of a power of sale which might have been contained in his mortgage, had sold the land subject to Mrs. Gray's interests, thus leaving her dower and annuity intact, and out of the proceeds of such a sale had paid himself off, what reason would there be in such a case for any difference between this case and that first put? None that I can discern, and none I am sure which any amount of fertile ingenuity could suggest. The like consequences must have followed and Mrs. Gray would have been entitled to be reinstated in her property and rights. Then take another hypothetical case; if MacLennan had sold all which had been mortgaged to him, viz. the lands free from the incumbrances of the dower and the annuity, so that these latter subjects of the mortgage would have been included in the sale, and had then paid himself out of the proceeds, why should the result as regards Mrs Gray differ in this case from those before put? The mere accident of the sale could not alter her rights and the residue of the purchase money remaining, so far as it might be adequate and to the extent of a full indemnity to her, would in that case also and on the same principle as

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in the cases first and secondly supposed have belonged to her absolutely. Then what difference as regards the rights and equities of the appellant can there possibly be between the last case and that which has in fact happened, of a sale by the court instead of by the mortgagee under a power? I venture to think that the most acute lawyer could not suggest a difference in principle between this series of cases beginning with the supposed case of a payment by the mortgagors and ending with the case actually before us. For the reasons thus made apparent, viz., that Coughlin, never having had or contracted for any charge or lien upon the appellant's property, is not entitled now, since they have been converted into money, to derive an advantage for which he could have shown no title while they existed in specie, I am of opinion that the Chancellor's judgment was entirely right and must be restored.

I am also of opinion, although it is not necessary to decide the point, that the rights of the appellant would have been precisely the same under a decree for foreclosure providing for successive redemptions. In considering this it is important to bear in mind that the question is not whether the respondent is to suffer any prejudice or loss through the appellant, but whether or not he is to obtain any adventitious addition to his security by extending, to the prejudice of the appellant, the lien of his mortgage to the appellant's property; if he fails in this he will lose nothing which he ever stipulated for; if he succeeds he will gain that which he never contracted for, or even contemplated the acquisition of. Any accidental advantage which might have been derived by the respondent in the way of getting the appellant's property as an additional security for his debt could only, therefore, have arisen, not from any rights or equities which the respondent

originally had against the appellant, but solely as a consequence of the paramount equitable right of the first mortgagee, MacLennan, to be redeemed entirely and not piece-meal. For this reason Mrs. Gray could not have had the security apportioned and have redeemed her dower and annuity by paying a proportionate part of the mortgage money. If the decree had been for foreclosure the first question in framing it would have been that as to who had the prior right to redeem, Mrs. Gray or Coughlin. Now, upon the 27th November, 1879, when the plaintiff, MacLennan, registered his mortgage the effect of that registration was to postpone Coughlin's mortgage, made on the 1st March, 1879, but not registered until the 2nd January, 1880, to MacLennan's mortgage ; the parties were, therefore, just in the same position from that date as if MacLennan's mortgage had been made first and Coughlin's mortgage had been made subsequently to it. They were to all intents and purposes first and second mortgagees from the date of registration on the 27th November, 1879. Then nothing can be clearer than that Mrs. Gray was a surety for her sons, and that MacLennan, from the very form of his security, knew this. It follows that Mrs. Gray was entitled from the first to be subrogated to all securities held by the creditor, the first mortgagee, on payment by her of the latter. Then according to the latest authorities this right of subrogation entitled her, not only to the securities held by the creditor when she originally became surety, but also to all securities and incidental advantages obtained by him after the appellant's liability as a surety arose. This was at one time supposed to be otherwise and the case of *Newton* v. *Chorlton* (1), was thought to have settled the law the other way. That case has, however, been overruled, the learned judge who decided it, V. C.

(1) 10 Hare 646.

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Wood, having subsequently considered that his decision was erroneous. *Pledge* v. *Buss* (1); *Pearl* v. *Deacon* (2); *Forbes* v. *Jackson* (3). To apply the rule to the facts of the present case it would therefore have been originally the right of Mrs. Gray to have had, upon payment to MacLennan of the amount of his mortgage debt, a transfer of his mortgage; and when MacLennan has gained by prior registration priority for his security over Coughlin that advantage would also have enured to the benefit of Mrs. Gray as a surety on her redeeming MacLennan. In that case she would have been entitled, as the law has now been settled by statute, not merely to be subrogated by decree to MacLennan's right and thus to stand in his shoes, but to have an actual transfer of his securities with the benefit of all priorities attached thereto, unless, for some good reason founded on equitable principles, she had disentitled herself to this *primâ facie* equity of a surety. No such reason for depriving the appellant of her ordinary equitable right as a surety could be suggested, except that which has been referred to in the court below that she had notice of the respondent's mortgage. That she had such notice is no doubt an established fact, but it is one totally irrelevant to the question of the right of priority of redemption between Mrs. Gray and the respondent. If anything can be well settled it is, that one who for valuable consideration acquires title from a purchaser or mortgagee, who has himself gained priority under the registry laws over a former unregistered deed or mortgage, is entitled to the benefit of the priority so acquired, even though such sub-purchaser or mortgagee may himself have had notice; in such case he is entitled to shelter himself under the valid preferable title of his own immediate grantor.

(1) Johns 663.
(2) 24 Beav. 186.
(3) 19 Ch. D. 615.

So that if A. takes a mortgage and does not register and then B. takes a mortgage of the same lands and acquires priority over A. by registering without notice, C., obtaining for valuable consideration an assignment of B's mortgage, though with notice of A's prior mortgage, is nevertheless entitled to the benefit of the priority acquired by his assignor B. Nothing can be better established than this, the principle being the same as that which always applied in equity to the case of a purchaser with notice from a *bonâ fide* purchaser for value without notice. Therefore Mrs. Gray would not in any manner be deprived of her right of subrogation by the fact that she had notice of the respondent's mortgage. Then in the case of Mrs. Gray paying off MacLennan, her own property, the dower and annuity, would have been revested in her and she would have been entitled to call on Coughlin to redeem the lands subject to the dower and annuity on payment of the full amount of the mortgage money, or stand foreclosed. In the event of the appellant not voluntarily paying off MacLennan, and a decree for foreclosure being drawn up by way of carrying out the same principle as that just referred to, the prior right of redeeming MacLennan would have been given to Mrs. Gray and the respondent in turn would have been directed to redeem her as to the lands only subject to the dower and annuity upon payment of the whole principal and interest paid to MacLennan; for she, being a surety, would retain in her own hands her own property mortgaged as such, and Coughlin would not have been entitled to redeem anything more than the lands belonging to the principal mortgagors; in other words, in the technical language of conveyancers, the suretyship securities, namely, the dower and annuity, would be "at home" in Mrs.

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Gray's hands, and the decree would have directed that in the event of Coughlin not redeeming the lands by paying off the full amount of the mortgage debt and interest he should stand foreclosed.

The foregoing conclusion results from the cases of *Forbes* v. *Jackson* (1) and *re Kirkwood* (2), which, following *Bowker* v. *Bull* (3), have overruled the earlier cases of *Williams* v. *Owen* (4) and *Farebrother* v. *Wodehouse* (5). To put it shortly, the equity of a surety to be subrogated to the rights of a mortgagee is a better equity and takes precedence of the right of a subsequent mortgagee to redeem. Here, by the effect of the prior registration by MacLennan of his mortgage, Coughlin became, in respect of his unregistered mortgage, a subsequent incumbrancer, just as he would have been had his mortgage not been executed until after the 27th of November, 1879, the day on which MacLennan's mortgage was registered. It is no answer to this to say that the registry laws gave Coughlin any advantage over Mrs. Gray by cutting out her equity to subrogation, when on the 2nd of March, 1880, he registered his mortgage; and this, for more than one reason; in the first place, Mrs. Gray acquired the right to subrogation under the mortgage to MacLennan, which, on its face, showed she was a surety, and which was registered previously to Coughlin's; then Coughlin had notice, by reason of the prior registration of this mortgage to MacLennan, when he himself registered, of all rights accruing under that instrument, for I hold that under the registry law of Ontario (now R.S.O., cap. 114, sec. 80), registration is conclusive and not merely presumptive notice to all subsequent purchasers and incumbrancers, and by a provision embodied in sec. 82 of

(1) Ubi sup.
(2) L.R. Ir. 1 Eq. 108.
(3) 1 Sim. N. S. 29.
(4) 13 Sim. 597.
(5) 23 Beav. 28.

the same act, not to be found in either the Middlesex or Yorkshire or Irish registry laws, (1), but peculiar to the Ontario Act, notice of a prior unregistered deed or equity, after the execution of a conveyance or mortgage, but before registration, is sufficient to postpone the party claiming under it. But the conclusive answer to any contention that the Registry laws operated in favor of Coughlin to counteract Mrs. Gray's right of priority, is that Coughlin had nothing to do with the dower and the charge for the annuity and never registered anything against those interests which were not comprised in his mortgage, and as they were, of course, distinct properties from the lands out of which they were derived, just as if they had been other lands owned by Mrs. Gray in fee, it is plain that on this ground alone, no advantage under the registry laws could have accrued to Coughlin as a subsequent registered mortgagee even if it should be considered that he had no notice of Mrs. Gray's equity, for he was not in fact a subsequent registered mortgagee at all in respect of the dower and the annuity. The right to subrogation as regards the lands mortgaged by Richard and Charles Gray is clear and in respect of them Mrs. Gray was entitled to be substituted for MacLennan together with all his right of priority as regards them, and for the reasons before given, notice to her of the respondent's mortgage could make no difference.

I have thus discussed the questions which would have arisen had the judgment directed a foreclosure and successive redemptions according to the old practice in chancery instead of a sale, not because the rights of the parties can depend upon such considerations, but rather by way of testing the correctness of the conclusion to which I have come upon the case as it is actually presented. For these reasons, I am of opinion

(1) *Elsey* v. *Lutyens*, 8 Hare 159.

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that even in the case of a strict foreclosure Mrs. Gray would have been entitled to priority in the case before us in which there are no complications or difficulties arising out of directions for successive redemptions but where the property as well that of the mortgagors as that of the surety, mortgaged on their behalf, has been all converted into money, and the mortgage debt having been paid out of the proceeds the only question which remains is as to the right of the surety to take the money representing in value her own property (or as much of it as remains for her to take) a right which I fail to see any one is entitled to interfere with.

Certainly, it would have been a strange result if by obtaining priority over the appellant the respondent could have indemnified himself from the result of his own negligence in not registering his mortgage, out of the property of the appellant, who neither by contract nor by any wrongful act or omission had in any way subjected it to the charge of the respondent's debt.

As regards the question of merger, the law now depends on the statute of Ontario which provides that there shall be no merger in such a case as the present, thus settling the law in the way the learned chancellor has indicated, and this is sufficient for the present purpose, without entering upon any consideration of the old authorities prior to the statute.

The appeal should be allowed and the chancellor's judgment restored with costs to the appellant both here and in the Court of Appeal.

FOURNIER, J.—I concur in the reasons given by the Chief Justice for allowing the appeal and restoring the chancellor's judgment.

GWYNNE J.—Charles Gray died in 1874, seised in

fee of certain lands which by his will he devised to his two sons Richard and John as tenants in common in fee, subject to the payment of his debts and legacies among which latter was a bequest of $150 to be paid yearly to his wife Rosanna during her life, and this bequest was not stated in the will to be in bar of her dower. In March, 1879, Richard and John Gray mortgaged the said land with the knowledge of Rosanna to the respondent Coughlin, to secure the repayment of $700 advanced by Coughlin to them, of which sum $150 at least was applied in payment of certain debts of the testator Charles. Rosanna did not bar her dower on this mortgage nor did she release her claim to the legacy of $150 per annum. In October, 1879, a quit claim deed was executed to Richard and John by the other legatees except Rosanna. In November, 1879, Richard and John Gray being desirous of borrowing a further sum of $4,000 upon a mortgage of the lands procured their mother Rosanna, in order to enable them so to do, to agree to release both her claim for dower and for the legacy. This was effected by a mortgage executed by Richard and John to one MacLennan to which Rosanna was made a party of the second part. She thereby released, demised and for ever quitted claim unto the said MacLennan his heirs and assigns, all her interest, &c., both at law and in equity so that MacLennan his heirs and assigns should hold the land for ever exonerated and discharged from all claims and demands whatsoever of the said Rosanna thereupon.

At the time of the execution of this mortgage Coughlin's mortgage had not been registered he having, at the request of the mortgagors Richard and John, abstained from registering it, but the legal estate in the land was nevertheless vested in him and upon the execution of the mortgage to MacLennan Coughlin's

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estate had precedence and was in fact then the first charge on the land; this precedence, however, he lost, but in the interest of MacLennan alone, by reason of MacLennan having placed his mortgage first on the registry whereby MacLennan acquired a statutory precedence over Coughlin. On the 4th August 1888 Richard Gray executed a deed of bargain and sale whereby he conveyed his undivided share in the said land to Rosanna in fee; this deed was put upon the registry on the same 4th of August. Rosanna now says that she was not a party to this conveyance; it appears, however, that subsequently to the execution of that deed she and John leased the premises to a tenant who occupied the land thereunder paying rent for some years and she must therefore be regarded as having been, since the execution of the deed by Richard to her, seized of the land as tenant in common with John of the equity of redemption in fee in the mortgaged lands. That is the position which she held when MacLennan instituted the suit for foreclosure or sale of the mortgaged lands to which suit, as such tenant in common in fee of the equity of redemption, she was made a necessary party. Upon a sale of the lands under a decree in that suit a sum has been realised which leaves a surplus above what is required to pay MacLennan's mortgage debt, and Rosanna's claim now is that although the lands were released, exonerated and discharged from her claims for dower and the annuity, yet that the money realised from the sale of the lands so released, exonerated and discharged remaining after payment of MacLennan's mortgage is not to be applied in discharge of the mortgage debt of Coughlin which was a charge upon the land and the estate in the equity of redemption therein of which Rosanna was herself seised as tenant in common with John, but is to be applied first in satisfaction of her original claim for both dower and annuity

as if she had never executed a release of the land from these claims, and thus that Coughlin's mortgage, the loan raised upon which was in part at least applied in payment of the testator's debts which had precedence of Rosanna's annuity, shall be postponed to her right of dower and annuity and so rendered worthless. This demand, in my opinion, has been rested wholly upon a fallacy, namely, that when Rosanna executed the release contained in the mortgage to MacLennan the effect was that she mortgaged what is called an estate which she had in the land as doweress and annuitant toMacLennan as collateral security and as surety merely for Richard and John. It is unnecessary, in my opinion, to inquire what her rights might have been upon the surplus if such had been the nature and effect of the transaction but there is no foundation, in my opinion, in law or equity for the contention that it was.

She had no estate in the land as doweress for dower had not been assigned to her. She had no estate either as annuitant. All that she had was a claim to have an estate in dower assigned to her and her annuity secured. These were claims from which she could have released the lands and in the interest of her sons Richard and John she released both her claims and the lands from liability therefor to MacLennan, his heirs and assigns, and such release operated, in my opinion, under the circumstances in which it was executed, by her, with full knowledge of the mortgage to MacLennan being a second mortgage, just as if she had released to Richard and John to enable them to execute and that thereupon they had executed the mortgage to MacLennan. The effect in reality was to release, exonerate and discharge the land both at law and in equity from these claims of Rosanna so that Richard and John might mortgage the lands freed therefrom as their own absolute estate and as MacLennan's mort-

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gage obtained only a statutory precedence over Coughlin's, upon MacLennan being satisfied out of the proceeds of the sale, Coughlin is entitled to come upon the surplus in preference to Rosanna who had no claim upon the land mortgaged, but as tenant in common with John of the equity of redemption therein and as such only after satisfaction of Coughlin's mortgage. The appeal therefore, in my opinion, should be dismissed with costs.

PATTERSON J.—Under the judgment appealed from the appellant is exactly in the position which she knowingly and intentionally assumed. She was aware that her sons had made a mortgage to Coughlin. She had refused to be a party to it for the purpose of releasing her dower or postponing the charge for her annuity. Then when the sons borrowed money from MacLellan on a second mortgage she joined in that deed and released her charges for the dower and the annuity. The land has now been sold under the mortgages for $7,500. The money is not enough to pay both mortgages in full and also to pay the full value of the annuity and the dower. It will pay her a part but not the whole. She must lose a part, but that is the risk she voluntarily undertook when she joined in the second mortgage. It would be a matter of some surprise to find that anything has happened to improve her position at the expense of either of the mortgagees. What has happened is that the first mortgage was left unregistered and the second was registered, whereby the first mortgage, of which the second mortgagee had not been informed but which the appellant knew all about, became liable to be adjudged fraudulent and void against the second mortgagee, and he became entitled to rank as first incumbrancer on the fund produced by the sale. The appellant insists that the

neglect to register the first mortgage enures to her benefit, and gives her an equity to take all the money that remains after satisfying the second mortgage and to let the first mortgage go wholly unpaid. No rule of equity could make her claim a just one, and I do not take it to be supported by any rule that has been appealed to.

There was plausibility in the contention that the appellant's relation to the second mortgage was that of surety, and that she was entitled to benefit by the advantage which accrued to the second mortgagee from the non-registration of the first mortgage.

That contention has been, in my opinion, effectually answered in the Court of Appeal. I shall add only a few observations which may, perhaps, be little more than a repetition in another way of the same ideas.

I do not say that the appellant may not properly be regarded as a surety, and I do not affirm that under the circumstances that was her true position. I assume, for the sake of argument, that she was a surety.

The first mortgage was not void as against her, and I know of no principle of equity on which she could insist on the second mortgagee asserting against the first the priority which his want of notice of the first mortgage entitled him to assert. The rules which in some cases enable one who has notice of an incumbrance or defect of title to acquire a good title by purchasing from one who took without such notice have no application to a case of this kind. Nor is it the case of a person who joins in a mortgage as surety under the belief that it is a first mortgage. The agreement, as far as the appellant was concerned, was that a second mortgage should be given embracing the land freed from the charges in her favor. That was the instrument to which she became a party. MacLennan,

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whose right under the Registry Act was to have Coughlin's mortgage adjudged fraudulent and void, was at liberty to waive such adjudication and let it retain its priority. He would have disobeyed no law, and would have done nothing of which the appellant could properly complain, by redeeming it as the first incumbrance ; and seeing that he would have had no choice in the matter but would have been obliged to redeem it if he had taken his mortgage with the knowledge which the appellant had when she joined in making it, her claim is, to my apprehension, a perversion of equity.

I am of opinion that the judgment of the Court of Appeal should be affirmed and the appeal dismissed with costs.

Appeal allowed with costs.

Solicitors for appellants : *Kingsford & Evans.*

Solicitor for respondent : *Henry J. Scott.*

ADA L. GILMOUR AND ROBERT P. GILMOUR (DEFENDANTS)..... } APPELLANTS;

AND

CHARLES MAGEE (PLAINTIFF).....RESPONDENT.

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*June 6.
*Dec. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Landlord and tenant—Verbal lease—Expiration of—Notice to quit—Sub-tenancy—Possession by sub-tenant after expiry of original lease.

M. by verbal agreement leased certain premises to McC. who sublet a portion thereof. After the original tenancy expired, on November 15th, 1887, the sub-tenant remained in possession and in March, 1888, received a notice to quit from M. In June, 1888, M. issued a distress warrant to recover rent due for said premises from McC. and the sub-tenant paid the amount claimed as rent due from McC., but not from herself to McC. More than six months after the notice to quit was given proceedings were taken by M. to recover possession of the premises from the sub-tenant.

Held, that the notice to quit given to the sub-tenant, and the distress during the latter's possession on sufferance, did not work estoppel against the landlord as the tenancy had always been repudiated. (Fournier J. dissenting.)

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) by which the verdict for the defendants at the hearing was set aside.

An action was brought to recover possession of a cellar on the corner of Queen and Canal streets in the city of Ottawa, by Charles Magee, the owner of the property and the respondent in this case who, in September, 1882, verbally leased to one William McCaffrey, the premises in question, for a term to expire on November 15th, 1887, at $150 per annum. Subsequently McCaffrey to the knowledge of the respondent, in May, 1885, sublet the

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

(1) 17 Ont. App. R. 27. (2) 17 O. R. 620.

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front part of the cellar known as " beer vaults " to one John Gilmour, who afterwards with the consent of McCaffrey transferred his interest in the premises to Ada L. Gilmour, one of the appellants, and McCaffrey accepted her as his tenant on the same terms as those under which John Gilmour held the place.

The last payment of rent was made to McCaffrey on the 1st September, 1887. On the 1st December, 1887, A. L. Gilmour sent a cheque for rent to McCaffrey who declined to receive it and returned the cheque, his tenancy having expired on 15th November 1887.

In the latter part of November the plaintiff attempted without success to recover possession under the Overholding Tenants Act. Subsequently, on the 6th March, 1888, he gave the defendants notice " to quit and deliver up the possession of the premises (describing them) which you now hold of me as tenants thereof on the 15th September next or at the expiration of the year of your tenancy which shall expire next after the end of one half year from the service of this notice." Both the defendants, however, disclaimed the plaintiff as their landlord, the defendant Ada Gilmour, whose agent the other defendant was, expressly saying when served with the notice that she did not know the plaintiff in the matter, that it was McCaffrey she dealt with

On the 21st June plaintiff issued a distress warrant to distrain " the goods liable to be distrained for rent " upon the premises in question which were described as " now or latterly in the tenure or occupation of William McCaffrey for the sum of $93.25 being rent due to me for the same on the 15th June, 1888, and for the purpose aforesaid distrain all such goods of the said William McCaffrey wheresoever they shall be found as have been carried off said premises but are liable by law to be distrained," etc.

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Upon this distress warrant a seizure was made and the defendants paid the rent demanded to the bailiff.

In November, 1888, the present action was brought and the defendants in answer thereto claimed that the lease being for more than three years and not in writing McCaffrey was a tenant from year to year of the plaintiff and having received no notice to quit his tenancy had not expired in November, 1888, when the action was brought. Further, that the issue of the distress warrant was an admission by the plaintiff of McCaffrey's tenancy.

The cause was heard before Mr. Justice Ferguson who held that plaintiff had no cause of action. This decision was reversed by the Divisional Court and the reversal affirmed by the Court of Appeal. In the proceedings in the latter courts another ground of defence was argued, namely, that defendants were themselves yearly tenants of the plaintiff, who was estopped from denying such tenancy by his notice to quit and distress warrant.

Barry for the appellants cited the following cases : *Pleasant* v. *Benson* (1) ; *Graham* v. *Allsopp* (2) ; *Doe d. Clark* v. *Smaridge* (3).

McDonald Q.C. for the respondents referred to *Pain* v. *Coombs* (4) ; *Parker* v. *Taswell* (5) ; *Walsh* v. *Lonsdale* (6), *Doe d. Tilt* v. *Stratton* (7).

Sir W. J. RITCHIE C.J.—I think McCaffrey's tenancy expired at the end of 5 years and 2 months, viz., on the 15th of September, 1887, without any notice to quit or demand of possession, and that the tenancy of his sub-tenant, who only held for the residue of his term, expired at the same time.

(1) 14 East 234.
(2) 3 Ex. 186.
(3) 7 Q. B. 957.
(4) 1 DeG. & J. 34.
(5) 2 DeG. & J. 559.
(6) 21 Ch. D. 9.
(7) 4 Bing. 446.

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McCaffrey was allowed by Magee to continue in possession until 15th November, 1887, when he abandoned the premises. His continuance in possession after the termination of his lease was merely on sufferance. The defendants' rights ended with the termination of McCaffrey's tenancy on the 15th September, 1887, unless they can show that they subsequently acquired a right to continue in possession under Magee, for it is clear the defendants never became tenants of McCaffrey after the termination of his and their tenancy. They, no doubt, wished to do so, but he never in any way entered into any new arrangement with them. He refused to and did not accept any rent from them even for the broken period between the 1st of September and the 15th of November.

I am inclined to think that the distress and payment of rent and notice to quit was a recognition of a tenancy from year to year after the expiration of the five years and two months, or on the 15th November, had defendants elected so to treat it and so to claim that their possession was lawful under Magee; if such had been the case they might, and I think would, have been entitled to a notice to quit, but instead of relying on any such tenancy they expressly disclaimed being Magee's tenants and repudiated him as their landlord, and, therefore, could not set up a want of notice to quit. Notwithstanding this disclaimer and repudiation, which would have rendered notice wholly unnecessary, they actually received due notice to quit from Magee on the 6th March, 1888, as he expresses it describing the property "which you hold of me as tenant thereof on the 15th day of September next, or at the expiration of the year of your tenancy which shall expire next after the end of one-half year from the service of this notice." This action was not brought till the 30th November, 1888, so that whether the term commenced the 15th

Sep ember or 15th November they received clear notice to quit.

I think, taking the most favorable view of the appellants' case, this was all to which they were entitled and they have now no right to withhold from the owner the possession of this property.

STRONG J.—I am of opinion that this appeal must be dismissed. It is clear that the appellants' sub-tenancy must have come to an end when the tenancy of their immediate landlord, McCaffrey, terminated, on the 15th of November, 1887. Therefore, the appellants in order to succeed must be able to show that something was done by the respondent to create a new tenancy subsequent to the expiration of McCaffrey's term. Two acts of the respondent are relied upon as creating a new tenancy by estoppel. First, it is said that on the 6th of March, 1888, the respondent gave the appellants a notice to quit in which he recognized them as being his tenants. It is clear that this was nothing more than an admission, which it is quite open to the respondent now to show that he made under the influence of error and mistake in the absence of any proof that the appellants adopted and acted upon it. So far from acting upon it the appellants repudiated it, Mrs. Gilmour expressly declaring, when served with the notice, that she had nothing to do with the appellant but held under McCaffrey.

Then on the 21st June, 1888, the respondent issued a distress warrant against McCaffrey. This, as is pointed out by Mr. Osler in his judgment, may have been a wrongful act as regards McCaffrey, and I will add would possibly have been tortious as regards appellants also if their goods had been seized and sold under it. It is, however, out of the question to say that it raised an estoppel as between the respondent and the

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appellants, So far from adopting the act of the respondents as indicating a tenancy to the benefit of which they were entitled, they repudiated it and have all along insisted it waswrongful.

On the whole, for the reasons given by Mr. Justice Osler in the court below, the judgment of the Court of Appeal should be affirmed and the appeal dismissed with costs.

FOURNIER J.—Was of opinion that the appeal should be allowed.

GWYNNE J.—This appeal must be, in my opinion, dismissed with costs. I cannot see why the proceedings which were instituted after the expiration of McCaffrey's lease in November, 1887, under the Overholding Tenant Act should not have prevailed, for as McCaffrey's term and right to possession terminated on the 15th November, 1887, it was his duty to surrender possession of the demised premises to his landlord freed from all let or hindrance of any person claiming under him, and if a sub-tenant of his refused to give up possession such conduct of the sub-tenant was surely an overholding by McCaffrey entitling the landlord to judgment in his proceedings under the Overholding Tenant Act. The defendants' right of possession, whatever may have been the terms of the subtenancy existing between them and McCaffrey, terminated on the 15th November, 1887, when McCaffrey's lease expired. This, too, was well known to the defendants, for McCaffrey upon the 1st December, 1887, refused to receive any rent from them because his lease had expired, and he no longer claimed any right of possession. The defendants' occupation then after the expiry of McCaffrey's lease was of their own wrong and as trespassers upon the plaintiff's property, and has so

continued to be ever since. The plaintiff by issuing the distress warrant against McCaffrey in June, 1888, to obtain payment of rent as accrued subsequently to November, 1887, no doubt, if McCaffrey was the person in possession of the premises claiming title thereto, would have had the effect of giving to him by estoppel a new interest in the premises at least unto the end of the then current year, but McCaffrey claims no such interest; in point of fact he never has been in possession nor has he claimed to have had any right to the possession since the 15th November, 1887, and the defendants cannot, in the present action, claim any benefit from the estoppel which McCaffrey might have claimed had he been in possession. The defendants' possession at the time of the execution of the distress warrant in June, 1888, against McCaffrey was in no privity whatever with McCaffrey the privity which had existed between them and McCaffrey ceased, as they well knew or ought to have known, on the 15th November, 1887, when McCaffrey's lease terminated, and this subsequent possession was without a shadow of right, a trespass on the plaintiff's property. It was not a possession then under McCaffrey at all or in privity with him. Such a wrongful possession could give to the defendants no right to set up as annexed thereto the title by estoppel which McCaffrey might have relied upon if he had been claiming title to the possession in virtue of the execution of the distress warrant in June, 1888.

The conduct of the defendants, in my opinion, can not only not be justified by any principle of law, but has been vexatious in the extreme. The plaintiff seems to have been willing to regard them as his tenants subsequently to the expiration of McCaffrey's lease, and so regarding them in March, 1888, he gave them notice to quit at the expiration of the then cur-

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Gwynne J.

rent year. This notice they repudiated, insisting that they were not tenants of the plaintiff at all; they utterly deny having ever recognized him as their landlord. Well then they have placed themselves in this dilemma. They were either tenants of the plaintiff or they were not. If they were, their tenancy was duly determined by sufficient notice before the commencement of the present action. If they were not the plaintiff's tenants they continued to be what they were ever since the expiration of McCaffrey's lease on the 15th November, 1887, mere trespassers on the plaintiff's property without shadow of right, and so in June, 1888, when the distress warrant against McCaffrey was executed, not in a position to claim any privity with McCaffrey, whose interest had terminated in November, 1887, and who has not since claimed to have any interest in the premises. They cannot, therefore, insist by any defence to the present action that a new tenancy by estoppel had been created between McCaffrey and the plaintiff by the execution of the distress warrant against McCaffrey in June, 1888, and that such new tenancy had not been determined by any notice to quit given to McCaffrey.

PATTERSON J.—Concurred.

Appeal dismissed with costs.

Solicitor for appellants : *W. H. Barry.*

Solicitors for respondent : *Christie & Christie.*

DAME JUSTINE DELPHINE DANSEREAU, (RESPONDENT BY REPRISE D'INSTANCE IN THE COURT OF QUEEN'S BENCH)..... APPELLANT;

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*May 14.
*Dec. 11.

AND

JEAN-BAPTISTE ST. LOUIS *et al.*, (APPELLANTS IN THE COURT OF QUEEN'S BENCH)..... RESPONDENTS.

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

Election law—38 *Vic.*, (*Q*) *s.* 266; *R.S.Q. art.* 425—*Promissory note.*

S. (appellant's husband) brought an action against St. L. Bros. on a promissory note for $4,000, a renewal of a note for same amount made by S., endorsed by him and handed to St. L. Bros., alleging that the original note had been made and discounted for the accommodation of St. L. Bro. The evidence showed that the proceeds of the note were paid over to one D., as agent for S., to be used as a portion of a provincial election fund controlled by S.

Held: affirming the judgment of the court below, that the plaintiff could not recover, even assuming a promise to pay on the part of St. L. Bros., the transaction being illegal under 38 Vic. c. 7 sec. 266 (P.Q.), now R. S. Q., art. 425, which makes void any contract, promise or undertaking, in any way relating to an election under the said act.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) (1) reversing the judgment of the Superior Court.

The facts and pleadings are fully stated in the judgment of Mr. Justice Cross of the Queen's Bench as follows:—

By this action instituted, 29th of May 1883, L. A. Sénécal claims to recover from St. Louis Brothers,

*PRESENT: Sir W. J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson JJ.

(1) M.L.R. 5 Q.B. 332.

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$4,000, the amount of a promissory note dated the 26th July 1882, made and signed by L. A. Sénécal himself, payable to his own order, and endorsed by him, alleging in his declaration that it was (without his receiving any consideration or value) loaned by him as an accommodation to St Louis Brothers who endorsed and discounted it for their own profit, appropriating to themselves the proceeds thereof, and undertaking to pay it at maturity, having recognized their liability to do so, more especially to one J. M. Dufresne, and giving their check for the amount thereof, on the 27th of July 1882, signed by Emmanuel St. Louis, one of them.

To this action, the Brothers St. Louis pleaded, denying generally the plaintiff's allegations, and answering that it was untrue that the note in question, had been loaned to them, or given for their accommodation, or without consideration for it ; that on the day it was transferred to them for their endorsement, it was L. A. Sénécal's own debt ; that they, St. Louis Brothers, got no value for it, but only endorsed it for the benefit and advantage of him, L A. Sénécal, who got the proceeds thereof, when discounted ; that the cheque was the personal affair of Emmanuel St. Louis, one of the partners, and was no acknowledgment of indebtedness by them who owed L. A. Sénécal nothing and got no consideration for the cheque. Emmanuel St. Louis was wholly unauthorized to bind the partnership, which never acknowledged any liability or in any way authorized Emmanuel St. Louis to bind the firm.

That L. A. Sénécal produced as exhibits, as well the promissory note in question, as a cheque for $4,000, on the bank of Hochelaga, dated the 27th July, 1882, payable to the order of J. M. Dufresne, signed E. St. Louis, with a protest at the instance of L. A. Sénécal, dated the 13th September, 1883.

L. A. Sénécal claimed that had rendered services for the amount of the note to St. Louis Brothers, in procuring for them payment of their claim against the Provincial Government; 2nd. That is as settled for them a dispute they had with H. J. Beemer, contractor, getting the latter to retire from a partnership which had existed between them and J. H. Beemer, and paying for them $4,000, as a consideration for J. H. Beemer retiring from the partnership; 3rd. That the note was given to pay a subscription by the St. Louis Brothers to an election fund of which L. A. Sénécal had the administration.

The first two grounds were unsupported by the evidence; as to the second, it was proved that the $4,000 given to H. J. Beemer, as a bonus, in consideration for his retiring from a contract, was provided for by St. Louis Brothers themselves.

With regard to the third ground, the two brothers, partners of the firm of St. Louis & Frère, were both examined; neither of them admitted that the original note or renewals, were either of them, given for their accommodation; on the contrary, they persist in saying, that what they had to do with the transaction was for the accommodation of L. A. Sénécal, Jean-Baptiste St. Louis explains that he had little to do with the transaction, somewhat when the original note was delivered to him by Dufresne, he took it over to the Hochelaga Bank, returned with the proceeds which he handed to J. M. Dufresne for L. A. Sénécal, or rather laid the money on the table, so that he might get it. Emmanuel St. Louis, who seems to have been the negotiator, corroborated his brother's story about the discount, and stated that he handed the money to J. M. Dufresne for L. A. Sénécal. He admitted that he signed the cheque for $4,000, but denied that he had anything to do with the transaction involved in this

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suit. He explained that the $4,000 was to be given to L. A. Sénécal, as a bonus in consideration of his procuring to St. Louis Brothers the payment, by the Government, of a claim for $25,575, which they were then making for damages and extras, under their contract with the Government for the construction of the workshops of the North Shore Railway, L. A. Sénécal being at the time Government superintendent of the said railway, and acting as referee to whom the Government had submitted the claim of the St. Louis Brothers, for his report. The cheque, he says, was his personal affair, and in no way bound the firm, from whom he had no authority in the matter, and allowed to the extent of $19,000, he did not consider himself bound to pay the cheque, his promise being conditional that the claim should be allowed and paid in full. In this respect he is to some extent corroborated by J. M. Dufresne.

J. M. Dufresne who acted as intermediary and agent of L. A. Sénécal, explained that the note sued on was a second renewal of a note of L. A. Sénécal, for a like amount of date 30th November, 1881, which was made and discounted to raise funds to be employed in the general elections of 1881, then about to be held to choose members of the Provincial Parliament, in which election L. A. Sénécal was acting and deeply interested for the Government, and probably in regard to the sale of the North Shore Railway then being agitated. J. M. Dufresne says, that at his solicitation, the St. Louis Brothers agreed to subscribe to the electoral fund, to the extent of $4,000, to be paid when they should receive their money from the Government, and should be idemnified for their damages and losses ; they said, that is Emmanuel St Louis said at the time, that they could not make that subscription. unless the Government adopted their account for

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damages and extras. L. A Sénécal was at the time superintendent and controlled everything. These negotiations were with Emmanuel St. Louis.

Other witnesses were examined to show that Emmanuel St. Louis acknowledged a liability and would have been willing to pay his half of the amount, if his brother had been willing to contribute his half share.

F. X. Archambault Q. C. for appellant.

Geoffrion Q. C. *and Ouimet* Q. C. for respondent.

Sir W. J. RITCHIE C. J.—After reading the above statement of the facts of the case, proceeded as follows :

I think this appeal should be dismissed. The plaintiff has shown no legal claim against the defendants ; the original transaction was in my opinion unquestionably void under 38 Vic. c. 7, sec. 266, now reproduced in article 425 R. S. Q. Province of Quebec, the note having been discounted for election purposes and the proceeds handed over to Dufresne for Sénécal to be used as a portion of an election fund controlled by him.

As to the check the defendants got no consideration for it, and the parties to it do not appear to have in any way authorised its being given by Emanuel St. Louis, or to have acknowledged any liability on it, and under any circumstances whether the note or check was given to Dufresne for Sénécal to induce him as representing the Government to secure the settlement of their claim for damages against the Government or as a contribution to an election fund, it was equally void in law.

I think this appeal should be dismissed.

STRONG J.—It is clear upon the evidence that the original note, of which that of the 7th of March, 1882, which is the basis of the action, was a second renewal was

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made and endorsed by L. A. Sénécal and handed to the respondents in order that they might get it discounted and pay over the proceeds to Sénécal. That they did get the note discounted and did hand over the proceeds to Dufresne for the benefit of and as agent for Sénécal for the purpose of being used for illegal purposes at a Provincial Election is also established. It also appears that if the respondents did make any promise to Senécal to indemnify him against the note it was so made by way of subscription to the election fund before mentioned and was therefore illegal and void. The respondents are therefore not liable on the note, for the reason that they are not parties to it, and any promise of indemnity must fail by reason of its illegal tendency.

The question is wholly one of evidence and there is no ground whatever for in any way interfering with the judgment of the Court of Queen's Bench. The appeal must be dismissed with costs.

FOURNIER J.—I am in favor of dismissing this appeal. It is a clear case. Two parties join together to raise money for an illegal purpose, and now one of them, the maker of the note, tries to collect it from the endorser. There is an express provision of the law against such dealings.

GWYNNE, J.—It is abundantly clear that the plaintiff utterly failed to prove the allegation in the declaration essentially necessary to be proved to entitle the plaintiff to recover; that the note to recover the amount of which as having been a loan by the late Mr. Sénécal to the defendants the action was brought, and which was made by Mr. Senécal payable to his own order, *or* the original note, of which the one sued upon was a renewal and the proceeds of which original note

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were received by Mr. Sénécal himself, was made to raise money for the accommodation of the defendants and lent to them as alleged in the declaration. Having utterly failed to establish this material allegation in the declaration the plaintiff cannot recover.

The only connection of the defendants with the note in question appears to have been a promise made by the defendants to take up for Mr. Sénécal the note sued upon, which promise was based upon a corrupt, illegal and frandulent consideration promised by Mr. Sénécal to be given to the defendants which, however, does not appear to have been in fact given by him. The particulars of this corrupt and illegal consideration are so well explained in the judgment of Mr. Justice Cross in the Court of Queen's Bench at Montreal in appeal that it is not necessary to repeat them. The appeal must, in my opinion, be dismissed with costs.

PATTERSON J. was also of opinion that the judgment of the court below should be affirmed.

Appeal dismissed with costs.

Solicitor for appellant: *F. X. Archambault.*

Solicitors for respondent: *Ouimet, Cornellier & Eymard.*

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*Nov. 20.

THE CORPORATION OF THE CITY OF SHERBROOKE (PLAINTIFF). ..... } APPELLANT;

AND

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*Feby. 26.

DANIEL McMANAMY *et al.* (DEFENDANTS)..... } RESPONDENTS.

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

Appeal—Validity of by-law—Supreme and Exchequer Courts Act, Secs. 29 (a), and (b) 30 and 24 (g)—Constitutional Question—When not matter in controversy.

The plaintiff sued the defendants to recover the sum of $150 being the amount of two business taxes, one of $100 as compounders and the other of $50 as wholesale dealers under the authority of a municipal by-law. The defendants pleaded that the by-law was illegal and *ultra vires* of the municipal council, and also that the statute, 47 Vic., ch. 84 P.Q. was *ultra vires* of the Legislature of the Province of Quebec. The Superior Court held that both the statute and by-law were *intra vires* and condemned the defendant to pay the amount claimed. On an appeal to the Court of Queen's Bench by the defendants that court confirmed the judgment of the Superior Court as regards the validity of the statute, but set aside the tax of $100 as not being authorized. The plaintiff thereupon appealed to the Supreme Court, complaining of that part of the judgment which declares the business tax of $100 invalid. There was no cross-appeal. On motion to quash for want of jurisdiction.

Held, that the appeal would not lie,—sec. 24 (*g*) of the Supreme and Exchequer Courts Act, not being applicable, and the case not coming within sec. 29 of the Act; the amount being under $2,000, no future rights within the meaning of said sec. 29 being in controversy nor any question as to the constitutionality of the Act of the legislature being raised. Strong J. dissenting on the ground that the judgment appealed from involved the question of the validity of the Provincial Act.

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

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

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By the judgment of the Superior Court for the province of Quebec, at Sherbrooke, rendered the 28th February, 1889, the act 47 Vic. c. 84 P. Q. was held *intra vires* of the Legislature of the Province of Quebec and respondents were condemned to pay to appellant one hundred and fifty dollars, being the amounts of two business taxes imposed by a municipal by-law passed in pursuance of the provisions of said act, viz., a tax of fifty dollars on wholesale liquor dealers, and a tax of one hundred dollars on compounders and bottlers of spirituous liquors, doing business in the said city.

The Court of Queen's Bench (appeal side) modified this judgment, and dismissed the action, so far as regards the tax of one hundred dollars for the reasons :

(1.) That neither the charter of the city (39 Vic. ch. 50 P. Q.) nor the amending act (47 Vic. ch. 84 P. Q.) in enumerating and specifying the different trades and occupations to be subjected to such tax, has specified the business of compounders or of bottlers of spirituous liquors ; and that this omission is not covered by the uncertain meaning to be given " to the vague, general and indefinite last lines of section seven of said act, more particularly too vague and uncertain in the matter of taxation," &c.

(2.) That the legislature had not delegated, by either of said acts or otherwise to the appellant, the power to impose the said tax of one hundred dollars, and that the by-law, in so far as regards the said tax, is *ultra vires*, null and void.

By their pleas the respondents impeached the constitutionality of the act, 47 Vic. ch. 84 (P.Q.), but did not file a cross-appeal on the appeal to the Supreme Court of Canada.

Mr. Belanger for respondent moved to quash the appeal on the ground that the amount in controversy was under $2000, and that no question as to the consti-

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tutionality of any act of the legislature of the Province of Quebec was in controversy in the judgment appealed from, that court having decided in favor of the appellant on the question of constitutionality, and the respondents not having filed a cross-appeal, but being willing to rest their case on the illegality of the by law and acquiescing in that part of the judgment which related to the constitutionality of the statute.

Mr. Brown Q. C. and *Mr. Ferguson* Q. C. for appellant *contra* contended that the case came within sections 24 (*g*) and 50 of the Supreme and Exchequer Courts Act, and cited and relied on *City of Montreal* v. *Corporation of Longueuil* (1), *Pigeon* v. *The Recorder's Court of Quebec* (2), *Major* v. *Corporation of Three Rivers* (3), *Mayor, &c. of Terrebonne* v. *Sisters of Providence* (4). In any case upon the face of the record the question of the constitutionality of an act of the Legislature of the Province of Quebec was involved, and therefore the case was appealable under sec. 29 (a) of the Supreme and Exchequer Courts Act.

SIR W. J. RITCHIE C.J—In my opinion no question whatever as to quashing the by-law arises in this case. I think the words " in such like matters or things " in sec. 29 of the statute refer to matters of the same nature as the title to lands, etc., previously mentioned, and I cannot see that this appeal comes within any of the exceptions in that section.

I do not think that any question is raised as to the constitutionality of the Quebec statute. The decision as to that was in favour of the appellant and the respondents do not complain and no question was intended to be brought before us in respect to it.

STRONG J.—On the face of the proceedings in this

(1) 15 Can. S.C . R. 566.
(2) 17 Can. S. C. R. 495.
(3) Cassels' Dig. 241.
(4) Cassels' Dig. 258.

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Strong J.

case, it appears that the constitutionality of an act of the legislature of the province of Quebec is impeached. The first question raised certainly is that as to the construction of the by-law, but if that point should be decided against the respondent, there would still remain, before the appeal could be decided, the question of the constitutionality of the statute of Quebec under the authority of which the by-law purports to have been passed. Should the by-law be held invalid it would be impossible to give judgment without pronouncing upon this constitutional question. The question of waiver by counsel is entirely immaterial. The city of Sherbrooke would have the right to say that the constitutional question was still before this court being patent upon the record and that they were entitled under sec. 29 (*a*) of the Supreme Court Act, to maintain their appeal inasmuch as the judgment appealed from "involves the question of the validity of an act of the legislature of the province of Quebec." For this reason I am of opinion that the motion to quash should be dismissed.

FOURNIER J.—Was of opinion that the appeal should be quashed.

TASCHEREAU J.— The respondent's counsel has demurred to the jurisdiction of this court in this case, and I think his objection is well taken. The appellant has attempted to support his appeal on sub-sec. (*g*) of sec. 24 of the Supreme Court act, as being in a case in which a by-law of a municipal corporation has been quashed by rule or order of court. But that enactment, probably of no possible application in the province of Quebec, does not help the appellant. There is no by-law quashed by a rule or order here. In fact there is none quashed at all by the judgment appealed from. We

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are all agreed on this point I believe, neither could it be contended that the case is appealable because it relates to a tax or duty. The statute gives a right of appeal only in matters relating to a duty payable to Her Majesty, where rights in future might be bound, which the tax in controversy could it be called a duty, is clearly not.

It is contended however that the appeal in this case lies because the matter in controversy involves the question of the validity of an act of the legislature of the province of Quebec. If that was so, the appeal would undoubtedly lie. But I cannot see that there is anything in controversy on such a point on the appeal to this court, as the case is presented to us. The respondent has abandoned that part of his pleas which put into question the right of the legislature to authorize this corporation to levy a tax of $100 on compounders, the only one now in contestation. He has succeeded before the court of appeal on another ground. He asks now that that judgment be confirmed. The appellants of course do not question the validity of the act, they support their action on this very act itself. Under these circumstances I cannot see that the matter in controversy here involves the validity of the Quebec act. The case of *Longueuil* v. *City of Montreal* (1) has no application. The constitutionality of an act of the legislature was clearly controverted in that case. I am of opinion that the appeal should be quashed with costs of motion.

PATTERSON J.—I am also of opinion that the appeal should be quashed.

Appeal quashed with costs.

Solicitors for appellant: *Ives, Brown & French.*

Solicitors for respondents: *Bélanger & Genest.*

(1) 15 Can. S. C. R. 566.

DAMASE LANGEVIN (PETITIONER)..... APPELLANT ; 1890

*Nov. 25.

AND

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*Feb. 5.

LES COMMISSAIRES D'ECOLE POUR LA MUNICIPALITÉ DE ST-MARC, DANS LE COMTÉ DE VERCHÈRES (RESPONDENTS..... ..... RESPONDENTS.

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

Mandamus—Judgment on demurrer not final—Appeal—Supreme and Exchequer Courts Act, sec. 24 (*g*)—*Secs.* 28, 29 *and* 30.

Interlocutory judgments upon proceedings for and upon a writ of mandamus are not appealable to the Supreme Court under sec. 24 (*g*) of the Supreme and Exchequer Courts Act. The word "judgment" in that sub-section means the final judgment in the case. Strong and Patterson JJ. dissenting.

APPEAL from a judgment of the Court of Queen's Bench (appeal side) for lower Canada, reversing the interlocutory judgment of the Superior Court.

The appellant, a freeholder and ratepayer of the school municipality of the parish of St. Marc, applied to the Superior Court for a writ of mandamus against the respondents, in order to enforce the execution of a decree of the Superintendent of Education ordering the respondents to maintain school district No. 6 of their municipality and to erect thereon a school house.

The respondents filed four pleas to the petition and the appellants demurred to three of the pleas. The Superior Court maintained the appellant's demurrers,

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

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but on appeal the Court of Queen's Bench for Lower Canada reversed the decision of the Superior Court and declared that the respondents had the right to the allegation set forth in their pleas.

On appeal to the Supreme Court of Canada,—

Mr. Cornellier Q.C. and *Mr. Geoffrion* Q.C. for respondent moved to quash the appeal on the ground that the judgment appealed from was an interlocutory judgment, and that section 24 (*g*) and section 30 of the Supreme and Exchequer Courts Act did not give leave to appeal except from the final judgment in the case.

Mr. Lacoste Q.C., *contra*, relied on the case of *Danjou* v. *Marquis* (1) and sections 24 (*g*), 27, 28 and 30 of the Supreme and Exchequer Courts Act.

SIR W. J. RITCHIE.—I am of opinion that this is not a final judgment which can be appealed from. It is said that the case of *Danjou* v. *Marquis* (2) supports the view that an appeal can be entertained. The question before the court was not whether an appeal would lie in the case, but whether there could be an appeal from the Court of Review treating that as the court of final resort. That was the point in issue in that case, and the conclusion arrived at was that the appeal would only lie from the Court of Queen's Bench.

As I am of opinion that under section 24 (*g*) of the Supreme Court Act, allowing appeals in proceedings for or upon a writ of mandamus, the decision sought to be appealed from must be a final judgment and that the judgment in this case was not final, it follows that we have no jurisdiction. I therefore think the appeal should be quashed.

STRONG J.—I entirely dissent from the opinion arrived at in this case by the majority of the court,

(1) 3 Can. S.C.R. 251 (2) 3 Can. S.C.R. 251.

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Ritchie C.J.

both upon the express words of the statute allowing appeals from the judgment in any case of proceedings for or upon a writ of mandamus (sec. 24 (*g*), and also upon this consideration that if an appeal in mandamus proceedings is confined to final judgments it would, under the Ontario system of procedure in such cases, be useless. The words of the statute are: (An appeal shall lie) "from the judgment in any case of proceedings for or upon a writ of *habeas corpus* not arising out of a criminal charge, and in any case of proceedings for or upon a writ of mandamus," nothing indicating that the legislature intended to limit it to an appeal from the final judgment on the writ of mandamus ; and we all know from experience that the final judgment in a mandamus case is seldom reached. To say that there must be a final judgment before there can be an appeal would imply that the return to the writ must be traversed, pleaded or demurred to and a final judgment given on such pleadings. If an appeal is to be confined to such a case, inasmuch as the proceedings seldom reach the stage of final judgment, there would be nothing left to appeal from.

I think the legislature in enacting the clause in question, intended that the appeal in such cases should be assimilated to appeals in equity cases, as provided in sub-section (*e*). In such cases appeals from interlocutory orders may be brought to this court, and from the nature of the proceedings in mandamus, it is reasonable to infer that the intention was to give an appeal in like cases.

The intention therefore (having regard to the express words of the statute) being to allow appeals from any judgment in proceedings for or upon a writ of mandamus, and not from the final judgment only, I am of opinion that the judgment appealed from in this case was a judgment upon a proceeding for a writ of man-

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Fournier J.

damus, and, therefore, one coming exactly within the precise words of the Act. The motion to quash should therefore be refused with costs.

FOURNIER J.—Le jugement dont est appel a été rendu sur une défense en droit qui avait été maintenue par la Cour Supérieure et que la Cour du Banc de la Reine a renvoyé. Ce jugement n'a certainement aucune finalité et partant n'est pas appelable.

Mais l'appelant prétend que dans les causes de *mandamus* l'appel n'est pas limité, comme dans les autres, au jugement final. Il fonde cette prétention sur le langage de la ss. *g*. de la sec. 24 concernant les *habeas corpus*, *mandamus* et règlements municipaux où il est dit :—

An appeal shall lie, g. From the judgment in any case of proceedings for or upon a case of *habeas corpus*, not arising out of a criminal charge, and in any case of proceedings for or upon a writ of *mandamus*, and in any case in which a by-law, &c., &c., &c.

Cette disposition est-elle une exception au principe général émis en tête de la section 24, limitant l'appel au jugement final? Il est évident que le statut a voulu proscrire les appels devant cette cour sur les jugements interlocutoires dont on avait reconnu les inconvénients et qui avaient fini par être considérés comme une entrave à l'administration de la justice. Cette disposition me paraît fondée sur le principe qu'il est de l'intérêt public de mettre, le plus tôt possible, un terme aux procès. Elle doit s'appliquer aux affaires mentionnées dans la ss. *g*, à moins que les expressions employées ne fasse voir une différence que l'on ne pourrait méconnaître. N'y a-t-il pas autant, et plus encore, de motifs d'arriver promptement au jugement final dans ces causes que dans les autres ? Je ne vois pas de différence et les termes de la section n'en font pas non plus suivant moi.

C'est dans la section (24) n'accordant l'appel que du

jugement final que se trouve cette disposition, et elle n'y forme pas une exception. L'appel n'y est donné que "du jugement," ce qui, sans doute, signifie le jugement final, comme dans les ss. *b*, *c* et *f*.

Il n'y a à cette signification qu'une seule exception, c'est celle faite par la ss. *e*. concernant les jugement des cours d'Equité. Mais là le langage est différent. Le législateur n'emploie plus comme dans les autres sous-sections l'expression "The judgment," mais au contraire, il se sert des termes "from any judgment" de tous jugements et non pas "du jugement," et les mots de "tous jugements" sont suivis d'une énumération de procédures (*decree, decretal order, or order in any action or suit*), qui fait voir que dans cette section l'appel n'est pas limité au jugement final et qu'il peut avoir lieu de jugements interlocutoires. Je vois dans cette disposition une exception bien formelle à celle qui n'accorde l'appel que du jugement final, mais cette exception n'existe pas dans les autres sous-sections. Conséquemment je suis d'avis que la motion doit être accordée et l'appel renvoyé.

TASCHEREAU J.—In this case, it is conceded by the appellant that the judgment he appeals from is merely interlocutory, but he contends that under sec. 24, sub-sec. (*g*) of the Supreme Court Act the appeal lies, because the case here is one upon a writ of mandamus, as to which, he contends, the right of appeal is not confined to the final judgment. I am of opinion that the statute does not bear that construction.

First, I cannot see why such a distinction would have been made. Why allow the right of appeal only from the final judgment, so as to prevent parties from multiplying appeals, as the statute clearly does, yet make an exception as to cases of *habeas corpus* and mandamus, and allow an unlimited number of appeals

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in every case of that nature? Would it be because, more so than in ordinary cases, a prompt judgment is desirable in such proceedings?

There is certainly, that I can see, no reason why the exception contended for by the appellent should have been made. And it has not been made, as I read the statute. The judgment in any case of proceedings upon a writ of *habeas corpus*, or mandamus, in sub-sec. (*g*) of sec. 24 of the act means the final judgment as the same words do in sub-secs. *b*, *c*, *d*, *f*. In sub-sec. (*e*) the statute makes an exception, but there, it says, any judgment, not the judgement. The appellant would read the words in sub-sec. (*g*) "an appeal shall lie from the judgment in any case of proceedings for or upon a writ of mandamus" as if they meant from any judgment; or from the judgment on any proceeding. Now "the judgment is not" any "judgment," and "in any case of proceedings" does not mean "*on* any proceeding." "The statute reads by simply reversing the sentence "in any case of proceedings upon a writ of mandamus an appeal shall lie from the judgment." Now, I repeat it, this means, it seems to me clear, the final judgment, not *any* judgment, nor the judgment upon *any* proceeding in a case of mandamus. Otherwise, a case on *habeas corpus* or mandamus may be brought up here on a motion for security for costs, for instance, or on any motion or interlocutory order or proceeding whatever in the case, and at any stage, and an unlimited number of times. I do not think that such is the law.

Sec. 30 of the act does not affect this case, and *Dan jou* v. *Marquis* (1) is no authority on this point. This question could not arise there at all, for the judgment appealed from was unquestionably a final judgment. The only point determined in that case was that an appeal does not lie from a judgment of the Superior Court.

(1) 3 Can. S.C.R. 251.

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I would quash this appeal. It is well settled law that an appeal never lies unless expressly given by statute. *Rex.* v. *Cashiobury* (1), *Rex.* v. *Hanson* (2), *The Queen* v. *Trustees of Warwickshire* (3).

Crompton J. says :—

The appeal is the creation of the statute and can only exist where it can clearly be collected from the language of the statute that it was the intention of the legislature to give the appeal.

Ex parte Chamberlain (4), Lord Campell C.J. says :

No appeal can be made except under an express enactment.

Attorney General v. *Sillem* (5), in the Exchequer Chamber and in the House of Lords (6) :

The creation of a right of appeal is plainly an act which requires legislative authority.

Lord St. Leonards :

Now it is clearly laid down that no right of appeal can be given except by express words.

And in *Chagnon* v. *Normand* (7) in this court. Sir W. J Ritchie C.J. for the court :

We think that an appeal which is unknown to the common law must be given by statute in such clear and explicit language that the right to appeal cannot be doubted.

We should, in my opinion, be careful not to assume jurisdiction where the statute does not clearly give it. I am against grasping at jurisdiction. We have gone too far already in that direction. In *Levi* v. *Reed* (8), for instance, amongst others, and *City of Montreal* v. *Labelle* (9), *Joyce* v. *Hart* (10), *Lord* v. *Davidson* (11), *Bender* v. *Carrier* (12), *The Ottawa* v. *Sheridan* (13) *Dorion* v. *Crowley* (14), in which we entertained the appeals,

(1) 3 D. & R. 35.
(2) 4 B. & Ald. 519.
(3) 6 E. & B. 837.
(4) 8 E. & B. 664.
(5) 2 H. & C. 581.
(6) 10 H. L. Cas. 704.
(7) 16 Can. S. C. R. 661
(8) 6 Can.S.C.R. 482.
(9) 14 Can. S.C.R. 741.
(10) 1 Can. S. C. R. 321.
(11) 13 Can. S.C.R. 166.
(12) 15 Can. S.C.R. 19.
(13) 5 Can. S.C.R. 157.
(14) Cassels's Dig.402.

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we have had since to determine that, in cases of that class, no appeal lies to this court (1).

PATTERSON J.—The appellant instituted proceedings in the Superior Court of the Province of Quebec, praying, for reasons set out in his petition, for the issue of a writ of mandamus commanding the school commissioners forthwith to carry out a decree of the superintendent of public instruction which ordered the formation of a new school district. The application was made to Judge Mathieu under article 1022 of the C. C. P. which authorises the issue of a writ commanding the defendant to perform the act or duty required or to show cause to the contrary on a day fixed.

The application was supported by affidavits as required by article 1023, and the judge, on the 24th of July, 1889, ordered the issue of a writ returnable on the first of August following. After the return of the writ the defendants filed pleas, the petitioner answered them; and the defendants replied, raising issues in law and in fact, and on the 21st of September, 1889, judgment was given by Mr. Justice Mathieu in favour of the petitioner. This entitled the petitioner to a peremptory mandamus under article 1025, but the commissioners appealed to the Court of Queen's Bench, and that court reversed the decision, holding, by a majority, that the petitioner had not established the duty which he asked to have enforced by the writ.

The question now is whether an appeal from that decision lies to this court.

The objection taken to our jurisdiction is that the judgment is not a final judgment.

Conceding, but only for the sake of the argument, that the judgment is not final within the definition of the term " final judgment " contained in the interpre-

(1) *Monette* v. *Lefebvre* 16 Can. S. C.R. 387.

tation clause of the Supreme and Exchequer Courts Act, I have no doubt that the right of appeal is given. I think that is the clear result of sections 24, 28 and 30.

That this is a judgment, and not a mere *ex parte* order such as that made on the 24th of July, is not and cannot be disputed. Section 24 enacts that an appeal shall lie in various cases specified in seven articles numbered from (*a*) to (*g*.) Mandamus is one of the subjects of article (*g*), and the enactment may be read thus: omitting all matters irrelevant to this subject:—

An appeal shall lie from the judgment in any case of proceedings for or upon a writ of mandamus.

The only reference to final judgments contained in the section is in article (*a*) which specifies final judgments of the highest court of final resort in any province. No restrictive words such as "final judgments only" are used. The article has no grammatical connection with the subsequent articles, and some of those subsequent articles specify judgments which obviously may not be final. Article (*d*) is one instance:

(*d*.) From the judgment upon any motion for a new trial upon the ground that the judge has not ruled according to law.

An order for a new trial is only interlocutory.

Now, while it is true that an appeal will lie only when given by affirmative enactment, and while article (*a*) specifies final judgments only, it is not laid down by section 24 as a general principle, either in terms or by implication, that an appeal will not lie from any judgment that is not final. As to *mandamus* and *habeas corpus*, it will be noticed that article (*g*) specifies proceedings *for* the writ as well as proceedings *upon* it.

The restriction of appeals to final judgments is found, not in section 24, but in section 28, which enacts that

Except as provided in this act or in the act providing for the appeal an appeal shall lie only from final judgments in actions, suits, causes matters and other judicial proceedings originally instituted in the Superior Court of the Province of Quebec, or originally instituted in a Superior Court of any of the provinces of Canada other than the Province of Quebec.

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We have here a two-fold restriction—first, to actions, &c., instituted in a Superior Court, and secondly to final judgments in those actions. Proceedings in cases of mandamus, being necessarily commenced in a Superior Court, would thus have come under the restriction that required a judgment to be final in order to be appealable, unless those cases were covered by the words "except as provided by this act." I am inclined to think they would be covered by those words; but section 30 puts the matter beyond question by enacting that

> Nothing in the three sections next preceding shall in any way affect appeals in Exchequer cases, cases of mandamus, *habeas corpus* and municipal by-laws.

Thus, on the assumption that the judgment in question is not a final judgment, the appeal is,in my opinion distinctly given by the statute.

I am not prepared, however, to concur in regarding this judgment as interlocutory. It concludes the controversy between the parties which was respecting the legal duty of the commissioners to do the act to enforce which the writ was prayed for. It is a final judgment just as any judgment dismissing an action is final. It would be equally so whether the peremptory writ were granted or refused. It has been refused, and the right to it is *res judicata*. If it had been granted the question of right could not have been again brought into contest by any return to the writ. All that would have remained to the commissioners would have been to do the act commanded, after which any attempt to appeal would have been labour lost.

For these reasons, I think we ought to hear the appeal.

Appeal quashed with costs.

Solicitors for appellant: *Lacoste, Bisaillon & Brosseau.*

Solicitor for respondents: *C. A. Cornellier.*

EDOUARD GUILBAULT (PLAINTIFF).... APPELLANT ; 1890

AND *May 16.
*Dec. 11.

THOMAS McGREEVY (DEFENDANT).....RESPONDENT.

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

Railway contract—Sub-contract—Engineer's certificate—Condition precedent.

A sub-contract for the construction of a part of the North Shore Railway provided *inter alia* that, "the said work shall, in all particulars, be made to conform to the plans, specifications and directions of the party of the second part, and of his Engineer, by whose classifications, measurements and calculations, the quantities and amounts of the several kinds of work performed under this contract shall be determined, and who shall have full power to reject and condemn all work or materials, which, in his opinion, do not conform to the spirit of this agreement, and who shall decide every question which may or can arise between the parties relative to the execution thereof, and his decision shall be conclusive and binding upon both parties hereto. The aforesaid party of the second part hereby agrees, and binds himself, that upon the certificates of his Engineer that the work contemplated to be done under this contract has been fully completed by the party of the first part, he will pay said party of the first part, for the performance of the same in full, for materials and workmanship. It is further agreed, by the party of the second part, that estimates shall be made during the progress of the work on or about the first of each month, and that payments shall be made by second party upon the estimate and certificate of his engineer, to the party of the first part, on or before the 20th day of each month, for the amount and value of work done, and materials furnished during the previous month, ten per cent. being deducted and retained by the party of the second part until the final completion of the work embraced in this contract, when all sums due the party of the first part shall be fully paid, and this contract considered cancelled."

*PRESENT : Sir W. J. Ritchie C.J. and Strong, Fournier, Gwynne and Patterson JJ.

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Upon completion of the contract the engineer made a final estimate fixing the value of the work done by the sub-contractor at $79,142.65, and after deducting the money paid to and received by the sub-contractor, and a clerical error appearing on the face of the certificate, a sum of $4,187.32 remained due to the sub-contractor. Upon an action brought by the sub-contractor to recover the sum of $36,312.12, the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, granted the plaintiff the amount of $4,187.32 with interest and costs.

On appeal to the Supreme Court.

Held, affirming the judgment of the court below, that the estimate as given by the engineer was substantially such a certificate as the contract contemplated, but if not the plaintiff must fail as a final certificate of the engineer was a condition precedent to his right to recover.

APPEAL and CROSS-APPEAL from the 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 appellant to recover the sum of $36,312.12, alleged to be due to him under a sub-contract entered into at Quebec, and executed before Glackemeyer, notary public, on the 11th September, 1877, between the appellant and George Leprohon of the one part, and the respondent on the other, for the construction of certain portions of the North Shore Railroad, the respondent having a contract with the Government of the Province of Quebec to build said road. The engineer valued the work done by the appellant at $79,142.65 and gave him a final estimate for that amount. The provisions of the contract and other facts material to the consideration of the case will be found in the headnote and judgments.

The Superior Court, holding that the said certificate bound the parties, adopted the sum therein mentioned as being the only one due, and crediting the defendant with the $74,500 paid by him condemned him to pay the balance $4,642.65 with interest from the date

of the summons and costs, and the parties proceeded to trial on these issues.

This judgment was affirmed by the Court of Queen's Bench.

Casgrain Q.C. for appellant, cited Redfield on Railways, (1), and contended that the certificate relied on by the respondent was not the certificate required by the contract.

Pentland Q. C. for respondent, cited and relied on *O'Brien* v. *The Queen* (2); *Hill* v. *South Staffordshire Railway Co.* (3); *Sharpe* v. *San Paulo Railway Co.* (4); *Kimberley* v. *Dick* (5); *Goodyear* v. *Mayor of Weymouth* (6); *McGreevy* v. *McCarron* (7.)

Sir W. J. RITCHIE C. J.—The respondents having entered into a contract with the Government of Quebec for the construction of the North Shore Railroad gave to Guilbault and Leprohon a sub-contract, the 7th September, 1887, a sub-contract for part of the work, viz.: 108 to 135. The work under the sub-contract was to be completed 1st February, 1878.

The important provisions of the contract affecting the present case are (8) :

The 3rd April 1879, the respondent's engineer gave the following as the final estimate.

(1) P. 306.
(2) 4 Can. S. C. R. 529.
(3) 11 Jur. N.S. 192 ; 12 L. T. N.S. 63.
(4) L. R. 8 Ch. App, 597.
(5) L. R. 13 Eq. p. 1.
(6) 35 L. J. C. P. 13.
(7) 13 Can. S. C. R. 387.
(8) See head note.

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MESSRS. GUILBAULT & LEPROHON

SUB CONTRACTORS.

FINAL ESTIMATES.

All works, section 18 to section 135, both inclusive,
All masonry " 108 " 117 " "

DESCRIPTION OF WORK.	QUANTITIES.		RATES.		AMOUNT.	
			$	cts.	$	cts.
Clearing acres	46	9/10	20	00	938	00
Grubbing "	10	1/ 2	65	00	682	50
Excavation dams and stream diversion, cub. yds.	8299			12	995	88
Road bed and farm crossing	204655			17	34,791	35
In foundation cub. yds	9308			30	2,792	40
Road diversion at l'Assomption cub. yds	1064			14	148	96
Platforms of timber in foundations, feet B. M.	56764		20	00	1,135	28
Piles driven, lin. feet	7489			30	1,946	70
Concrete cub. yds	296		4	00	1,184	00
1st class masonry in cement cub. yds	2240	1/10	10	50	23,521	05
2nd " " " "	290	1/ 2	6	50	1,888	25
2nd " " dry "	1168	1/10	5	00	5,840	50
Paving	70	2/ 5	2	00	140	80
Cattle guards, timber, cub. feet	2640			15	396	00
Farm bridges, feet B. M.	86295		15	00	* 1,294	42
Wooden box drains, feet B. M.	16234		12	00	195	40
Brush under embankment, lin. rods	697		1	00	697	00
Squared timber delivered at Chaloupe, feet B. M.	6324		8	00	505	92
Piles delivered at Chaloupe River, lin. ft.	603			08	48	24
					$79,142	65

CHAS. ODELL,
Contractor's Engineer

Quebec 30th April, 1879,

* Note farm bridges. I am not aware whether clause ten in the contract in reference to the above has been complied with.

C. O.

This is either a final estimate or it is not.

I think it is substantially such as the contract contemplates and therefore the appellant is bound by it, but if it is not, then by the terms of the contract the appellant is only bound to pay upon the certificate of his Engineer that the work contemplated to be done under the contract has been fully completed and wanting this the plaintiff must fail as such certificate is a condition precedent to his right to recover.

I therefore think the plaintiff must fail in this appeal.

STRONG J.—It would be impossible to give the appellant the relief he asks by this appeal without overruling

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many previous decisions of this court and disregarding innumerable other authorities. The respondent was a contractor for the construction of a part of the North Shore Railway and the appellant and one Leprohon entered into a sub-contract to perform a portion of the work included in the respondent's contract.

This sub-contract was in writing and it expressly provided that the respondent should upon the certificate of his Engineer "that the work contemplated to be done under this contract has been fully completed by the party of the first part" (the appellant and Leprohon) pay said party of the first part for the performance of the same in full at certain specified rates contained in a schedule immediately following.

And it was further provided by the second clause of the contract that as regards extra work the Engineer should either before the work should be performed fix such prices as he should consider just and equitable and the parties should abide by such prices provided the party of the first part should enter upon and commence the work with a full knowledge of the prices so fixed by the Engineer, or if the extra work should be done before such prices should have been fixed for such work then the Engineer should estimate the same at such prices as he should deem just and reasonable and his decision should be final.

The work was completed and on the 30th April, 1879, Mr. Odell, the contractor's engineer, made his final estimate by which he found the price and value of the work done by the appellant and his partner Leprohon amounted to $79,142.65. Previously to this Leprohon, who was associated with the respondent in the performance of the work as a partner and co-contractor, had ceded and transferred all his interest in the contract and in the monies arising therefrom to the respondent. Of this amount fixed as the price of

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the work $74,500 had been paid to the appellant, which after allowing to the respondent a deduction of $455.53, the amount of a clerical error appearing on the face of the certificate, a sum of $4,187.32 remained due for which amount with interest the Court of Queen's Bench have given judgment.

According to the terms of the contract both parties are bound by the engineer's certificate just as firmly as they would have been if they had entered into a formal and authentic deed, fixing the amount due to the appellant for the work done at the amount ascertained by the final estimate. Then there being no dispute whatever between the parties as regards the payment and the error in the certificate it must follow that the judgment appealed against is unimpeachable.

Both this appeal and the cross-appeal must therefore be dismissed with costs.

FOURNIER, GWYNNE and PATTERSON JJ. concurred that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellant: *Casgrain, Angers & Lavery.*

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

THE ROYAL INSTITUTION FOR THE ADVANCEMENT OF LEARNING..... PLAINTIFFS;

AND

GEORGE BARRINGTON *et al* (INTERVENANTS..... APPELLANTS;

AND

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY (DEFENDANTS)..... RESPONDENTS.

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*Oct. 24.
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*Feb. 10.

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

Appeal—Order for a new trial—When not appealable—Supreme and Exchequer Courts Act, secs. 24 *(g.)* 30 *and* 61.

Where a new trial has been ordered upon the ground that the answer given by the jury to one of the questions is insufficient to enable the court to dispose of the interest of the parties on the findings of the jury as a whole, no appeal will lie from such order which is not a final judgment and cannot be held to come within the exceptions provided for by the Supreme and Exchequer Courts Act in relation to appeals in cases of new trials. See Supreme and Exchequer Courts Act secs. 24 (*g*), 30 and 61.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal side) affirming the judgment of the Superior Court in Review ordering a new trial.

The facts and pleadings of the case are given in the judgment of the Chief Justice of the Supreme Court.

Doherty Q.C., *Kavanagh* with him, moved to quash the appeal on the ground that the judgment appealed from was not a final judgment.

Trenholme Q.C. for appellants *contra*.

PRESENT: Sir W. J. Ritchie, C.J., and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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Ritchie C. J.

Sir W. J. RITCHIE C. J.—This was an action brought by the Royal Institution for the Advancement of Learning, against the respondents to recover the amount of a policy of insurance for $4000 issued to George Barrington & Sons, the loss having by endorsement been made payable to the Royal Institution, who are the mortgagees of the insured property.

The defendants set up a number of pleas to the action, alleging misrepresentation of interest, and the breach of several conditions, and a special plea alleging that, at the time of the institution of the action and before, any injury and damage that may have been caused by fire to the property in question had been completely repaired without loss, cost or expense to plaintiffs, and the said property put in as good, and in fact better, condition than it was previous to the date of the fire, whereby the security of the plaintiffs and the value of the premises had been increased and the plaintiffs completely indemnified from any possible loss resulting from said fire, and that by reason of the premises the plaintiffs had no interest in the loss, nor was the amount of it payable under the policy.

George Barrington & Sons intervened alleging that as mortgagors of the premises they had an interest in the suit and in having the amount of the policy recovered from the defendants.

The case came on for trial before Mr. Justice Davidson and a jury. A number of questions were put and answered by the jury, most of them directly in favor of the plaintiffs. One specially related to the alleged repair of the premises, viz:

Question No. six. "Previous to the institution of the present action had the injury and damage done to the said property by the said fire been repaired without cost or expense to the plaintiffs, and was said property put in the same condition as previous to the occurance of the said fire, and plaintiffs indemnified of any possible loss resulting therefrom?"

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To this question the jury answered: "Impossible to say."

Before the Court of Review the plaintiffs moved for judgment in their favor upon the verdict of the jury. The intervenants moved that judgment be rendered according to said verdict in favor of the plaintiffs and the intervenants, and that the intervention be maintained. The defendants moved for judgment *non obstante veredicto* dismissing intervention. And the defendants also moved for a new trial. The court granted the defendants' motion for a new trial, and set aside the verdict of the jury with costs.

They seem to have been influenced in coming to this conclusion by the belief that the answer to the sixth question was insufficient to enable them to dispose of the interests of the parties on the findings of the jury as a whole.

The Court of Queen's Bench affirmed this judgment of the Court of Review with costs.

A motion has been made on behalf of the respondents to quash this appeal for want of jurisdiction, on the ground that the judgment in question is not a final judgment, which it clearly is not, and cannot be brought within any of the exceptions provided for by the act in relation to cases of new trial. The question, in fact, seems very similar to the one raised in the case of *The Accident Insurance Company* v. *McLachlan*, (1) and involves a consideration of the same provisions of the Supreme Court Act, viz.:—

Sec. 24, sub-sec. (*d.*) [An appeal will lie] From the judgment upon any motion for a new trial upon the ground that the judge has not ruled according to law.

Sec. 30. Nothing in the three sections next preceding shall in any way affect appeals in Exchequer cases, cases of rules for new trials and cases of mandamus, *habeas corpus* and municipal by-laws.

In Halifax Street Railway v. *Joyce* (2), this court held

(1) See p. 627.

(2) 17 Can. S. C. R. 709.

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that sec. 24 (*d.*) of Supreme Court Act which provides for an appeal from a judgment ordering a second trial applies only to cases which have been tried by a jury and that no appeal would lie under that section from an order granting a new trial in an non-jury case, the expression " that the judge has not ruled according to law," having reference to the directions given by a judge to the jury.

STRONG J.—I am also of opinion that the appeal should be quashed. It is clear that there is no final judgment, so that the jurisdiction of the court would have to be rested, not on the final judgment clause of the statute, but upon the clauses relating to new trials. An appeal under these clauses is not general but is limited to two cases of new trials. One is confined to the case of where the judge has not ruled according to law, and the other where the verdict is against the weight of evidence. This appeal does not come within either of these categories. It is quite evident that it is within the power of a court to send a case back for re-trial by a jury in order that the facts may be further investigated. This was the course pursued in the present case. Mr. Justice Cross, giving the judgment of the court says : " It is a complicated case. The order of the court below was for a new trial. I would be ready to give plaintiff judgment on his motion, because I think the obstacles are all removed, and the jury decided the case according to the facts ; but as it is only for a new trial and points of importance may be cleared up on both sides by a further investigation, I concur with my colleagues that it is the exercise of the discretion of the court ; we are not disposed to disturb the judgment of the Superior Court in Review, and therefore the appeal will be dismissed

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with costs of appeal, the other costs to follow the event of a new trial."

I think these observations accurately state the reasons for the judgment of the Court of Queen's Bench, and, therefore, that court did what it had a perfect right to do in the exercise of its discretion without subjecting its judgment to be reviewed on appeal to this court. The appeal should be quashed.

TASCHEREAU J.—This case is now before us on a motion to quash the appeal for want of jurisdiction. I am of opinion to allow this motion. This is not an appeal from a final judgment, but from a judgment granting a motion for a new trial. Now, an appeal lies in such a case by way of exception only where the motion is allowed upon the ground that the judge at the trial has not ruled according to law.

In this case a new trial has been ordered by the Court of Appeal, confirming the order made by the Court of Review, but simply upon the ground that the verdict of the jury was an imperfect verdict, inasmuch as they had not answered the sixth of the questions or assignment of facts put to them. Art. 414 C.C.P. enacts that when there is an assignment of facts the verdict must be special and articulated upon each fact submitted and be explicitly affirmative or negative. To the sixth question the jury had answered "impossible to say." This is clearly not an appealable judgment under the statute. The appellant, it is true, had moved for judgment upon the verdict, and that motion was dismissed. But that judgment is also an interlocutory judgment. It is clearly not a final judgment in the case. A judgment refusing a motion is not a final judgment. *South Eastern* v. *Lambkin* (1). In fact, on this point, the appellant's grievance is that the court below

(1) 21 L. C. J. 325.

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Taschereau J.

did not give a final judgment. The judgment dismissing his motion for judgment upon the verdict was the necessary consequence of the judgment ordering a new trial upon the motion of the defendants. They form but one judgment. Both motions under Art. 422 of the code of procedure formed but one issue. We could not entertain an appeal in the case upon the appellant's motion were it otherwise appealable, without at the same time entertaining the appeal on the judgment ordering a new trial upon which no appeal clearly lies. This, it seems to me, is conclusive against the appellant's contentions.

It is true that if the appeal was entertained the appellant would be admitted to contend that his motion for judgment should be granted, and that this court would have to give the judgment that, in their opinion, ought to have been given in the court below. But that is not the criterion of the jurisdiction of this court. That is mistaking the exit door for the entrance door of the court. The appellant must first show that he has a right to come into this court and it is not by the judgment that he would have a right to get when the case would have been won in this court, that we are to be guided as to our jurisdiction, but purely and simply by the nature of the judgment appealed from. We must look at the judgment that was given, not to any judgment that should have been given, or that we would or might give. A case in point and in which, in my opinion, the decision is unimpeachable, is the *South Eastern* v. *Lambkin* (1). In that case the Superior Court had entered judgment upon the verdict for $7,000. The Court of Appeal reversed that judgment and ordered a new trial. Upon an application for leave to appeal to the privy council, Dorion C.J. for the court, refusing the application, said :

(1) 22 L.C.J. 21

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But it is said that by the judgment of this court the respondent has been deprived of the benefit of the final judgment which he had attained in the court below, and that, therefore, his appeal ought to be allowed as from a final judgment. The appeal to the privy council is not from the court below, but from the judgment by this court and the judgment rendered by this court is a judgment ordering a new trial and is merely interlocutory.

The privy council in that case did later on entertain an appeal (1), but on special leave, in virtue of the prerogative of the crown and not at all, as the misleading summary of the report gives it, on the ground that the Court of Appeal in Montreal had erred in refusing the leave to appeal.

FOURNIER, GWYNNE and PATTERSON JJ. concurred.

Appeal quashed with costs.

Solicitors for appellants: *Trenholme, Taylor & Buchan.*

Solicitor for respondents: *H. J. Kavanagh.*

(1) 21 L. C. J. 325.

1890
*Nov. 19.
1891
*Feb. 26.

ALEXANDER MOLSON (DEFENDANT, PETITIONER) ..... } APPELLANT ;

AND

EDMUND BARNARD (PLAINTIFF, CONTESTING PETITION) ..... } RESPONDENT.

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

Appeal—Saisie conservatoire—Judgment ordering a petition to quash seizure to be dealt with at the same time as the merits of the main action —R.S.C. ch. 135, ss. 24-28.

A judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) reversing a judgment of the Superior Court, which quashed on petition a seizure before judgment, and ordering that the hearing of the petition contesting the seizure should be proceeded with in the Superior Court at the same time as the hearing of the main action, is not a final judgment appealable to the Supreme Court. R.S.C. ch. 135, ss. 24-28. Strong J. dissenting.

APPEAL from a judgment of the court of Queen's Bench for Lower Canada (Appeal Side) ordering the case to be sent back to the Superior Court in order to enable the parties to proceed on the merits of the *saisie conservatoire* and of the respondent's claim at the same time. The proceedings in the case are fully stated in the judgments hereinafter given.

Doherty Q.C. for respondent moved to quash the appeal on the ground that the judgment appealed from was not a final judgment within the meaning of the Supreme and Exchequer Courts Act.

Robertson Q.C. and *Laflamme* Q.C. *contra.*

Sir W. J. RITCHIE C.J.—The judgment appealed from

PRESENT: Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau and Patterson JJ.

reversed the judgment of the Superior Court quashing a seizure before judgment taken by the plaintiff against the defendant on monies in the hands of the Prothonotary of the Superior Court, Montreal, and of the Provincial Treasurer. By his declaration accompanying the seizure the plaintiff claimed $3,932.17 for services as detailed in his account rendered to the defendant, his wife and children and to protect the rights of the substitution created under the will of the late Hon. John Molson, and especially to save the sum of $13,712.50 which was seized in the cause.

The defendant took proceedings to quash the seizure on various grounds.

The Superior Court presided over by Mr. Justice Wurtele quashed the seizure

The Court of Queen's Bench reversed this judgment and ordered that the hearing of the petition contesting the seizure should be proceeded with at the same time as the hearing of the main action, and for this purpose directed that the petition should be joined to the said action to be decided at the same time as the merits of the action.

The respondent contends that no appeal will lie from this judgment, that, even admitting that the proceedings on the petition in question are judicial proceedings within the meaning of the Supreme Court Act in which an appeal would lie if the judgment on such proceedings were a final judgment, the judgment in question is in no sense final.

I am of opinion that the judgment in this case was in no sense final but the exact opposite. This case is not governed by any previous decision of this court, and therefore the appeal should be quashed.

STRONG J.—The appeal in this case is maintainable upon the authority of the judgment of this court in the

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v.
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Strong J.

case of *Chevalier* v. *Couvillier* (1), and therefore the application to quash should be refused with costs.

FOURNIER J.—The judgment appealed from is clearly an interlocutory judgment and decides nothing. In my opinion it is not appealable.

TASCHEREAU J.—In this case the plaintiff, now respondent, issued a writ of attatchment by garnishment. The defendant, now appellant, protested the attachment by a petition. The Superior Court granted the petition and quashed the attachment. The Court of Appeal reversed that judgment, but without adjudicating upon the petition, or upon the respondent's right to a seizure before judgment, simply ordered that the merits of the proceeding and of the action should be tried together. It is from this judgment that an appeal is taken to this court. I am of opinion that we have no jurisdiction. The judgment appealed from is clearly not a final judgment; it is not a judgment at all upon the contestation between the parties. A fair test, on appeals to this court, where the question arises whether the judgment of the court of Queen's Bench is final, or interlocutory, seems to me this: Would such a judgment if given by the Superior Court, have been an interlocutory judgment or a jugement *preparatoire*? If the answer to this is in the affirmative, then the judgment given by the Court of Appeal is an interlocutory judgment or a *jugement preparatoire* and not a final judgment from which an appeal lies to this court. It cannot be that a judgment which would be interlocutory only if given by the Superior Court, is not of the same nature, in the case, because given by the Court of Appeal. The Court of Appeal may, when giving such an interlocutory judgment have to reverse a judgment

(1) 4 Can. S.C.R. 605.

which, if it remained unappealed from, would have been final, but that does not make the judgment of the Court of Appeal a final judgment so as to bring it within the jurisdiction of this court. That is only the consequence of the decision they have come to to order an interlocutory or judgment *d'instruction*, or rather the means to put the record in such a state that the interlocutory order may be given effect to. The judgment of the Court of Appeal deprived the present appellant of a judgment he had in his favor ,it is true, but it did not finally put an end to any matter in controversy between him and the respondent. It is equivalent to a judgment of *preuve avant faire droit*. Now, has such a judgment ever been held to be a final one ? It is evidently a " simple judgment *preparatoire ou d'instruction*. *Goldring* v. *La Banque d'Hochelaga* (1), is a case where, on a similar petition, the appeal was refused. The Privy Council in that case held that a judgment rejecting a petition to quash a *capias* was an interlocutory judgment from which there was no appeal. I refer also to *Molson* v. *Carter* (2). In that case the Court of Appeal had affirmed the judgment of the Superior Court. But, if the Superior Court had granted the petition and quashed the *capias*, and if the Court of Appeal had reversed that judgment and rejected the petition, the result would have been the same and the Privy Council, I assume, would not have entertained the appeal. If interlocutory when confirming, it would not have been less interlocutory when reversing. Now, here, the appellant's case is a great deal weaker, because his petition has not been dismissed but simply postponed for later adjudication. The appellant has invoked what he called his constitutional right of appeal. Now there is no such right, nor any common law right of appeal. It is the creation of the statute,

(1) 5 App. Cas. 371.
(2) 8 App. Cas. 530.

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and must be refused if not given in express or clear terms (1).

PATTERSON J. concurred that the appeal should be quashed.

Appeal quashed with costs.

Solicitors for appellant : *Robertson, Fleet & Falconer.*

Soiicitors for respondent : *Doherty & Doherty.*

(1) *Chagnon* v. *Normand*, 16 Can. S. C. R. 661.

THE ACCIDENT INSURANCE COMPANY OF NORTH AMERICA (DEFENDANTS) ..... APPELLANTS;

AND

WILLIAM McLACHLAN *et al.* (PLAINTIFFS) ..... RESPONDENTS.

1890
*Nov. 19.
1891
*Feb. 26.

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

Appeal—New trial ordered by Court of Queen's Bench suo motu—Final judgment—Supreme and Exchequer Court Act.

In an action tried by a judge and jury the judgment of the Superior Court in review dismissed the plaintiffs' motion for judgment and granted the defendants' motion to dismiss the action.

On appeal to the Court of Queen's Bench, the judgment of the Superior Court was reversed, and the court set aside the assignment of facts to the jury and all subsequent proceedings and *suo motu* ordered a *venire de novo* on the ground that the assignment of facts was defective and insufficient and the answers of the jury were insufficient and contradictory.

Held, that the order of the Court of Queen's Bench was not a final judgment and did not come within the exceptions allowing an appeal in cases of new trials, and therefore the appeal would not lie.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) setting aside a judgment of the Superior Court sitting in review, rendered on the 29th September, 1888, which rejected the plaintiffs' motion for judgment in their favor on the verdict and findings of the jury empanelled in the cause, and granted the motion of defendants for judgment in their favor, and dismissed the action of the plaintiffs with costs.

This was an action brought to recover the amount of a policy issued by the appellant company, insuring

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

1890

THE ACCIDENT INS. CO. OF NORTH AMERICA v. MCLACHLAN.

John S. McLachlan, William McLachlan, Francis W. Radford and Thomas Brophy as members of a firm doing business in Montreal under the name of McLachlan Brothers & Co. The plaintiffs alleged that by the policy the appellants undertook to pay, within ninety days after the death of any one of the persons named, to the surviving representatives of the firm, the sum of $10,000, upon satisfactory proof of the death of such member of the firm. The plaintiffs further alleged that on the 18th November, 1888, John S. McLachlan met his death by drowning, and that the policy was in full force and effect at the time of his death. On the 23rd December, 1886, as was further alleged, appellants were notified that Thomas Brophy had ceased to be a member of the partnership and by endorsement upon the policy one James E. Bizzey was substituted for him.

The defendants pleaded three exceptions to the action. By the first they admitted the making of the policy but alleged they were not indebted; that the firm of McLachlan Brothers & Co. was dissolved on the 10th April, 1886, and by the conditions of the policy the insurance thereby became null and void.

By the second exception it was alleged that at the time of the death of J. S. McLachlan he was not a member of the firm of McLachlan Brothers & Co., he having on the 10th April, 1886, retired from the said firm.

By the third exception it was pleaded that the action should have been brought by all the surviving members including Bizzey.

Bizzey subsequently intervened in the cause to meet the objection taken on the ground of his not being a party.

To the first plea the respondents answered that J. S. McLachlan never had retired from the firm, but that

his capital remained in it and he retained an interest in the profits ; that in September, 1886, when appellants substituted Bizzey for Brophy, by endorsement on the policy, the appellants had full knowledge that the two McLachlans, Bizzy and Radford had an interest in the insurance on the lives of each other as associated in the said business.

The trial of the action took place before a judge of the Superior court and a jury. Certain questions were put to the jury the questions and answers thereto being as follows :—

Question first (*a*). At the date of the policy, plaintiffs' exhibit No. one, did the defendants know that the only persons registered as interested in the firm of McLachlan Brothers & Co. were William and John S. McLachlan ?

Answer :—Yes, by the registration of declaration.

(*b.*) Were the defendants aware what business relations existed between the McLachlans, Francis W. Radford and Thomas Brophy ?

Answer :—Yes as shown by application for insurance.

(*c.*) Had Radford and Brophy to the knowledge of the company defendant an interest in the success and existence of the business of McLachlan Brothers & Co.

Answer:—Yes, as shown by application for insurance.

Question Second :—Did the defendant ever vary the terms of the policy excepting by consenting to a transfer of insurance from the person of Brophy to the person of James E. Bizzey ?

Answer :—No.

Question Third :—Were McLachlan Brothers & Co. dissolved on or about the 10th April, 1886 ?

Answer :—Yes, but J. S. McLachlan had a continued and active interest in the business.

Question Fourth:—Did McLaughlan Brothers & Co.

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in that month publicly advertise that John S. McLachlan had retired and that a new firm had been formed ?

Answer :—Yes.

Question Fifth, (*a.*)—On the 18th of November, 1886, was John S. McLachlan a member of McLachlan Brothers & Co ?

Answer :—No, but had an interest in profits.

(*b.*) Had Bizzey any interest in the firm ?

Answer :—No evidence.

Upon these findings both parties moved at the ensuing term of the court of review for judgment, with the result that the appellants' motion was granted and that of respondents refused, the effect being to dismiss the action.

Before the Court of Queen's Bench as before the Court of Review, respondents submitted that the answers of the jury warranted a judgment in their favor upon their motion for judgment ; appellants on the other hand contended for the judgment in their favor. The Court of Queen's Bench, however, rejected both motions made by the parties severally and *suo motu* ordered a new trial.

When the appeal came on for hearing in the Supreme Court the respondents took exception to the jurisdiction of the court on the ground that the judgment was not one from which an appeal would lie.

The question arising for decision is this : Assuming that the judgment, being a judgment ordering a new trial, is not a final judgment does it come within any of the provisions of the act providing for appeals from judgment not in their nature final, and more especially the provisions relating to new trials ?

The only provisions relating to new trials are the following : An appeal shall lie :

" Sec. 24, sub-sec. (*c.*) From the judgment upon any

motion to enter a verdict or non-suit upon a point reserved at the trial."

"(*d.*) From the judgment upon any motion for a new trial upon the ground that the judge has not ruled according to law."

"Sec. 30. Nothing in the three sections next preceding (secs. 27, 28 and 29) shall in any way affect appeals in Exchequer cases, cases of rules for new trials, and cases of mandamus, *habeas corpus* and municipal by-laws."

Section 27 provides there shall be no appeal from orders made in the exercise of judicial discretion, except in equity cases.

Section 28 provides that except as provided in the act appeals are to lie only from final judgments.

Section 29 is the section regulating and limiting appeals from the province of Quebec.

Section 61 also relates to new trials and is as follows: "On any appeal the court may, in its discretion, order a new trial, if the ends of justice seem to require it, although such new trial is deemed necessary upon the ground that the verdict is against the weight of evidence."

Dallon McCarthy Q.C., and *Hatton* Q.C. for appellants, and

Greenshields Q.C. and *H. Abbott* Q.C. for respondents.

SIR W. J. RITCHIE C.J.—(After reading the above statement of facts proceeded as follows): I think this is not a final judgment within the meaning of section 28, and does not come within any of the provisions of the sections relating to new trials, viz: sections 24 (*a*), 30 and 61, but the court of appeal in its discretion has ordered a new trial and consequently

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THE ACCIDENT INS. CO. OF NORTH AMERICA v. MCLACHLAN.

Strong J.

this is not an appealable case. As the objection was not taken by counsel but by the court after the case had been argued for two days the appeal will be quashed, but without costs.

STRONG J.—This is an appeal from an order for a new trial made by the Court of Queen's Bench in the exercise of its discretion for the purpose of eliciting further information as to the facts, and, therefore, for the same reasons as those assigned for the judgment in the preceding case of the *Barrington*, v. *Scottish Union* (1) it seems to me clear that no appeal lies in the present case. The objection to the jurisdiction of this court having been raised, not by the respondent, but by my brother Taschereau after two days' argument by counsel on the merits, I think no costs should be given. The appeal must be quashed.

TASCHEREAU J.—We have no jurisdiction in this case, in my opinion. Upon the findings of the jury both parties moved for judgment. There was no motion for a new trial. The Superior Court in review dismissed the plaintiffs' motion and granted that of the defendants' and dismissed the action. The Court of Appeal reversed that judgment, set aside the assignment of facts, and all the subsequent proceedings, and without adjudicating upon the merits ordered a *venire de novo* upon the grounds :—1st, That the assignment of facts was defective and insufficient; 2nd, That the answers of the jury thereto were so insufficient, contradictory and irregular that no judgment could be given thereon for either party. It is from this judgment that the company now appeals. Now this is clearly not a final judgment. Neither is it a judgment on a motion for a new trial upon the ground that the judge at the trial

(1) See p. 617.

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THE ACCIDENT INS. CO. OF NORTH AMERICA v. MCLACHLAN.

Fournier J.

has not ruled according to law, nor a judgment upon any motion to enter a verdict or non-suit upon a point reserved at the trial. Consequently it is not appealable. I refer to my remarks in *Molson* v. *Barnard* (1) and *Barrington* v. *Scottish Union* (2) on the question.

FOURNIER and PATTERSON JJ. concurred that the appeal should be quashed without costs.

Appeal quashed without costs

Solicitors for appellants: *Hatton & McLennan.*

Solicitors for respondents: *Greenshields, Guerin & Greenshields.*

(1) See p. 624. (2) Pee p. 619.

1891
*Mar. 11.

CHARLES WILLIAM MARTIN, (DEFENDANT) ..... APPELLANT ;

AND

JAMES STEWART MOORE, (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Appeal—Application to judge in chambers to set aside a writ of summons—Final judgment.

Application was made to a judge in chambers to set aside a writ of summons served out of the jurisdiction of the court on the grounds that the cause of action arose in England and the defendant was not subject to the process of the court, and if the court had jurisdiction that the writ was not in proper form. The judge refused the application and his decision was affirmed by the full court.

Held, Gwynne J. *hesitante*, that the decision of the full court was not a final judgment in an action, suit, matter or other judicial proceeding within the meaning of the Supreme Court Act, and no appeal would lie from such decision to the Supreme Court of Canada.

APPEAL from a decision of the Supreme Court of the North-West Territories (1) affirming the ruling of a judge in chambers, who refused to rescind for irregularity an order for service of a writ out of the jurisdiction and to set aside the writ.

The plaintiff resided in the District of Alberta and the defendant was in the habit of spending a portion of each year in the Territories and residing in England the remainder of the time. An ordinary writ for service within the jurisdiction, returnable in ten days, was issued by the plaintiff, and the defendant not

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(1) 1 N.W.T. Rep 48.

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being found an order was made by a judge in chambers allowing the writ to be served out of the jurisdiction and extending the time for appearance to sixty days. The amended writ was served on the defendant in England and he moved before the judge who made the order to have it rescinded and the writ and all proceedings thereon set aside for irregularity. The motion was refused by the judge whose decision was affirmed by the full court. The defendant then sought to appeal to the Supreme Court of Canada.

Chrysler Q.C. moved to quash the appeal for want of jurisdiction. The decision appealed from is not a final judment under the Supreme Court act but is a decision that deals merely with a matter of practice or procedure in the court below with which this court will not interfere. *See Standard Discount Co.* v. *Le Grange* (1).

Moss Q.C. *contra.*—The fact that an appeal relates to a matter of practice will not oust the jurisdiction of this court. *McKinnon* v. *Kerouack* (2); *Wallace* v. *Bossom* (3).

An important question as to the jurisdiction of the court below is involved in this appeal. *In re Anglo-African s.s. Co.* (4).

The following cases were cited as authorities for the position that defendant had no other remedy than to move as he did. *In re Orr-Ewing* (5); *Hewitsin* v. *Fabre* (6): *Fozen* v. *Hawkins* (7).

For service out of the jurisdiction only a concurrent writ could be issued. *Smallpage* v. *Tongue* (8); *Fowler* v. *Bristow* (9).

Sir W. J. RITCHIE C.J.—After hearing the very full

(1) 3 C.P.D. 67.
(2) 15 Can. S.C.R. 111.
(3) 2 Can. S.C.R. 488.
(4) 32 Ch. D. 250.
(5) 22 Ch. D. 456.
(6) 21 Q. B. D. 9.
(7) 15 Q. B. D. 650.
(8) 17 Q. B. D. 644.
(9) 20 Ch. D. 249.

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MARTIN v. MOORE.

Ritchie C.J.

argument of Mr. Moss I cannot say that this case is anything more than an application to set aside a writ which was refused, and whether it touches the jurisdiction of the court below or not I do not think, so far as I can understand the case, to be of any importance whatever because the question we have to determine is not: Had the court below jurisdiction? but: Have we jurisdiction to hear the appeal?

I do not see how the decision in this matter can be called a final judgment under our statute or that it comes within any of the provisions of the act giving us jurisdiction and if not I fail to see how we can possibly hear an appeal our jurisdiction being purely statutory. If we should entertain this appeal we should be flooded with appeals in all cases where orders in chambers have been made and judgments pronounced thereon in matters relating to practice and procedure in the court below. I think the appeal should be quashed.

STRONG J.—I am of opinion that the motion to quash this appeal must be granted. Mr. Moss has said everything that could be said in favor of the jurisdiction but he has failed to satisfy me that we can entertain the appeal. As the Chief Justice has said the only question is: Is this a final judgment? That is answered, I think, in this way. The application in this case was to set aside a writ of summons, nothing more nor less, and if we were to hold the decision of the judge *a quo* to be a final judgment under our statute, we should have to hold the same in every like case where judgment has been given affirming or setting aside an order of a judge in chambers. I think that the circumstance that an appeal would involve the question of the jurisdiction of the Supreme Court of the territories to make an order for service beyond their territorial jurisdiction a mere incident in the case,

and that it does not for the present purpose differ the case from any other order made as a mere matter of procedure.

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v.
MOORE.

GWYNNE J.

GWYNNE J.—The point in question appears to be whether the court in the North West Territories had or not jurisdiction to make the order appealed against. Their order concludes the point, as far as that court can, that it had jurisdiction. I am not satisfied, if that was an erroneous decision, that there is not an appeal to this court under the statutes relating to our jurisdiction, but as the other members of the court appear to entertain no doubt upon the point I do not desire to delay judgment for further consideration of it.

PATTERSON J.—I think the question we are dealing with at present is not whether the court of the North-West Territories had jurisdiction, but whether we have jurisdiction to hear the appeal, and that must depend upon the question whether or not the judgment appealed from is, within the meaning of the statute by which we are governed, a final judgment. I do not think it is. I think it merely deals with the matter of setting aside a writ of mesne process. The cases referred to by Mr. Moss, which show that the question dealt with by the court below is one of considerable importance, and that the mode adopted by the appellant is the only one by which relief could be obtained, do not, in my opinion, touch the question of our jurisdiction. The observation of Baron Amphlett quoted by Mr. Moss from one of those cases (1), makes the distinction between a summary decision by a judge in chambers, although it may, in England, be contested

(1) *Preston* v. *Lamont* 1 Ex. D.361.

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Patterson J.

on appeal and if necessary in the House of Lords, and a determination of the merits of the action.

Our jurisdiction does not arise until the merits have been disposed of. I think, therefore, that the appeal should be quashed.

Appeal quashed with costs.

Solicitors for appellant: *Loughead, McCarthy & Beck.*

Solicitor for respondent: *T. B. Lafferty.*

THE MUNICIPALITY OF THE COUNTY OF CAPE BRETON (DEFENDANTS)..... APPELLANTS;

AND

THOMAS E. McKAY (PLAINTIFF)..... RESPONDENT.

1890
*Oct. 29.
1891
*May 12.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Appointment of board of health—R. S. N. S. 4th ser. c. 29—37 V. c. 6 s. 1 (N.S.)—42 V. c. 1 s. 67 (N.S.)—Employment of physician—Reasonable expenses—Construction of contract—Attendance upon small-pox patients for the season—Dismissal—Form of remedy—Mandamus.

Sec. 67 of the act by which municipal corporations were established in Nova Scotia (42 V. c. 1) giving them "the appointment of health officers * * * and a board of health" with the powers and authorities formerly vested in courts of sessions, does not repeal c. 29 of R. S. N. S. 4th ser. providing for the appointment of boards of health by the Lieutenant Governor in Council. Ritchie C.J. doubting the authority of the Lieutenant-Governor to appoint in incorporated counties.

A board of health appointed by the executive council by resolution employed M., a physician, to attend upon small-pox patients in the district "for the season" at a fixed rate of remuneration per day. Complaint having been made of the manner in which M.'s duties were performed he was notified that another medical man had been employed as a consulting physician, but refusing to consult with the new appointee he was dismissed from his employment. He brought an action against the municipality setting forth in his statement of claim the facts of his engagement and dismissal and claiming payment for his services up to the date at which the last small-pox patient was cured and special damages for loss of reputation by the dismissal. The act (R.S.N.S. 4th ser. c. 29 s. 12, allows the board of health to incur reasonable expenses, which are defined (by 37 V. (N.S.) c. 6 s. 1) to be services performed and bestowed and medicine supplied by physicians, in carrying out its provisions, and makes such expenses a district, city

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

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or county rate to be assessed by the justices and levied as ordinary county rates.

Held, Per Fournier, Gwynne and Taschereau JJ. affirming the judgment of the court below, that the contract with M. was to pay him $6.50 per day so long as small-pox should prevail in the district during the season; that his dismissal was wrongful and the fulfilment of the contract could be enforced against the municipality by action.

Per Ritchie C.J and Strong J. That there was sufficient ground for the dismissal of M. Assuming, however, his dismissal to have been unjustifiable, M's. only remedy would have been by mandamus to compel the municipality to make an assessment to cover the expense incurred. But the claim being really one for damages for wrongful dismissal it did not come within the "reasonable expenses," which may incurred by a board of health and made a charge on the county, and the municipality was, therefore, not liable.

Per Patterson J. That the proper remedy for the recovery of the expenses mentioned in said sec. 12 is by action and not by mandamus to compel an assessment, but a claim for damages for wrongful dismissal does not come within the section and is not made a county charge.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment for the plaintiff at the trial.

The plaintiff in his statement of claim alleges that he is a duly qualified medical practitioner for Nova Scotia; that he was employed by the defendants through "the board of health for District No. 4 North Sidney," to attend certain person there ill of the small-pox and who might thereafter during the "then season" become ill of that disease in District No. 4; that the board agreed to pay plaintiff for his services at the rate of $6.50 per day for said period; that the plaintiff relinquished his other practice in order to attend to his duties under this agreement with the board of health; that the board of health nevertheless discharged plaintiff and employed other practitioners; that the plaintiff has suffered special damage by reason of such

(1) 21 N. S. Rep. 472.

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a wrongful dismissal; that persons would not employ him for fear of contagion and by reason of his dismissal the public were led to believe he had neglected his duty. And plaintiff claimed damages to the amount of $700, viz. $350 for salary from 12 March to 8 May 1880, at $6 50 per *diem*, and $550 for special damages for wrongful dismissal.

The defence states: That defendants did not employ plaintiff; that the board of health was not legally appointed; that the board of health did not employ plaintiff; that plaintiff did not give up his other practise; that defendants did not through board or otherwise agree to pay plaintiff for his services; that defendants never discharged plaintiff, or employed other practitioners; that provisions of chap. 29 of revised statutes were not complied with, and board had no authority to employ plaintiff; that board having appointed another physician to act with plaintiff as consulting physician and surgeon, plaintiff refused to act or consult with such physician and for that reason board dismissed him.

The action was tried before Mr. Justice Macdonald without a jury, who found a verdict and entered judgment for the plaintiff for $300.

From the evidence given on the trial of this case the following facts appeared: In the month of February, 1880, small pox broke out at North Sydney, Cape Breton. About the 9th or 10th of February meetings of the inhabitants were held to consider the best means to be used to prevent the spread of the disease, and a board of health was chosen, the persons comprising which were subsequently by a commission under the great seal of the province, bearing date the 16th February, 1880, duly constituted by the Lieutenant Governor a board of health, pursuant to the provisions of the Revised Statutes, N.S., 4th series, ch. 29, sec. 2, for

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the police district of North Sydney. At a meeting of this board, held on the 17th February, a resolution was passed " that a doctor be secured and retained by the board to attend upon all the small pox patients who are and may the present season be attacked with the disease of small pox in district No. 4, under board's jurisdiction at the rate of $6.50 per day." At a subsequent meeting of the board held on the same day, there is a minute as follows : " Dr. McKay being present agreed to take charge of the small pox patients at the rate of $6.50 per day under the conditions of the resolution passed by the board this morning ; all medicines and drugs to be provided by the board, and his services to the board thereunder to commence from the 18th February instant ; thereupon a resolution was passed that Dr. McKay be engaged for such purposes and under such conditions." The plaintiff in his disposition says : " The matter was discussed and the board decided they would not retain us by the month, as they did not know how long the disease would last, and that they thought they should pay us so much a day, viz., $6.50, with the understanding that whichever doctor was engaged his services were to be retained as long as there should be a small pox patient under the jurisdiction of the board that season." Subsequently he says : " I was present at the afternoon meeting. They asked me if I would attend the small-pox patients on the terms stated in the resolution passed at the morning meeting. I said I would. Then a resolution was passed that I should be engaged and services accepted under those considerations."

Plaintiff entered upon his duties immediately after the passing of the resolution of 17th February and continued his services up to the 12th of March. On the last mentioned day the plaintiff received a communication from the secretary of the board informing him that

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the board had passed the following resolution, viz.: "Resolved that the board courteously dispense with the services of Dr. E. N. McKay from this date, as they consider the service of two doctors unnecessary for the present, and that the services of Dr. McPherson be retained until further notified;" and the secretary's letter concludes as follows: "You will therefore consider yourself relieved from further attendance on behalf of this board and upon such patients from this date." The circumstances which led to this dismissal appear to have been the following: Sometime before the 5th of March the board passed the following resolution: "Resolved that a doctor be engaged by this board to visit the hospital daily as a consulting physician and to report his opinions of the treatment and condition of the patients therein to this board daily." And in the letter of the secretary of the 5th of March communicating this resolution to the plaintiff, the secretary added, "I am instructed by the board to request that you consult with Dr. McPherson and then inform the board through the secretary by 10.30 o'clock, a.m. to-morrow whether you will consent to act together in pursuance with such resolution. Please reply punctually."

The plaintiff did not answer this letter until the 8th of March, when he wrote to the secretary as follows: "I will not act in pursuance with the inclosed resolution, but I will continue my services to the board as I have heretofore done and consult Dr. McPherson upon such occasion as I would like to ascertain his opinion respecting the condition and treatment of such patient or patients as may happen to come under my care from time to time. I mean ascertaining his opinion in serious cases only. If the board send Dr. McPherson to the hospital daily to report my treatment and condition of patients I will throw no obstacle in the way, but I

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will consult him only in cases of emergency. You know, Mr. Hearn, that I consented only to one clause embodied in that resolution, neither will I. Bear in mind that while I do not throw any obstacle in the way of the board with regard to sending Dr. McPherson to the hospital daily to make a report he does not prescribe to any patient under my treatment without my consent." Upon this resolution of dismissal was passed and the plaintiff discontinued his services from the 12th of March up to which date he was paid for his services from the 18th of February at the rate of $6.50 per diem. The plaintiff having brought an action against individual members of the board in which he failed (1) instituted this action action against the company in 1886.

The learned judge who tried the cause having given judgment for the plaintiff as before mentioned the defendants appealed to the Supreme Court in Banc by which court the appeal was, after argument, dismissed. The judgment of the court was delivered by Mr. Justice Townshend who held that under sec. 12 of ch. 29 R. S. N. S. (4th series) the municipality was rendered liable to the plaintiff on the contract entered into by the board of health. Mr. Justice Ritchie also delivered a short judgment holding that on the authority of *McKay* v. *Moore* (1) the statutory provision already mentioned was to be held as imposing liability on the defendants, but also stated his opinion to be that in "most cases" the proper remedy to enforce the obligation imposed on the municipality by sec. 12 of ch. 29 (4th series), will be found to be a writ of mandamus to compel an assessment.

The Municipality appealed to the Supreme Court of Canada.

W. B. Ritchie for the respondent. The executive

(1) See *McKay* v. *Moore* 4 Russ. & Geld. 326.

council could not appoint this board. The act of 1879 vested the power of appointment in the municipality and that repeals the former act so far as the two are repugnant. Maxwell on Statutes (1); *New London Railroad Company* v. *Boston and Albany Railroad Company* (2).

The board could not bind the municipality by such an agreement as this. See *Smith* v. *Corporation of Collingwood* (3); *Re Derby and Local Board of Health* (4).

In any event the municipality is only liable, under the statutes, for services actually performed.

The evidence shows justification for the dismissal.

Henry Q. C. for the respondent. The action is on a contract for services covered by the statutes and not an action for a tort.

The statutes make the municipality liable for expense incurred by the board of health which is explained to mean services such as those in this case.

SIR W. J. RITCHIE C. J.—It is very clear from the evidence that there was no contract whatever between the municipalities of the county of Cape Breton and the plaintiff, and that the defendants never directly nor through the board of health for district No. 4 North Sydney actually employed the plaintiff as alleged in paragraph 2 of the claim, and never directly nor through said board agreed to pay plaintiff for his services as alleged in paragraph 3; nor does it appear that the defendants ignored such an agreement as there referred to, or ever discharged the plaintiff from the performance of that or any agreement or employed other medical practitioners as alleged in paragraph 4. Issues on all these most material allegations were raised by the defendants' defence paragraphs 2, 5 and 7, and being

(1) 2 ed. p. 197.
(2) 102 Mass. 386.
(3) 19 U. C. Q. B. 259.
(4) 19 O. R. 51.

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unsustained by any evidence should have been found for the defendants. The plaintiff, the evidence shows, was employed by a board of health constituted by a commission issued by the Lieutenant Governor of Nova Scotia on the 16th February, 1880. But it does not appear from the evidence that any sanatory orders were ever made or orders given prescribing the duties of such boards as required by the act R.S. N.S., 4th ser. ch. 29, and an issue has been raised as to the due constitution and appointment of this board in that no such sanatory orders have been made nor the duties of said board prescribed, and paragraph 9 of the defence also alleges that persons acting or purporting to act as the board of health for the district of North Sydney appointed the plaintiff as physician and surgeon to have the care and attention of small-pox patients, and that complaints having been made of want of skill and attention the board appointed another physician with whom the plaintiff refused to act and consult, and he ceased to attend persons ill and afflicted with small-pox, and the said board was compelled to employ other physicians and they discharged the plaintiff from the position aforesaid.

In the same volume of the revised statutes p. 288 title 13 is ch. 57 "of municipalities in incorporated counties," which the County of Cape Breton appears to have been. By section 56 municipal corporations shall have the appointment of health officers, health wardens and health inspectors, and a board of health with the authority and powers given to justices in general or special sessions by the 29th and 30th chapters. These statutes do not give the sessions any power to appoint a board of health, but to appoint health officers with power to enter houses, etc., and report their condition to the board of health, and if the sessions do not appoint such health wardens the board of health shall

appoint them. Sessions of not less than seven justices on requisition from the board of health may order a general vaccination, and it is also enacted, page 395 of the Revised Statutes that "nothing in this chapter contained shall be construed to repeal or affect the provisions of any law or enactment now in force except so far only as such law or enactment shall be inconsistent with or repugnant to the provisions of this chapter or the attainment of the objects and purposes thereof."

Without expressing any positive opinion I incline to think that this enactment authorising municipal corporations to appoint boards of health is inconsistent with the authority of the Governor to appoint a board of health in an incorporated county. The conflict of jurisdiction of two boards of health in the same county, one appointed by the Governor and the other by the municipal council, so likely to arise and productive of so great inconvenience, is such that I scarcely think that the legislature could have contemplated the existence of two such bodies in the same county but that in unincorporated counties, if any, the power continued in the governor in which case the reasonable expenses would be assessed by the justices in session and levied and collected as provided by the 12th section of chapter 29, while in incorporated counties the appointment would be confined to the municipal councils. But be this as it may, in the view I take of this case it is unnecessary to decide this or the other questions I have referred to, because I think this action cannot be maintained against the municipality under any circumstances, though I may say if the only question in the case was the dismissal of the plaintiff as at present advised I should say there was ample ground for it. All that is made a charge on the county by ch. 29 are the reasonable expenses al-

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ready incurred or hereafter to be incurred by any board of health, and the act of 1874, cap. 6, expressly declares that the words reasonable expenses in the said 12th section shall be construed to include all medical attendance and services bestowed and performed and medicine supplied by physicians when required to be bestowed, performed and supplied under the provisions of such chapter. How can it be said that this claim for a wrongful discharge by the board of health, whereby as he alleges the defendants (though in point of fact they had nothing to do with the matter) discharged plaintiff and employed other medical practioners, are services bestowed and performed and medicine supplied when required to be bestowed or performed, when his complaint is that he never bestowed or performed any services or supplied medicines because he was discharged from doing so? How can he possibly bring the special damage he alleges he suffered by reason of his patients not employing him from dread of infection and contagion, or that by such discharge and employment of other medical practitioners it was indicated and so believed and understood by many persons who would likely employ him that he improperly cared for and attended such patients and was not a competent medical practitioner, within the terms of the statute as services bestowed and performed and medicine supplied? If they do not come within the definition of the statute of reasonable expenses they are not a charge on the county. If the plaintiff has a legal claim which has become a county or district charge in my opinion his remedy for its recovery is not by action against the municipality. The law fixing the charge has given the remedy which is clearly not by action. I think it is clearly established that where a pecuniary obligation is created by statute, and a remedy is expressly given for enforcing it, that

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remedy must be adopted. The case of the *Vestry of St. Pancras* v. *Battersby* (1), clearly established this. In the present case the language is:—

> The reasonable expenses incurred, &c., by any board of health shall be a county or district or city charge and shall be assessed by the justices in session (now by the municipal council) in incorporated counties and levied and collected in the same manner and at the same time as the ordinary county rates.

Cresswell J. in the case cited states the principle, which is entirely applicable to this case, very tersely when he says:—

> I also am of opinion that a pecuniary obligation and the mode of enforcing it are indissolubly united by the statute and cannot be severed.

It would be a very strange thing if the municipalities could be sued the moment the expense was incurred by all or any of the parties who may have given medical attendance or bestowed and performed services or supplied medicine and other necessaries for combating the disease or in carrying out the powers of the act and the municipality be thus harrassed by actions and put to great cost when they have no funds to meet these expenses, and possibly before the time has arrived when the amount could be assessed, levied and collected. It would be most unreasonable that these parties should be allowed to obtain judgments and be in a position to sell the municipal property for their satisfaction to the possibly great inconvenience and loss of the municipality. I think this cannot be so. The only fund those who supply medical attendance or other services or materials and necessaries can look to is that provided by the statute, namely, the county charge to be assessed as provided. The legislature having provided municipalities with no other funds to meet these expenses if parties are not satisfied to

(1) 2 C. B. N. S. 477.

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rely on this they should not render the services or supply the necessaries, and if inconvenience should arise from any such cause the legislature must interfere and provide other means for their payment, and in the event of the municipality failing to assess in a proper case the only means of compelling it is to do so, so far as I am aware, is by the prerogative writ of mandamus. Should an application be made for a mandamus in this case it would be open to the municipality to raise all or any of the questions discussed before us or to which I have referred or any other they may be advised would afford an answer to such an application. In the meantime this appeal must be allowed and the action dismissed with costs in all the courts.

STRONG J.—In my opinion this appeal must succeed. As regards the objection that the power of the Lieutenant Governor to appoint boards of health conferred by sec. 2 of cap. 29 (R.S.N.S. 4 series) is superseded, and that section repealed by implication, by sec. 56 of ch. 57 (R. S. 4 series), it appears to me that there is no foundation for such a contention. The board of health contemplated by sec. 56 of cap. 57 seems to have been a general board for the whole municipality, the words of the statute being " a board of health." The board provided for by sec. 2 of cap. 29 is on the other hand a local board restricted to such place or district as the Lieutenant Governor may prescribe. It is therefore impossible to say that these two provisions are so inconsistent that they cannot stand together but must be regarded as repugnant to each other to such an extent that the prior enactment is to be taken to be by implication repealed by the latter.

I do not think the appointment was void because the Lieutenant Governor did not make sanatory regulations under sec. 1 of ch. 29. The board enforcing such sana-

tory regulations as the Lieutenant Governor might prescribe was no doubt to perform certain duties to which the making of sanatory regulations was an indispensable preliminary, but there were other duties incidental to such a body which were incumbent upon the board irrespective of any regulations by the Lieutenant Governor defining the nature of these latter duties, these being such as usually and without any specific provisions by the executive power are well understood as appertaining to such bodies as local boards of health. In the execution of these latter functions I have no doubt that it was within the power of the board to employ a medical man to take charge of a hospital for small-pox patients and to attend to such patients generally, and that his remuneration would be a "reasonable expense" under sec. 12. I am, however, of opinion that sec. 12 would not authorize such an action as the present against the municipality. The county are in no way a party to the contract between the respondent and the board of health. The latter body are not appointed by the county, and are not in any sense its officers or agents. Any liability of the county for the contracts of the board must rest entirely upon the statute and be limited by its terms. The present action is substantially one for a wrongful dismissal by the board in breach of the contract with the respondent, the respondent having been paid the full compensation for his actual services up to the date of the dismissal. Then, what is there in the statute to warrant such an action in respect of the conduct of the board against the municipality? The words of sec. 12 (in which clause of the statute, if anywhere, we must find the liability sought to be enforced), are not that the county shall be bound by the contracts of the board but merely that the "reasonable expenses" of the board shall be a "county, district or city charge" to be assessed, levied

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and collected in the same way as ordinary rates. Then what is the proper construction of these words? Can they be so interpreted as to include a liability such as the respondent insists upon in this action? I may here turn aside for a moment to notice a point which was raised in the court below founded upon the word "district." I have no hesitation in adopting in its entirety the construction of the Supreme Court of Nova Scotia attributing to this word the meaning of a municipal district, such as those which in some cases in Nova Scotia have been formed out of part of a county. The whole context and the preceding and following words "county" and "city" indicate this to be the true meaning.

But, to return to the question of municipal liability, how can it be said that imposing a duty upon the county to raise by the imposition of a rate the amount required to defray the expenses of a board of health creates any privity of contract between the creditors of the board and the company? I can see nothing to justify such an extension of the language actually used which would be requisite in order to give such an operation to the statute. No doubt there is a duty resting on the company to raise the amount of the expenses, but the existence of that duty is not sufficient to support such an action as the present for a breach of contract by the board. The appropriate remedy for the enforcement of that duty is the writ of mandamus. Therefore, it appears to me that no action is maintainable against the county for any breach of contract by the board.

Further, I doubt if there was anything more than a contract for services from day to day. The word "season" in the connection in which it is used in the resolution is too indefinite to have any precise signification. The respondent himself in his deposition says

he accepted the employment on the terms embodied in the resolution, and by these terms he must therefore abide, and he cannot go outside of them and annex an additional term which he says vaguely was spoken of, viz., that the employment was to last as long as there remained any small-pox patients which would have continued it to the 5th of May. I do not, however, rest my judgment on this point.

Next, assuming the action to be maintainable, was there not good ground for dismissal? Surely there was nothing unreasonable in the proposition of the board that Dr. McPherson should act in conjunction with the respondent as a consulting physician. In his letter of the 8th of March, addressed to the secretary of the board, the respondent positively refused to comply with the ordinances of the board in this respect. Having taken this course of refusing to obey the reasonable and lawful directions of his employers he must, it seems to me, abide by the consequences and submit to the resolution discharging him from employment, which the board having clearly the right so to do saw fit to pass.

The appeal must be allowed with costs.

FOURNIER J.—I am of opinion that the appeal should be dismissed for the reasons given by Mr. Justice Gwynne.

TASCHEREAU J.—I also agree with my brother Gwynne that this appeal should be dismissed.

GWYNNE J.—This case turns, in my opinion, upon the construction to be put upon section 12 of ch. 29 of the Revised Statutes of Nova Scotia, 4th series, as that section is amended by ch. 6 of the acts of 1874. I entertain, no doubt, that the board of health for poll-

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ing district No. 4, in the county of Cape Breton, was well constituted by the commission issued by the Lieutenant Governor of Nova Scotia bearing date the 16th of February, 1880. The contention of the learned counsel of the appellants, that chapter 29 of the 4th series of the Revised Statutes which gives power to the Lieutenant Governor to appoint boards of health was repealed by implication by sec. 67 of ch. 1 of the acts of 1879, cannot be entertained.

The 4th series of the Revised Statutes constituted an act consisting of several chapters all equally in force. By chapter 29 of that act the Lieutenant Governor was authorized to constitute boards of health, and to appoint the members thereof. By chapter 57 of the same act, sec. 56, it was enacted that the county municipal corporations constituted under the act

> shall have the appointment of health officers, health wardens, and health inspectors, and a board of health with the authority and powers given to justices in general or special sessions by chapters 29 and 30.

It is obvious that the powers thus conferred upon county municipal corporations did not repeal the powers given to the Lieutenant Governor to constitute boards of health by chapter 29 of the same act. It may be that the legislature thought it prudent thus to provide against the injurious consequences which might result in the case of neglect or delay upon the part of the municipal authorities, but whatever may have been the motive for retaining both provisions it is clear that sec. 56 of ch. 57 of the 4th series did not repeal sec. 1 of ch. 29 of the same series.

Here ch. 1 of the acts of 1879 is but a reconsolidation into one act of the laws relating to county municipal corporations, and while by its 88th section it repealed ch. 57 of the 4th series it re-enacted in its 67th section in identical terms the provisions contained in the 56th sec. of ch. 57 of the 4th series and thus expressly

referred to chs. 29 and 30 of the 4th series as still in full force and effect. It is clear, therefore, that ch. 1 of the acts of 1879 did not repeal the 1st sec. of ch. 29 of the 4th series any more than did sec. 56 of the above chapter 57. That this is so is further apparent by reference to the act which constitutes the 5th series of the Revised Statutes, for there in chapter 26 the 1st section of ch. 29 of the 4th series, which is the section which authorizes the Lieutenant Governor to appoint boards of health, is re-enacted verbatim, and in sec. 80 of ch. 56 of the same act is re-enacted the power vested in the municipal councils of county corporations to appoint boards of health as follows :—

> The municipal council shall have the appointment of health officers, health wardens and health inspectors and a board of health who shall have the powers conferred by chapters 26 and 27 of the Revised Statutes.

These statutes, 26 and 27 of the 5th series, being identical with chs. 29 and 30 of the 4th series, save only that the words "municipal councils" &c., are substituted for the words "courts of general or special sessions," it is not disputed that upon the 19th February, 1880, the board of health which was appointed by the Lieutenant Governor by the commission bearing date the 16th of said month of February did in point of fact pass a resolution for engaging the services of a medical man to attend to small pox patients, which resolution was in the following terms :—

> That a doctor be secured and retained by the board to attend upon all the small pox patients who are, and may the present season, be attacked with the disease of small pox in District No. 4 under the board's jurisdiction at the rate of $6.50 a day.

It is admitted also that at a meeting of the board the plaintiff,

> Dr. McKay being present agreed to take charge of the small pox patients at the rate of $6.50 under the resolution passed by the board this morning, all medicines and drugs to be provided by the

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board, and his services to the board thereunder to commence from the 18th February instant,

and that thereupon a resolution was passed by the board

that Dr. McKay be engaged for such purpose and under such conditions.

The plaintiff, in his statement of claim, states that he was a duly qualified medical practitioner within the Province of Nova Scotia, and that as such he was employed by the defendants, through the board of health for district number four North Sydney, in the County of Cape Breton, to attend certain persons then ill of smallpox, and who might thereafter, during the then season, become ill of that disease in the said district No. 4, and that the defendants, through the said board, agreed to pay plaintiff for his services $6.50 per day for the period, and that plaintiff gave up his other practice as a medical practitioner, and endeavored to heal and cure such sick persons, and gave them his care and attention, and was willing to continue his services, yet defendants ignored said agreement, and whilst persons were sick of the said disease during the said season in said district the defendants discharged the plaintiff and employed other medical practitioners —whereby plaintiff suffered damage, &c.

The defendants, in their statement of defence, admit that plaintiff is a duly qualified medical practitioner as alleged, but deny that they employed the plaintiff through the alleged board of health or otherwise. They then deny that the board of health was duly constituted. They deny that the plaintiff was at all employed by the said alleged board of health—and they deny that the defendants, through the said board of health or otherwise, agreed to pay the plaintiff for his services, and they say that they never discharged the plaintiff, nor did they employ other medical practitioners, and finally they pleaded certain allegations

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by way of justification of the dismissal and discharge of the plaintiff by the board of health that employed him.

The learned judge who tried the case, in his judgment, declared that no evidence was produced at the trial of any justification for dismissal of the plaintiff, and he found all the issues in favor of the plaintiff and rendered a judgment in his favor for $350.00 and costs.

This judgment, upon appeal, was affirmed by the Supreme Court of Nova Scotia, from the judgment of which court in affirmance of the judgment of the trial judge this appeal is taken.

The argument before us consisted for the most part of merely technical objections.

1. That the board of health that employed the plaintiff was not legally constituted.

2. Assuming it to have been that the contract made with the plaintiff by the board was the contract of the defendants;

3. That the action was substantially for a wrongful dismissal and that for such wrong the defendants were not liable, their liability being limited to what is prescribed by sec. 12 of c. 29 of the revised statutes of Nova Scotia 4th series as amended by c. 6 of the acts of 1874.

As to the first of these objections I have already expressed my opinion to be that the board of health that employed the plaintiff was duly constituted.

As to the 2nd and 3rd of the objections as above stated they are purely of a technical character for, under the statutory provisions as to amendments required to be made as well by the court below as by this court, in order that the true question in issue between the parties shall be determined, the pleadings can, and should even now, be amended if necessary so as to raise such true questions, but they do, I think,

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sufficiently raise such questions, which are not whether the contract entered into by the board of health with the plaintiff is strictly speaking the contract of the defendants, or the dismissal of the plaintiff by the board if wrongful, the wrongful act of the defendants but

1. Whether the plaintiff fulfilled the contract upon his part in all things which according to a reasonable construction of the contract were to be fulfilled by him.

2. Whether the board of health fulfilled the contract in all things, which according to a reasonable construction of it were to be performed by them.

3. Whether, assuming the first question to be answered in the affirmative and the second in the nagative, the defendants are by sec. 12 of c. 29, 4th series, as amended by c. 6 of the acts of 1874, liable to the plaintiff to pay him the amount agreed by the board to be paid to him for his services, namely, $6.50 per day, as long as the small pox should prevail in that season, which it is not disputed was until the 5th of May, 1880. These are the real points in issue between the parties which they went down to try, and which in point of fact were tried, and which are now before us for our decision.

Now, the first point to be determined is: What is the true construction of the contract ?

The resolution of the board under which the plaintiff agreed to render his services at $6.50 per day was that

> a doctor be secured and retained to attend upon all small pox patients which were then and during that season might be attacked with small pox in the District No. 4 under the jurisdiction of the board.

It was in accordance with this resolution and for the purposes thereof that the plaintiff was engaged, secured and retained, and, for the remuneration of $6.50 per day during such time in the then season that there

should be small pox patients in the district under the jurisdiction of the board, he agreed to render his professional services. To fulfil this contract upon his part it was natural that he should have given up, and he says that he did give up, his general practice in order to keep himself always in readiness to attend to small pox patents and to fulfil his contract. The reasonable construction then of this contract appears to me to be that thereby the plaintiff was secured, retained and engaged to attend to all small pox patients there should be during the season in the District No. 4 under the jurisdiction of the board. And if he kept himself in readiness to attend to all such small pox patients so long as there should be any requiring medical attendance, and did attend to all such as he was permitted by the board to attend, he must, I think, be held to have fulfilled his contract according to its reasonable construction in all things upon his part to be performed. That he did so fulfil his contract the learned judge who tried the case has found as matter of fact, and that point must be held to be determined in the plaintiff's favor.

Then as to the board of health the true construction of their contract is, I think, that they engaged and retained the plaintiff to attend to all small pox patients within the jurisdiction of the board who during the season should require medical attendance, and that he should be paid $6.50 a day during such period or so long as the plaintiff should fulfil his part of the contract. If, therefore, they prevented him attending to small pox patients within the district under the jurisdiction of the board who during the season required medical attendance they committed a breach of their contract which can only be justified and excused by there being pleaded and proved sufficient cause in excuse of such breach; and it

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appears that in point of fact although the board permitted the plaintiff to attend small pox patients from the 18th February to the 12th of March, 1880, they did, from thence until the 5th May, when there ceased to be any small pox patients requiring attendance in the district under the jurisdiction of the board, prevent the plaintiff from attending any such patients although he was ready and willing to attend them, and the board procured the attendance of another medical man without any justification of such their breach of their contract with the plaintiff, as the learned judge who tried the case has found. Under these circumstances the plaintiff's contract entitled him to be paid the $6.50 per day until the said 5th of May, and the only remaining question is whether the sections of the statutes referred to impose upon the defendants a liability to pay the plaintiff what must be admitted to be due to him under the terms and conditions of his contract.

The 12th sec. of c. 29 of the 4th series as amended by sec. 1st of c. 6 of the acts of 1874 reads as follows:—

> The reasonable expenses already incurred or hereafter to be incurred by any board of health in carrying out the provisions of this chapter, including all medical attendances and services bestowed and the medicines supplied by physicians when required by any board of health to be bestowed, performed and supplied under the provisions of this charter, shall be a county district or city charge and shall be assessed and levied and collected in the same manner and at the same time as the ordinary county rates.

Upon the true construction of this clause there can, I think, be no doubt that it was competent for the board of health of the district No. 4, in the county of Cape Breton, to engage and retain the services of a medical man to be always in readiness to attend all small pox patients within the district under the jurisdiction of the board of health for as long as the disease should prevail in the district.

Having regard to the infectious nature of the disease

and to the interference which constant attendance upon patients suffering from it would necessarily have with the medical man's general practice, it was legally reasonable, and indeed perhaps absolutely necessary, that the contract with the medical man engaged and retained should be for the whole period that the disease should prevail in the district as was done by the contract between the board of health and the plaintiff; and as the plaintiff has fulfilled that contract in all things to be performed upon his part the amount for which he contracted to render his professional services and which the board of health agreed should be paid to him at $6.50 a day so long as there should be small pox patients in the district is by the statute made a charge and liability upon the county corporation which they are bound to pay.

It has been suggested here, though not apparently in the court below, and no such defence is put upon the record, that the plaintiff's remedy is not by action but by mandamus. Apart from the point that no such defence has been raised upon the record I am of opinion that there is no weight in the objection now suggested for two reasons.

1st. Because I think that the true construction of the statute is to make the amount as agreed upon between the board of health and the medical man whose services have been engaged and retained by them to be a charge upon the county corporation and a liability or debt due by them to the medical man, and in such a case the medical man so engaged and retained is vested with his common law right to enforce by action the liability and charge which is imposed upon the corporation by the statute. The statute in express terms imposes the amount which the plaintiff is entitled by his contract to demand and receive a charge and liability upon the

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corporation and it enables the corporation to reimburse themselves by levying an assessment in the same manner and at the same time as the "ordinary county rates," levied to pay all other liabilities of the corporation.

Secondly, because the power of making, even at this stage of the cause, all necessary amendments to prevent the miscarriage of justice is so extensive that the court can if necessary direct a prayer for a mandamus to be added to the statement of claim, and the judgment of the court under order 53 of ch. 104 of the Revised Statutes 5th series may order a mandamus to issue to compel the defendants to levy a rate, but, as I have already said, the statute under the circumstances appearing in the case imposes the amount which is due to the plaintiff as a charge and liability upon the corporation which can be enforced by action against the corporation and they can reimburse themselves. The appeal therefore, in my opinion, should be dismissed with costs.

PATTERSON J.—There is only one point in this case on which I entertain any serious doubt.

I have no doubt that the law contained in chapter 29 of the 4th series Revised Statutes, was in force in 1880, when the transactions in question took place, and is, in fact, still in force. My brother Gwynne has dealt fully with that subject, and I have nothing to add to what he has said. I am also of opinion that the proper remedy for the recovery of the expenses mentioned in the 12th section of the act, whether those expenses have been paid by members of the board out of their own pockets, or are due to persons who have rendered services or furnished supplies under the orders of the board, is by an action like the present one, and not by mandamus to compel the making of an assessment.

The latter proceeding would be very inconvenient, if not impracticable. It cannot have been the intention of the legislature that boards of health should incur a debt, payable only by means of an assessment made for the purpose, for every service rendered. If such were the idea it would of course apply to all services important or trifling, to the wages of a charwoman as well as to the fees of a physician. The statute, it is true, gives no direction for providing funds by the county in advance of the assessment which can only be collected once a year. The enactment of section 12 is, that the reasonable expenses incurred by the board shall be a county or district charge, and shall be assessed by the justices in session and levied and collected in the same manner and at the same time as the ordinary county rates. This might perhaps have been more happily expressed, but it means, as I think is sufficiently plain, that the operations of the board of health are to be conducted at the expense of the county or district—"district" evidently denoting a district with a municipal organization, such as those mentioned in chapter 57 of the Revised Statutes 4th series—and the provision referring to the assessment, which may have been inserted *ex majore cautela*, and may not have been strictly necessary, does not demand any other construction than that the expenses which the county is made liable for may be included in the ordinary estimates of money required for public purposes.

The making of these estimates was a duty of the grand jury of the county, and the assessments were made under orders of the sessions by the 21 ch. of the Revised Statutes 4th series, until those functions were transferred, 42 V. c. 1, s. 49, to the municipalities in 1879.

This understanding of the effect of sec. 12 is borne

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out by reference to cognate provisions of provincial acts, as well as to the other sections of chapter 29. Thus we have in section 11 an allusion to direct payments by the board of health. The section requires that a yellow flag shall be displayed on houses where there is small pox, and enacts that the expense shall be borne by the board; and section 9 which is strictly in *pari materia* with section 12, enacts that amounts for vaccinating poor people,

when examined and allowed shall be assessed for and paid as other county and city charges.

Sometimes express provision has been made for procuring, in advance of the collection of the rate, the funds necessary to pay debts which are made a county charge. Thus, sec. 5 of ch 21 (4th series), authorized the grand jury to present sums required for certain local purposes, and empowered the sessions, who were to assess the localities for the amounts, to appoint commissioners to expend the money and to authorise the commissioners to borrow the amount, adding these words :

And any money borrowed under this chapter shall be a county or district charge and bear interest till paid.

This money was evidently to be borrowed on the credit of the county or district, and not of the special local assessment.

There is part of an act printed in appendix A to the Revised Statutes, 4th series, which authorized the Provincial Government to advance money to pay compensation for buildings removed or destroyed for railway purposes, which money was to remain a county charge, to be raised by assessment and returned to the provincial treasury. In the present instance members of the board raised money by giving their own notes, as we are told by one of them. I see no reason why they should not have been supplied by the county with money to pay their way.

Even a temporary loan effected by the council, such as under one of the statutes commissioners were authorized to procure, and under another might be made by the government, must be a matter of frequent occurrence when there are not funds on hand. No difficulty of the kind involved in the point in discussion was made with regard to the money paid to the plaintiff for his services up to the date of his dismissal, and the objection is not put upon the record. I infer from these circumstances that the construction I apply to the statute has been already recognized as the appropriate and practical one.

The doubt I have is whether the plaintiff's claim is one of the "reasonable expenses" incurred by the board of health which are, by section 12, made a county charge. The term "reasonable expenses" is a very comprehensive one, but its elasticity is limited by the effect of the act of 1874, chap. 6, which declares that it "shall be construed to include all medical attendance and services bestowed and performed, and medicines supplied by physicians when required by any board of health to be bestowed, performed and supplied under the provisions of chapter 29."

I do not see my way to give to the term "reasonable expenses" in section 12 a more extensive signification, as applied to professional claims of a physician, than that which this explanatory statute gives to it. The question, therefore, is whether the present claim can properly be treated as being for "medical attendance and services bestowed and performed."

Now, if the claim is regarded as one for wrongful dismissal I must answer the question in the negative. The board of health had no power to bind the county by an executory contract, or to make the county liable for a breach by the board of its own contract. Services refused and forbidden, and therefore left unperformed, cannot properly be called services bestowed and per-

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formed. I, for some time, was inclined to think that, the agreement being to pay the plaintiff $6.50 a day for his attendance on smallpox patients during the season, that scale of remuneration having been adopted in preference to $200 a month which had been proposed, the gross amount of $6.50 multiplied by the number of days during which there were any smallpox patients that season might be treated as the sum agreed to be paid for whatever services the plaintiff performed during the season he, of course, performing, as has been found in his favor, all that the board required of him.

The judgment practically proceeds upon that computation.

On reflection, however, I am satisfied that that mode of bringing the plaintiff's claim within the letter of section 12, as explained by the act of 1874, puts too great a strain upon the terms of the contract, under which the plaintiff would clearly be paid in full if paid $6.50 at the close of each day while he was bestowing attendance or performing services. It would, besides, by doubling the rate at which the professional services were valued, make the remuneration unreasonable, while the charge on the county is for reasonable expenses only.

We thus come back to the form in which the plaintiff has presented his claim, viz.: for damages for wrongful dismissal, and in that shape it is not, in my opinion, made a county charge.

On this ground I think the appeal should be allowed with costs and the action dismissed with costs.

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

Solicitors for appellant: *Borden, Ritchie, Parker & Chisholm.*

Solicitors for respondent: *Henry, Ritchie & Henry.*

HARRY ALLEN (PETITIONER).....APPELLANT ; 1890

AND *May 16.
*Dec. 11.

CHARLES A. HANSON *et al.* (LIQUIDATORS)..... RESPONDENTS ;

In re THE SCOTTISH CANADIAN ASBESTOS COMPANY (LIMITED)

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

Constitutional Law—Winding-up act, R. S. C. ch. 129 sec. 3—Foreign corporations—Liquidation.

Sec. 3 of "The Winding-up Act," Revised Statutes of Canada ch. 129 which provides that the Act applies to*** incorporated trading companies doing business in Canada wheresoever incorporated is *intra vires* of the Parliament of Canada.

2. A Winding-up order by a Canadian court in the matter of a Scotch company incorporated under the Imperial Winding-up Acts doing business in Canada, and having assets and owing debts in Canada, which order was made upon the petition of a Canadian creditor with the consent of the liquidator previously appointed by the Court in Scotland as ancillary to the winding-up proceedings there, is a valid order under the said Winding-up Act of the Dominion. *Merchants Bank of Halifax* v. *Gillespie*, (10 Can. S. C. R. 312.) distinguished.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), affirming a judgment of the Superior Court, by which the respondents were appointed liquidators of the Scottish Canadian Asbestos Company (limited) under the provisions of the Dominion Winding-up Act, ch. 129 of the Revised Statutes of Canada, and the appellant's motion

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

(1) 16 Q.L.R. 79 ; S.C. 13 Legal News, 129.

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to have the order set aside and to dissolve a meeting of creditors called under the statute, was rejected.

The Scottish Canadian Asbestos Company (limited), a Joint Stock Company, incorporated under the acts of Imperial Parliament of 1862 and 1886, having its head office in the City of Glasgow, Scotland, its principal business having been carried on at Arthabaska, in Canada, where its chief property and interests are situated, became insolvent, and proceedings were taken in Scotland for the winding-up of its affairs, and a liquidator was appointed.

Upon a petition made by the firm of Lucke & Mitchell, creditors of the company, in which the Scottish liquidator joined, the Superior Court in and for the district of Arthabaska, Mr. Justice Billy presiding, made a winding-up order under the Canadian Statute, R.S.C. ch. 129, and the respondents were appointed liquidators. A motion was then made by the present appellant, a large shareholder, to set aside the said Winding-up order and also to dissolve a meeting of creditors called under the statute. The motion was in the following terms, viz.:—

"That inasmuch as the said company was incorporated under the provisions of the Joint Stock Companies' Act of the United Kingdom of Great Britain and Ireland, and is subject to the provisions of the said Imperial Act as regards its status, powers, and franchises, and the rights and obligations of shareholders and contributories, and as regards all matters respecting its corporate capacity; and inasmuch as the said company is subject to the laws of the United Kingdom of Great Britain and Ireland, as regards its liquidation; and inasmuch as the Winding-up Act of the Dominion of Canada does not apply to the said company; and inasmuch as the said Winding-up Act, and all legislation of the Parliament of the

Dominion of Canada, in so far as it relates or applies to the liquidation of the said company, is *ultra vires* of the said Parliament of the Dominion of Canada; that the present meeting of creditors be dissolved, and that the winding-up order and all proceedings had herein be set aside and declared irregular and of no effect, saving to the said company and its shareholders and creditors all rights to which they may be by law entitled."

This motion was rejected. The appellant thereupon applied for and obtained leave to appeal to the Court of Queen's Bench, and that court by a majority affirmed the judgments appealed from. Thereupon the appellant obtained from the Registrar of the Supreme Court sitting as judge in chambers leave to appeal as required by sec. 76 of the Winding-up Act, and also the necessary order approving the security for costs under sec. 46 of the Supreme and Exchequer Court Act.

The question raised on this appeal is: Whether a winding-up order under the Canadian Act can be made against a company incorporated under the Imperial acts having assets in Canada, and whether the legislation of the Canadian Parliament providing therefor is within the powers of the said Parliament?

Mr. Smith for appellant.

Trenholme Q.C. for respondents.

The cases cited by counsel are reviewed in the judgments hereinafter given and in the report of the case in the court below (1).

SIR W. J. RITCHIE C.J.—[After stating the facts of the case his Lordship proceeded as follows:—]

The following cases bear on the question raised in this case:

(1) 16 Q. L. R. 79.

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In re Matheson Brothers, limited (1) The head note is :

The court has jurisdiction under section 199 of the Companies Act, 1862, to wind up an unregistered joint stock company, formed and having its principal place of business in New Zealand, but having a branch office, agents, assets and liabilities in England.

The pendency of a foreign liquidation does not affect the jurisdiction of the court to make a winding-up order in respect of the company under such liquidation although the court will, as a matter of international comity, have regard to the order of the foreign court.

It being alleged that proceedings to wind up the company were pending in New Zealand the court, in order to secure the English assets until proceedings should be taken by the New Zealand liquidators to make them available for the English creditors *pari passu* with those in New Zealand, sanctioned the acceptance of an undertaking by the solicitor for the English agent of the company that the English assets should remain *in statu quo* until the further order of the court.

In re Commercial Bank of India [L. R. 6 Eq. 517.] approved.

* * * * * *

Kay J.—I think that the court has jurisdiction to make a winding-up order upon a petition of this kind, otherwise there might be no means by which the English creditors could obtain payment of their debts (2).

* * * * *

And at page 230 :

Had it not been then for the fact of a winding-up order existing in New Zealand this court would in my opinion have had jurisdiction to wind up this New Zealand company having an office and carrying on part of its business here as an unregistered company within the terms of the 199th section.

This being the case, what is the effect of the winding-up order which it is said has been made in New Zealand? This court, upon principles of international comity, would no doubt have great regard to that winding-up order and would be influenced thereby, but the question of jurisdiction is a different question and the mere existence of a winding-up order made by a foreign court does not take away the right of the courts of this country to make a winding-up order here, though it would, no doubt, exercise an influence upon this court in making the order.

* * * * * *

(1) 27 Ch. D. 225. (2) Ibid. p. 228.

Having, therefore, jurisdiction to make a winding-up order I feel myself at liberty to sanction the acceptance of the undertaking offered by Mr. Hart. I have said thus much as to my own opinion upon the effect of the act. But there is the authority of *In re Commercial Bank of India* [L. R. 6 Eq. 517], in which counsel of eminence were engaged on both sides, Mr. Southgate, Q.C., Mr. Bristowe, and Mr. (now Lord Justice) Lindley being for the petitioners, and Mr. (now Lord Justice) Baggallay and Mr. Kekewich for the official liquidator of the new company. There a joint stock company formed in India, registered under Indian law, and having its principal place of business in India, with an agent and a branch office in England, was ordered to be wound up under the Act of 1862, and Lord Romilly said (1) "I think I have jurisdiction to make the order; if the company is not wound up here, these persons will not be able to get their money."

Now that case was decided in 1889, and no authority against it has been cited.

In re Commerciat Bank of South Australia (2), a bank incorporated in Australia, carrying on business there, and having a branch office in London with English companies and assets in England, it was held the English court had jurisdiction to make a winding-up order which would be ancillary to a winding-up in Australia. In this case the learned judge said, "if I have control of the proceedings here, I will take care there shall be no conflict between the two courts."

I think there is jurisdiction to make this winding-up order, which would be ancillary to the winding-up in Scotland for the purpose of getting in the Canadian assets and settling a list of the Canadian creditors, as *in re Corsellis* (3), the winding-up in England was ancillary to winding-up in Australia for the same purpose, and there need not be. and should not be any conflict between the two courts.

In the case of the *Merchants Bank* v. *Gillespie* (4), in the view I took of this case, I considered it quite unnecessary to discuss or decide the question as to the extent

(1) L. R. 6 Eq. 519.
(2) 33 Ch. D. 174.
(3) 33 Ch. D. 160.
(4) 10 Can. S. C. R. 312.

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of the power of the Dominion Parliament to pass laws for winding-up or otherwise dealing with foreign insolvent trading companies doing business in the Dominion, because I thought the then winding-up Act 45 Vic. ch. 23, was not intended to apply to a company incorporated under the Imperial Joint Stock Company's Acts, 1862-1867, and I was confirmed in that opinion by the action of the Dominion Parliament in passing the 1st section of the 47 Vic. ch. 39, which repealed the 1st section of 45 Vic. ch. 23, and substituted the 1st section of 47 Vic. in lieu thereof, the only alteration being the addition to the enumeration of the companies to which the 45 Vic. ch. 23 is to apply of the words, "which are doing business in Canada, no matter where incorporated," and "which are insolvent," covering it appeared to me a clear intimation that the 45 Vic. ch. 23, did not so apply. The question now raised in the present case is: Was such addition within the legislative power of the Dominion Parliament, or in other words was such enactment *ultra vires?*

If parliament has legislated respecting strictly foreign corporations, and is not to be considered to be legislating respecting colonial corporations unless they are expressly named, (see *in re Oriental Inland Steam Company* (1), surely it must be said that the Dominion Parliament can in its right to legislate in reference to bankruptcy and insolvency, legislate respecting insolvent companies doing business in Canada, and with reference to property of such companies within its jurisdiction.

Inasmuch then as the Dominion statute declares that the winding-up act now applies to all companies which are doing business in Canada and no matter where incorporated, there can be no doubt of the intention of Parliament to apply the winding-up act to foreign as well as

(1) 9 Ch. App. 560.

domestic incorporated companies, and as I think such an enactment is within the legislative power of the Dominion Parliament, and it being admitted that this company was carrying on its business, and held valuable lands in Canada, and was insolvent, and as the provisions of the English Companies Act, 1862, are held to apply to foreign companies carrying on business in England and are worked out as nearly as may be, or left not worked out as the exigencies of the case dealt with require ; and inasmuch as the greater part of the assets of this company would seem to be in Canada, there is the more reason why the property within the territorial limits of the jurisdiction of the courts of Canada should be dealt with under the provisions of the Canadian act ; in fact it is difficult to see how such property could be dealt with by the English liquidators ; and inasmuch as in this case it appears the liquidators under the English Act are acting in concert with the liquidators under the Canadian act, I can see no reason for supposing that any conflict can possibly arise whereby this stockholder can be in any way damnified ; on the contrary, it appears to me that this is the most satisfactory way by which the company can be wound up and its assets realized for the benefit of the company and all the parties interested.

All the winding-up act, as I understand it, seeks to do in the case of foreign corporations is to protect and regulate the property in Canada and protect the rights of creditors of such corporation upon their property in Canada. It by no means follows that because all the provisions of the act may not be applicable to foreign cases that those portions which are should not be acted on.

The fact that liquidation proceedings have already been taken in Scotland under the Imperial Act, and that the Scotch liquidator acquiesces in the present proceed-

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ings under the Canadian act, affords a tolerably good guarantee that there will be no conflict of authority in this case, but whether he acquiesced or not it would be the duty of the courts of both countries to see no conflict should arise.

STRONG J.—In the case of *The Merchants Bank of Halifax* v. *Gillespie* (1) my judgment did not proceed upon the ground that the legislation there invoked was unconstitutional but I stated as a reason for not adopting the construction there contended for that such an interpretation would give to the statute an effect which would be *ultra vires* of the Parliament of Canada. That case raised the question of the validity of winding up proceedings under our statute as the sole and principal winding-up of a company registered under the English Act of 1862. I adhere to what I there said as applicable to the principal and original winding-up of such a company to which case my opinion was intended to apply and alone did apply.

In the present case, however, the winding-up order has been granted upon the petition of the liquidator under a liquidation previously instituted under the act of 1862, in Scotland, and as ancillary to that principal winding-up. The effect of the winding-up here can therefore only be to entitle the liquidator appointed under it to realise the assets, and after paying creditors (not merely creditors within this jurisdiction, but all creditors) to remit the balance (if any) of the assets to the liquidator in Scotland to be applied and distributed as may there be directed by the proper forum.

In other words this winding-up is subsidiary to the same proceeding which had been previously instituted in the forum of the domicile of the corporation. I am of opinion that an order thus limited as

(1) 10 Can. S.C.R. 312.

this is authorized by the statute, and that it is entirely within the powers of the Dominion Parliament to confer such a jurisdiction.

The appeal must be dismissed.

FOURNIER J.—La seule question soulevée par le présent appel est de savoir si les créanciers de la compagnie insolvable, résidant dans le pays, peuvent de concert avec le liquidateur nommé par la cour en Ecosse, soumettre la dite compagnie aux dispositions du *Canadian Winding up Act*, pour ce qui concerne les biens qu'elle possède dans le pays.

L'appelant prétend que le parlement fédéral n'a pas le pouvoir de passer un acte qui puisse s'appliquer à une compagnie incorporée en vertu des " actes impériaux " *Winding up Acts of* 1862, 67,—et qu'en conséquence les jugements et procédés qui ont eu lieu à cet effet dans cette cause, sont nuls et sans effet.

Il invoque au soutien de sa prétention la décision de cette cour dans la cause *The Merchants Bank of Halifax* v. *Gillespie* (1).

La question décidée en cette cause était bien de savoir si une compagnie incorporée à l'étranger pouvait être liquidée en vertu de notre *Winding up Act* et la cour a jugée que l'acte 45 Vic. ch. 23 n'était pas applicable à une telle compagnie,—mais sans rien décider au sujet de la constitutionalité de l'acte. C'est le motif donné par Sir W. J. Ritchie C.J. qui s'est fondé sur l'acte 47 Vic., ch.39 amendant la 1er sec. de la 45 Vic. en y ajoutant dans l'enumération des compagnies auxquelles cet acte doit s'appliquer celles

which are doing business in Canada no matter where incorporated

parceque, dit-il, cet amendement a été passé après le commencement des procédés, et que rien n'indique qu'il doit avoir un effet rétroactif. Il tire delà la

(1) 10 Can. S. C. R. 312.

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confirmation de son opinion que l'acte 45 Vic. ch. 23, n'était pas applicable aux procédés soumis à la cour.

Maintenant, si la question pouvait faire difficulté avant l'amendement, cet amendement a-t-il l'effet de la trancher en déclarant que cet acte s'appliquerait aux compagnies faisant des affaires en Canada quelque soit le lieu de leur incorporation? Pour moi, qui ai soutenu dans la cause de *Merchants Bank of Halifax* v. *Gillespie*, que la 45e Vic. ch 23 devait s'appliquer aux compagnies insolvables faisant affaires dans le pays et y possédant des biens, il me semble que cet amendement a eu l'effet de faire disparaître toute difficulté au sujet de l'application de la loi, et que l'on ne doit pas hésiter à la déclarer applicable aux compagnies étrangères. Dans ce cas, il ne resterait à décider que l'unique question soulevée par l'appelant au sujet de la constitutionalité de la loi.

La compagnie dont il s'agit a d'abord été mise en liquidation en Ecosse, et la demande faite pour la soumettre au *Winding up Act* du pays a été faite avec le consentement du liquidateur nommé par la cour en Ecosse, et les liquidateurs nommés ici l'ont été sur la demande des créanciers Canadiens et du liquidateur autorisé en Ecosse.

L'intimé prétend que les procédés adoptés dans cette instance sont soutenus par les autorités et il invoque la cause de la *Commercial Bank of South Australia*, (1). Cité comme autorité par Lindley on Company Law, 1889, (2) comme suit:

> Bank incorporated and carried on business in Australia, not registered here but had a branch office in London. Winding up proceedings were pending in Australia,—North J., made an order but expressed an opinion that the proceedings here should be ancillary to those in Australia, and that the liquidator should only deal with assets in this country. Compare *Matheson Brothers*, Limited, 27 Ch. D. 225, where no order was made.

(1) 33 Ch. D. 174, (2) P. 644.

Lindley est encore cité (1) pour établir que les cours en Angleterre peuvent mettre en liquidation en vertu de l'acte impérial des compagnies coloniales ou étrangères et qu'elles peuvent agir comme auxiliaires des cours coloniales pour les biens situés en Angleterre ; pour quelle raison les cours canadiennes ne pourraient-elles pas en faire autant pour les cours anglaises en ce qui concerne les biens situés en Canada, et surtout comme dans le cas actuel, lorsqu'elles en seraient requises par la cour chargée de la liquidation ? Quoique les tribunaux soient indépendents les uns des autres, ils n'en sont cependant pas moins tenus de prêter le secours de leur autorité pour faire exécuter des lois qui ont pour but de règler des intérêts communs aux citoyens des deux pays.

Mais indépendamment de ce concours pour arriver à la liquidation, je crois que l'action de nos tribunaux seule peut suffir pour arriver à ce but. J'ai développé cette opinion dans la cause du *Merchants Bank of Halifax* v. *Gillespie* (2), et je ne crois pas devoir revenir ici sur ce point.

Quant à la question de savoir si le parlement fédéral avait le droit de passer les *Winding up Acts*, cela me semble ne faire aucune difficulté. La liquidation des sociétés et compagnies insolvables, tout comme les lois de faillites sont clairement du ressort du parlement fédéral. Notre parlement à un pouvoir complet et absolu de légiférer sur ce sujet et n'est nullement dans la dépendance du parlement imperial. Dans les limites de sa jurisdiction son pouvoir est égal à celui du parlement impérial. Cette question a été si souvent décidée qu'il est inutile d'y revenir. C'est un point réglé.

L'argument que l'acte du parlement fédéral est contraire à l'acte impérial et partant nul, est tout-a-

(1) Pp. 912 et 622.

(2) 10 Can. S. C. R. p. 326.

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fait sans fondement. Il n'y a aucun acte du parlement impérial défendant à notre parlement de légiférer sur cette matière; au contraire, il en existe un, l'acte de l'Amérique Britannique du Nord, qui lui en donne tout spécialement ce pouvoir, cet la sec. 91, s.s. 21 de cet acte.

Pour annuler un acte du parlement fédéral il ne suffirait pas qu'il fut contraire à la loi anglaise,—mais il faudrait qu'il fut contraire à une loi positive rendue obligatoire pour le Canada par disposition expresse, ou par une conséquence nécessaire de cette loi et encore cette nullité n'aurait lieu que pour les parties seulement de cette loi qui serait en contradiction directe à celui du parlement impérial. Le juge Wilies dans la cause de *Philips* v. *Eyre* (1) s'exprime ainsi sur cette question :

It was further argued that the Act in question was contrary to the principles of English Law, and therefore void. This is a vague expression, and must mean either contrary to some positive law of England, or to some principle of natural justice, the violation of which would induce the Court to decline giving effect even to the law of a foreign Sovereign state. In the former point of view, it is clear that the repugnancy to English law which avoids a colonial act means repugnancy to an Imperial statute or order made by authority of such statute applicable to the Colony by express words or necessary intendment; and that, so far as such repugnancy extends, and no further, the Colonial act is void. The 28 & 29 Vict. C. 63, S. 2, enacts that, any Colonial law which is, or shall be, in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the Colony the force and effect of such Act shall be read subject to such Act, order or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Pour faire disparaître tout doute la section 3 du même acte déclare que :—

No Colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order or regulation as aforesaid.

(1) L. R. 6 Q. B. 20.

Les actes impériaux concernant la liquidation des compagnies ne s'appliquent pas au Canada et il est de principe que le parlement impérial ne légifère pas sur la propriété située en dehors du Royaume-Uni. Ainsi cette législation ne peut affecter la nôtre qui est parfaitement constitutionnelle et doit avoir son application autant qu'il est possible pour atteindre la liquidation demandée.

Appel renvoyé.

GWYNNE J.—I can add nothing to the judgment of the learned Chief Justice of the Court of Queen's Bench, Sir A. A. Dorion. I entertain no doubt as to the correctness of that judgment, and am of the opinion that the appeal should be dismissed with costs.

PATTERSON J.—The Scottish Canadian Asbestos Co. (limited), was incorporated on the 31st day of July, 1886, under the Imperial Companies' Acts, 1862 to 1886. Its registered office is in Glasgow, but its chief place of business is in the Province of Quebec where it owns real and personal property and has carried on the business of quarrying and working for asbestos.

The company being insolvent an order was made in November, 1888, by the Court of Session in Scotland, that the company be wound up under the provisions of the Companies' Act, and appointing a liquidator. The liquidator, by authority of the Court of Session, appointed the respondents, Hanson Brothers, for the purpose, amongst other things,

for and on behalf of me as liquidator aforesaid, to appear before and to apply to such Courts of Law in Canada aforesaid as my said attorneys and attorney shall deem necessary to have effect given to the order to wind up said company pronounced by the said Lords of Council and Session aforesaid, as also, if need be, to apply for an order

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to wind up said company in Canada, either as auxiliary to the Scotch liquidation or otherwise, or to consent to any such winding up.

The application to the court for leave to appoint the attorneys set out, and the power of attorney recited, that the company had its principal assets in Canada, and that considerable sums of money were due by the company to creditors resident in Canada. Thereupon a petition, in which the Scotch liquidator joined, was presented to the Superior Court in the District of Arthabaska in Quebec, Mr. Justice Billy presiding. A winding-up order was made under the Canadian Statute, (R. S. C. ch. 129), and Messrs. Hanson Brothers were appointed liquidators.

The appellant, who is a large shareholder in the company, moved against that order, and also to dissolve a meeting of creditors called under the statute. That motion was dismissed by Mr. Justice Billy, and his judgment was affirmed on appeal by the Court of Queen's Bench. The present appeal is from that decision.

The grounds of appeal are that the Canadian Winding-up act does not apply to this company, and that in so far as it professes to apply to the company it is *ultra vires* of the Parliament of Canada.

The first point is answered by the express language of the statute which declares, in section 3, that the act applies to incorporated trading companies doing business in Canada, wheresoever incorporated; and (*a*) which are insolvent; or (*b*) which are in liquidation or in process of being wound up, and on petition by any of their shareholders or creditors, assignees or liquidators ask to be brought under the provisions of this act.

This declaration, which was introduced into the Winding-up act after the proceedings in *The Merchants' Bank of Halifax* v. *Gillespie* (1) had been com-

(1) 10 Can. S. C. 312.

menced, though before the judgment of the court was pronounced, alters the law from that which was held by a majority of the court to result from a correct interpretation of the act as it formerly stood, so that we can hold that foreign corporations are within the operation of the act without conflicting with the judgment which declared that they were not within its operation at the earlier date.

The question of *ultra vires* is, however, still undecided in this court, because, although it was advanced in *The Merchants' Bank of Halifax* v. *Gillespie*, (1) and opinions upon it were expressed by two of the learned judges who denied the jurisdiction and by one who affirmed it, it was not pronounced upon by the court.

Two points are made against the existence of the legislative jurisdiction. It is argued that it is conclusively negatived by the Imperial statute, 29 & 30 Vic. ch. 63, which declares, in section 2, that any colonial law which is or shall be in any respect repugnant to the provisions of any act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament, or having in the colony the force and effect of such act, shall be read subject to such act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

To sustain this objection two things are essential. The Imperial Act of Parliament must extend to the Dominion, and the Dominion Winding-up Act must be repugnant to the Imperial Companies' Act.

I do not think the appellant has succeeded in maintaining either of these propositions. The first section of the statute of 29-30 Vic. ch. 63, which is the interpretation clause, declares that an act of parliament or any provision thereof shall, in construing that act, be said to

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extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any act of parliament.

There are certainly no express words contained in the Companies' Act of 1862, or in any of the amending acts, extending their provisions to Canada, or to any of the provinces comprised in the Dominion, and it is equally difficult to trace in their provisions an intendment that they shall so apply. On the contrary we find the provisions relating to practice and procedure in winding-up proceedings framed with exclusive reference to the British Islands. A distinct instance of this is afforded by section 122 of the act of 1862, which provides for enforcing in any one of the three divisions of the United Kingdom orders made in the courts of any other division, but makes no allusion to enforcing such orders in any colony.

The Companies' Acts, therefore, do not extend to Canada. Nor is there any repugnancy between their provisions and the power now questioned of making a winding-up order by a Canadian court in the matter of an English or Scotch company which does business in Canada, has a place of business here, owes debts here, and has assets here. To hold such an order repugnant to the English acts would be to question the cases, of which there is a consistent series, in which the English courts have made orders to wind up colonial companies, or, as in one case, have asserted the power while refusing, as an exercise of discretion, to make the order. See *In re Union Bank of Calcutta* (1); *in re Commercial Bank of India* (2); *in re Commercial Bank of South Australia* (3); *in re Matheson Brothers* (4); Westlake's Private International Law (5); Thring on

(1) 3 DeG. & S. 253.
(2) L. R. 6 Eq. 517.
(3) 33 Ch. D. 174.
(4) 27 Ch. D. 225.
(5) 2nd ed. sec. 124.

Joint Stock and other companies (1); Lindley on Company Law (2). See also the judgment of my brother Fournier in *Merchants' Bank of Halifax* v. *Gillespie* (3), which is for the most part applicable to this case, and in which I entirely concur.

It is true that our courts cannot exercise with regard to an English company the full extent of the powers conferred by our Winding-up Act. For example, they cannot, by the effect of a winding-up order, affect the operations of the company in England, causing it to cease to carry on its business there, as under section 15 the company must do in this country. But the same difficulty was presented when the English courts were asked to make orders to wind up colonial companies, and was held not to affect the jurisdiction. See particularly the observations of Mr. Justice Kay *in re Matheson Brothers* (4), and of Mr. Justice North *in re Commercial Bank of South Australia* (5).

The fallacy in this particular may perhaps have been contributed to by an idea that an order called a Winding-up order, made in pursuance of an act called a Winding-up Act, must be inoperative if, in its potential effect, it must stop short of winding up or dissolving the company.

The expression usually employed in our statute is "winding up the business of the company," though the phrase "the winding up of the company," is sometimes used, as *e g.* in section 42 (6). The terms are convertible, and the former readily adapts itself to the operation of the order now in question, which is to wind up the business carried on by the company in Canada, though our courts may be as powerless as the English courts find themselves in dealing with colonial

(1) Notes under sec. 199 of the Companies Act, 1862, 5th ed. 302.
(2) 5th ed. 622.
(3) 10 Can. S. C. 312, 328.
(4) 27 Ch. D. 225, 228.
(5) 33 Ch. D. 174, 178.
(6) R. S. C. ch. 129.

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companies, to dissolve the corporation or to administer the assets that are beyond the territorial limits of their jurisdiction.

Some extracts from the company's articles of association have been put in evidence, and an argument against the jurisdiction of the Canadian court has been based on section 125, which reads as follows :—

> If the directors shall pass a resolution recommending the company to be dissolved, and a general meeting shall in pursuance of such recommendation resolve that the company be dissolved, and a second general meeting shall confirm that resolution, then the company shall henceforth subsist and carry on business for the purpose of winding-up its affairs, and its affairs shall be wound up and it shall be dissolved in accordance with and subject to the provisions of "The Companies' Acts, 1862 to 1883," which are and may be applicable in the voluntary winding-up of a company under the same, or the occurrence of an event in which it is provided that a company under the same may be wound up voluntarily.

One has only to read this to see that it cannot affect the present contest. It is a contract among the members of the company, and deals only with a voluntary winding-up which may be brought about in a specified manner. There is no pretence of dictating to the creditors of the company what remedies they may employ or what forum they must resort to to enforce their remedies.

On these grounds, and without thinking it necessary to discuss the recognition of the company by the issue of letters patent in the Province of Quebec, or the effect of the Scotch liquidator being a party to the proceedings here, I am of opinion that the judgment should be affirmed and the appeal dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant : *MacLaren, Leek, Smith & Smith.*

Solicitors for respondents : *Taylor & Buchan.*

DAME ANNE SHAW LOW (DEFENDANT) APPELLANT; 1890

AND *May 13.
*Dec. 11.

DAME ANNE JANE GEMLEY, *et al.* (PLAINTIFFS)..... ..... } RESPONDENTS.

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

Testamentary executor—Power to substitute—Liability for mis-appropriation by agent—Art. 1711 *C. C.*

Held, affirming the judgments of the courts below, that when a testamentary executrix employs an agent as attorney, she is bound to supervise his management of the matters entrusted to him and to take all due precautions and cannot escape liability for the misappropriation of funds committed by such agent, although he was a notary public of excellent standing prior to the misappropriation.

APPEAL from a judgment of the Court of Queen's Bench (appeal side) (1), confirming in part a judgment of the Superior Court (2), and ordering the reformation of certain accounts rendered by the defendant in her capacity as executrix of the will of the late Charles Adamson Low; and also condemning the defendant, personally, to pay to the plaintiff, in her quality of tutrix to the minor children of her deceased husband Geo. H. Low, the sum of $17,914.11, being made up of certain amounts misappropriated by one J. S. Hunter, who acted as notary and agent for the estate.

The action was brought by the respondent Dame A. J. Gemley in her quality of tutrix to the four minor children issue of her marriage with the late George Hamilton Low, against the appellant Dame A. S. Low

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

(1) M. L. R. 5 Q. B. 186. (2) M. L. R. 4 S. C. 92.

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as executrix of the will of the late Charles Adamson Low, to obtain the reformation of the accounts rendered to her by the executrix, and the payment of the children's share of the testator's estate as established by the accounts and by the corrections which the tutrix sought to introduce therein.

The items in the accounts rendered alleged to have been misappropriated by Mr. J. S. Hunter, N. P. were as follows :—

Loaned to	Mrs. Emma Roussell.....	$ 2,916 81
"	" Mrs. John Clark.....	1,000.00
"	" Joseph Bouchard.....	3,000.00
"	" Est. C. Phillips.....	10,997.30
		$17,914.11

The judgment of the Superior Court ordered the rectification of the accounts according to the plaintiff's pretensions, and condemned the defendant in her quality of executrix to hand over to the tutrix the portion of the estate comprised in the accounts, and personally to pay the amounts which should have been placed to the credit of the minors in these accounts.

An appeal to the Court of Queen's Bench was taken by the executrix, and during the pendency of this appeal one of the minors whom the tutrix represented, Miss Maud H. Low, attained her majority and obtained leave to take up and continue the proceedings on her own behalf.

The executrix met the action brought by the tutrix by a two-fold defence. She contended that the accounts as rendered were correct, and she further urged that in any event the tutrix could not claim the possession or control the capital of her wards' estate until the attainment of the age of majority of one of the children, in view of the provisions of the will which were alleged to place the estate under the control of trustees until the fulfilment of this condition.

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When Miss Maud Low came of age and obtained leave to continue the proceedings in her own behalf, this second defence became unavailing, and the executrix declared to the Court of Queen's Bench by her factum, that she had no objection to pay to Miss Maud Low such portion of the estate as might be found to be due to her as one of the legatees under the will.

The Court of Queen's Bench unanimously confirmed the judgment of the Superior Court as regards the correction ordered to be made in the accounts, and the payment of the children's revenues to the tutrix, but adopted the appellant's interpretation of the will as to the right of the trustees to retain the control of the capital against the tutrix until the majority of the children. In view of the fact that Miss Maud Low attained her majority during the proceedings, and of the declaration made by the appellant, the judgment of the Court of Queen's Bench ordered the executrix to pay to Miss Maud Low her share of the estate as established by the corrected accounts.

The respondents accepted this judgment *in toto* and the appellant has acquiesced in a portion of the judgment by filing a consent that it should be executed in so far as it orders the payment to Miss Maud Low of her share of the capital and revenue of the estate admitted by the executrix in her accounts as rendered.

The circumstances under which the moneys in question were misappropriated fully appear in the reports of the case in the courts below (1) and in the judgment hereinafter given.

H. Abbott Q.C. for appellant, and *Lafleur* for respondents.

The points of argument and cases and authorities relied on by counsel are given at length in the report of the case of the Court of Queen's Bench (2).

(1) M. L. R. 5 Q. B. 186 ; M. L. R. 4 S. C. 92.

(2) M. L. R. 5 Q. B. 190 *et* seq.

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The judgment of the court was delivered by—

SIR W. J. RITCHIE C.J.—As to the merits we have to deal with the important question of the responsibility of executors for the funds in their hands under the circumstances of such a case as this.

The first thing will be to see what it was precisely that the defendant did. The evidence shows, first, that on 1st November, 1875, Mrs. Lawford handed over to Hunter $2,916.81 to invest on mortgage from Emma Roussel. No mortgage was ever executed, and the money was appropriated by Hunter, who seems to have paid the interest on the supposed mortgage to Mrs. Lawford out of his own pocket.

On 1st December, 1880, a sum of $3,000 which had been loaned to Mrs. Joseph Bouchard and secured by a mortgage on real estate became due. Mrs. Lawford signed a receipt and acquittance bearing that date, which is filed with the record.

No proof is offered to explain the disappearance of this money, but defendant can only suggest that when she signed the receipt she imagined that she was signing an extension of the mortgage.

On 6th July, 1877, Mrs. Lawford handed Hunter $1,000 to invest on mortgage from Mrs. John Clarke. No such mortgage was ever executed or registered, and the money was appropriated by Hunter, who paid interest on the supposed investment out of his own pocket.

On 20th February, 1882, Mrs. Lawford handed Hunter $20,576.60, to be used in payment of assessments due by the estate Philips, and held partly by Robert Hamilton and partly by the city, from whom subrogation was to be obtained. On 28th February, 1882, Mrs. Lawford signed a subrogation for $9,579.30. Hunter appropriated the balance of 10,997.30, and

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defendant can only suggest that when she signed the deed she imagined it was for the whole amount.

The question will be whether, all this money having been lost by the misconduct of Hunter, the defendant has any lawful excuse for not paying it to the plaintiff *és qual.*

It is abundantly clear that trust money ought not necessarily to be left with strangers.

In this case it is beyond question that the executrix placed herself completely in the hands of Hunter delegating to him the confidence reposed in herself, placing the most implicit confidence in him, acquiescing without question or investigation in all he proposed, accepting his statements without any inquiry as to their correctness, and generally without exercising any surveillance or control over the money to be invested, or without any inquiry as to whether the investments had been made or the security properly executed and registered before the money to be invested in the securities was paid over, but gave him the absolute control of such moneys by drawing checks payable to him personally when no necessity existed for such a course being adopted and when if such checks had been drawn in favor of the borrowers or their order it could not have been in his power to have perpetrated the gross frauds of which he appears to have been guilty in this case. It was, however, stated in the evidence that the plaintiff was a woman who professed to possess a certain knowledge of business; if she does it is quite clear that she failed to put any such knowledge in practice, but on the contrary, without any direction, supervision, inquiry or superintendence, in a blind confidence, she placed the moneys of this estate in the hands of this man who fraudulently appropriated the same to his own use.

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Now who should be the sufferers by this rascality? Should it be the executrix who by an entire abandonment of her control over these funds, and of her duties as executrix, and substituting in her stead the author of those wrongs and needlessly placing in his hands the moneys of the estate thereby enabling him to perpetrate them, and whose only answer practically is: "I had such confidence in him that I did not believe he could do wrong"; or the infant children of the testator, guilty of no improper conduct or wrong?

I think this executrix cannot be considered in any other light than as guilty of culpable negligence. I cannot conceive any system of law recognising the duties of executors that would throw such a loss as this case develops on the devisees and relieve the negligent executor from all liability. No doubt when Hunter was perpetrating these frauds and until his flight his reputation was unquestioned and he enjoyed public confidence and esteem. No doubt he was an ancient friend of the Low family, and appears to have been particularly so of the plaintiff, but this case is not to be decided on sentiment. What we have to do with are the business relations of the plaintiff as executrix with the notary Hunter, and in those relations did she exercise that due care and control over the interests of the estate, and that surveillance over the transactions in question, that her duty as executrix and her duty to the estate demanded?

I can discover no substantial difference between the French and English law on the question at issue in this case. I have not thought necessary to go into the authorities French or English, because I think the principle involved in the case is too clearly established to require that I should do so.

The law applicable to this case is clearly stated in *Clough* v. *Bond* (1). It was held by Lord Cottenham,

(1) 3 Mylne & C. 490.

affirming the decree of Sir L. Shadwell V.C., (reported 8 Sim. 594 nom. *Clough* v. *Dixon*), that the estate of John Bond was answerable for the loss.

It will be found, " said his lordship," to be the result of all the best authorities upon the subject, that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it ; yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive.

* * * * *

So when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been intrusted. Necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative. But if, without such necessity, he be instrumental in giving, to the person failing, possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator : *Langford* v. *Gascoyne* (1), *Lord Shipbrook* v. *Lord Hinchinbrook* (2), *Underwood* v. *Stevens* (3).

This case does not come at all within the case of *Speight* v. *Gaunt* (4), which, in my opinion, is entirely distinguishable from it.

Persons who accept the office of executors or trustees must be supposed to accept it with the responsibility at all events for the possession of ordinary care and prudence. *Learoyd* v. *Whiteley* (5), per Lord Halsbury.

Appeal dismissed with costs.

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

Solicitors for respondent : *Lafleur & Rielle.*

(1) 11 Ves. 333.
(2) 11 Ves. 252 ; 16 Ves. 477.
(3) 1 Mer. 712.
(4) 9 App. Cas. 1.
(5) 58 L. T. 94.

APPENDIX.

UNREPORTED CASES DECIDED SINCE THE ISSUE

OF

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APPENDIX.

UNREPORTED CASES DECIDED SINCE THE ISSUE OF VOL. XVI.

THOMSON *v.* QUIRK.

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ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Mar. 29, 30.
June 14.

Chattel mortgage—Renewal—One year from date of filing—Description of goods—Sufficiency of.

The ordinance of the North-West Territories relating to chattel mortgages (Ordinance of 1881 No. 5) provides by section 9 that "every mortgage filed in pursuance of this ordinance shall cease to be valid as against the creditors of the persons making the same after the expiration of one year from the filing thereof, unless a statement, &c. is again filed within thirty days next preceding the expiration of the said term of one year." A chattel mortgage was filed on August 12th, 1886, and registered at 4.10 p.m. of that day. A renewal of said mortgage was registered at 11.49 a.m. on August 12th, 1887.

Held, affirming the decision of the court below that the renewal was filed within one year from the date of the filing of the original mortgage as provided by the ordinance.

Per Patterson J. In computing the time mentioned in this section the day of the original filing should be excluded and the mortgagee would have had the whole of the 12th August, 1887, for filing the renewal.

Section 6 of the same ordinance provides that: "All the instruments mentioned in this ordinance whether for the mortgage or sale of goods and chattels shall contain such sufficient and full description thereof that the same may be readily and easily known and distinguished." The description in a chattel mortgage was as follows: "All and singular the goods, chattels, stock-in-trade, fixtures and store building of the mortgagors, used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise now being in the store of said mortgagors on the north-half of section six, township nineteen, range twenty-eight west of the fourth principal meridian."

Held, affirming the decision of the court below, (1 N. W. T. Rep. No. 1 p. 88) that the description was sufficient. *McCall* v. *Wolff* (13 Can. S.C.R. 130) distinguished. *Hovey* v. *Whiting* (14 Can. S.C.R. 515) followed.

PRESENT.—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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Mar. 30.

June 14.

JONES *v.* THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Company—Station buildings—Planked way—Invitation to public to use—Duty of company—Negligence.

The approach to a station of the Grand Trunk Railway from the highway was by a planked walk crossing several tracks, and a train stopping at the station sometimes overlapped this walk, making it necessary to pass around the rear car to reach the platform. J., intending to take a train at this station before daylight, went along the walk as his train was coming in, and seeing, apparently, that it would overlap, started to go around the rear when he was struck by a shunting engine and killed. It was the duty of this shunting engine to assist in moving the train on a ferry, and it came down the adjoining track for that purpose before the train had stopped. Its headlight was burning brightly, and the bell was kept ringing. There was room between the two tracks for a person to stand in safety. In an action by the widow of J. against the company :

Held, Fournier and Gwynne JJ. dissenting, that the company had neglected no duty which it owed to the deceased as one of the public.

Held, per Strong and Patterson JJ., that while the public were invited to use the planked walk to reach the station, and also to use the company's premises, when necessary, to pass around a train covering the walk, there was no implied guaranty that the traffic of the road should not proceed in the ordinary way, and the company was under no obligation to provide special safeguards for persons attempting to pass around a train in motion.

Held, per Taschereau J., that the death of the deceased was caused by his own negligence.

The decision of the Court of Appeal (16 Ont. App. R. 37) was affirmed.

PRESENT :—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

BATE *v.* THE CANADIAN PACIFIC RAILWAY COMPANY.

1889
April 4, 5.
June 14.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Co.—Contract to carry passenger—Special contract—Reduced fare—Notice of conditions—Negligence.

The plaintiff purchased from an agent of the defendant company at Ottawa what was called a land seeker's ticket, the only kind of return ticket issued on the route, for a passage to Winnipeg and return, paying some thirty dollars less than the single fare each way. The ticket was not transferable and had printed on it a number of conditions, one of which limited the liability of the company for baggage to wearing apparel not exceeding $100 in value, and another required the signature of the passenger for the purpose of identification and to prevent a transfer. The agent obtained the plaintiff's signature to the ticket explaining that it was for the purpose of identification, but did not read nor explain to her any of the conditions, and having sore eyes at the time she was unable to read them herself. On the trip to Winnipeg an accident happened to the train and plaintiff's baggage, valued at over $1,000, caught fire and was destroyed. In an action for damages for such loss the jury found for the plaintiff for the amount of the alleged value of the baggage.

Held, reversing the judgment of the Court of Appeal (15 Ont. App. R. 388) and of the Divisional Court (14 O.R. 625), Gwynne J. dissenting, that there was sufficient evidence that the loss of the baggage was caused by defendants' negligence, and the special conditions printed on the ticket not having been brought to the notice of plaintiff she was not bound by them and could recover her loss from the company.

PRESENT :—Strong, Fournier, Taschereau and Gwynne JJ.

IMPERIAL FIRE INSURANCE CO. *v.* BULL.

1889
April 5, 6.
June 14.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire insurance—Insurance by mortgagee—Interest insured—Payment to mortgagee—Subrogation.

Mortgagees of real estate insured the mortgaged property to the extent of their claim thereon under a clause in the mortgage by which the mortgagor agreed to keep the property insured in a sum not less than the amount of the mortgage, and if he failed to do so that the mortgagees might insure it and add the premiums paid to their mortgage debt. The policy was issued in the

name of the mortgagor who paid the premiums, and attached to it was a condition that whenever the company should pay the mortgagees for any loss thereunder, and should claim that as to the mortgagor no liability therefor existed, said company should be subrogated to all the rights of the mortgagees under all securities held collateral to the mortgage debt to the extent of such payment. A loss having occurred the company paid the mortgagees the sum insured, and the mortgagor claimed that his mortgage was discharged by such payment. The company disputed this and insisted that they were subrogated to the rights of the mortgagees under the said condition. In an action to compel the company to give a discharge of the mortgage :

Held, per Fournier, Taschereau and Gwynne JJ., that the insurance effected by the mortgagees must be held to have been so effected for the benefit of the mortgagor under the policy, and the subrogation clause which was inserted in the policy without the knowledge and consent of the mortgagor could not have the effect of converting the policy into one insuring the interest of the mortgagees alone ; that the interest of the mortgagees in the policy was the same as if they were assignees of a policy effected with the mortgagor ; and that the payment to the mortgagees discharged the mortgage.

Held, also, that the company were not justified in paying the mortgagees without first contesting their liability to the mortgagor and establishing their indemnity from liability to him ; not having done so they could not, in the present action, raise any questions which might have afforded them a defence in an action against them on the policy.

The result of the decision of the Court of Appeal (15 Ont. App. R. 421) and of the Divisional Court (14 O. R. 322) was affirmed.

PRESENT :—Strong, Fournier, Taschereau and Gwynne JJ.

1889

May 20, 21.
June 14.

OSBORNE *v.* HENDERSON.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Partnership—Dissolution—New partnership by continuing partner—Liability of new firm—Right of third person to enforce—Trust—Novation.

A firm consisting of two persons dissolved partnership, the retiring partner receiving a number of promissory notes in payment of his share in the business which notes he indorsed to the plaintiff H. The continuing partner of the firm afterwards entered into a partnership with O., the defendant, and transferred to the new firm all the assets of his business, his liabilities, including the

above mentioned promissory notes, being assumed by the co-partnership and charged against him. The new firm paid two of the notes and interest on others, and made a proposal for an extension of time to pay the whole which was not entertained.

Held, reversing the decision of the Court of Appeal (17 Ont. App. R. 456 *sub-nomine Henderson* v. *Killey*) and of the Divisional Court (14 O.R. 137), Fournier J. dissenting, that the agreement between the continuing partner and the defendant did not make the defendant a trustee of the former's property for the payment of his liabilities, and the act of the defendant in paying some of the notes did not amount to a novation as it was proved that plaintiff had obtained and still held a judgment against the maker and endorser of the notes in an action thereon and there was no consideration for such novation.

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

KENNEDY *v.* PIGOTT.

1889

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO. May 22.

Contract—Public work—Sub-contractor—Rescission—Quantum meruit—Arbitration—Setting aside award. June 14.

P. was a contractor with the Government of Canada for building a post office and K. was sub-contractor to do the mason and brick work for a lump sum, the sub-contract consisting simply of an offer to give the work for the sum named and an acceptance by K. P. being dissatisfied with the work done by K. took the contract out of his hands before it was completed and finished it himself. K. then brought an action for the value of the work done by him and on reference by the court to arbitration an award was made in K.'s favor. The Court of Appeal set aside the award and remitted the case to the arbitrator for further consideration, holding that though the contract did not authorise P. to take over the work and finish it at K.'s expense, and the latter was therefore entitled to recover on the *quantum meruit*, yet the cost of completing the work was considerably in excess of the contract price.

Held, reversing the judgment of the Court of Appeal, that as it appeared from the evidence that the arbitrator fully understood the matter and got all the information that could be obtained on the subject, and as no impropriety or mistake was shown to have been committed by him, no benefit could result from sending the award back for reconsideration, and the decree of the Court of Appeal was not justified.

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

1890

Feb. 25.

MAY *v.* McDOUGALL.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract of sale—Particular chattel—Representation.

McD. bought at auction, through an agent, a billiard table described in the auctioneer's advertisement as "a full size 6 pocket English billiard table made by Thurston," etc., and wrote to M. & Co., makers of billiard tables in Toronto, describing his table and asking terms of exchanging it for a new one of another style. On receiving the information asked McD. wrote that he could not accept the terms offered. M. & Co. afterwards wrote the following letter :—

TORONTO, Oct. 2nd, 1886.

D. C. McDOUGALL, Esq.. Agent Halifax Banking Co. Antigonish.

DEAR SIR,—Your laconic reply to our letter of 24th instant to hand. We would drop the matter if it was not for an inquiry which we have just received from a private party in the far North-West who would like to purchase a good second-hand English table. We would therefore kindly ask you to make us your offer for the proposed exchange, and if we can possibly do it we will accept it. Give us as near a description as you can of your table, maker's name is essential, but as you have nothing with it but the billiard outfit (no life and pyramid balls and boards) you should not make your price too high, or a deal will be impossible. Awaiting your kind reply, we remain, yours truly,

SAMUEL MAY & Co.

To which McD. answered : I may just say I never saw our table yet, but am informed it is a very nice one, made by "Thurston" and very little the worse of wear, being in the private family of Sir Edward Kenny in his country residence near Halifax. This gentleman who purchased the table for us writes thus : "I got the 3 billiard balls and marker, and 19 cues, which is all that is needed for billiards. I am told the table is a great bargain, cost £200 in England, and is not much the worse for wear." The table is 6 x 12, and for particulars we would refer you to Jerry E. Kenny, Esq. or F. D. Clark, auctioneer, Halifax.

Yours truly,

D. C. McDOUGALL.

M. & Co. then wrote accepting the offer and adding, "We trust that the English table is fully as represented ; and if you are satisfied, you may ship it at once, with billiard balls, markers, 19 cues, cloth and what else there may be. In the meantime we will get up a 4½ x 9 Eclipse Combination table in best style, and with outfits

for pool, carom and pin pool games. Awaiting you early reply, we remain, dear sir,

Yours truly,

SAMUEL MAY & Co."

The table shipped by McD. on reaching Toronto was found to be an American made table with English cushions and worth only from $15 to $25. M. & Co. brought an action for the original price of the new table.

Held, affirming the the judgment of the court below, that McD. agreed to deliver to M. & Co. an English built table made by Thurston as described in his letter and having failed to deliver such a table he was liable to pay the full price of the one obtained from M. & Co.

PRESENT.—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

KLOEPFER *v.* WARNOCK.

1889
Mar. 29.
1890
Mar. 7.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Assignment—Benefit of creditors—Fraudulent preference—R.S.O. c. 118—48 *V. c.* 26 *s.* 2 (*O*).

One N. owed defendants a sum of money which he was unable to pay in full, and he assigned to defendants all his book debts and accounts, the assignment providing that the book debts should be placed in the hands of a firm of financial agents for collection, who should account to the defendants for the proceeds less the commission, and whatever amount remained in defendants' hands after their debts were paid should be paid over to N. Plaintiffs, judgment creditors of N., brought an action to set aside this assignment as having the effect of hindering, delaying and defeating them in the recovery of their claim and giving defendants a preference over other creditors, and so being void under R.S.O. c. 118, as amended by 48 V. c. 26 s. 2 (O).

Held, affirming the judgment of the Court of Appeal (15 Ont. App. R. 324), and of the Divisional Court (14 O.R. 288), Gwynne J. dissenting, that N. being unable to meet the demands of his creditors for payment must be deemed insolvent within the meaning of the said act ; that book debts are a species of property included in the provisions of 48 V. c. 26 s. 2 (O.), and that the assignment by N. to the defendants was void under that section.

PRESENT :—Strong, Fournier, Taschereau, and Gwynne JJ.

1889
Oct. 24, 25.
1890
Mar. 10.

SEARS *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF ST. JOHN.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Lessor and lessee—Covenant for renewal—Option of lessor—Second term—Possession by lessee after expiration of term—Effect of—Specific performance.

A lease for a term of years provided that when the term expired any buildings or improvements erected by the lessees should be valued and it should be optional with the lessors either to pay for the same or to continue the lease for a further term of like duration. After the term expired the lessees remained in possession for some years when a new indenture was executed which recited the provisions of the original lease and, after a declaration that the lessors had agreed to continue and extend the same for a further term of fourteen years from the end of the term granted thereby at the same rent and under the like convenant, conditions and agreements as were expressed and contained in the said recited indenture of lease, and that the lessees had agreed to accept the same, it proceeded to grant the further term. This last mentioned indenture contained no independent covenant for renewal. After the second term expired the lessees continued in possession and paid rent for one year when they notified the lessors of their intention to abandon the premises. The lessors refused to accept the surrender and after demand of further rent, and tender for execution of an indenture granting a further term, they brought suit for specific performance of the agreement implied in the original lease for renewal of the second term at their option.

Held, affirming the judgment of the court below (28 N.B Rep. 1) Ritchie C.J. and Taschereau J. dissenting, that the lessors were not entitled to a decree for specific performance.

Held, per Gwynne J., that the provision in the second indenture granting a renewal under the like covenants, conditions and agreements as were contained in the original lease, did not operate to incorporate in said indenture the clause for renewal in said lease which should have been expressed in an independent covenant.

Per Gwynne J., Assuming that the renewal clause was incorporated in the second indenture the lessees could not be compelled to accept a renewal at the option of the lessors, there being no mutual agreement therefor; if they could the clause would operate to make the lease perpetual at the will of the lessors.

Per Gwynne and Patterson JJ. The option of the lessors could only be exercised in case there were buildings to be valued erected during the term granted by the instrument contain-

ing such clause; and if the second indenture was subject to renewal the clause had no effect as there were no buildings erected during the second term.

Per Gwynne J. The renewal clause was inoperative under the statute of frauds which makes leases for three years and upwards, not in writing, to have the effect of estates at will only, and consequently there could be no second term of fourteen years granted except by a second lease executed and signed by the lessors.

Per Ritchie C.J. and Taschereau J. The occupation by the lessees after the terms expired must be held to have been under the lease and to signify an intention on the part of the lessees to accept a renewal for a further term as the lease provided.

PRESENT :—Sir W.J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

VAUGHAN *v.* WOOD.

1889
Oct. 28.
1890
Mar. 10.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Dog—Injury committed by—Ownership—Scienter—Evidence for jury.

W. brought an action for injuries to her daughter committed by a dog owned or harbored by the defendant V. The defence was that V. did not own the dog, and had no knowledge that he was vicious. On the trial it was shown that the dog was formerly owned by a man in V'.s employ who lived and kept the dog at V'.s house. When this man went away from the place he left the dog behind with V'.s son, to be kept until sent for, and afterwards the dog lived at the house going every day to V'.s place of business with him, or his son who assisted in the business. The savage disposition of the dog on two occasions was sworn to, V. being present at one and his son at the other. V. swore that he knew nothing about the dog being left by the owner with his son until he heard it at the trial. The trial judge ordered a nonsuit, which was set aside by the full court and a new trial ordered.

Held, affirming the judgment of the court below, that there was ample evidence for the jury that V. harbored the dog with knowledge of its vicious propensities and the non-suit was rightly set aside.

PRESENT.—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

1889
Dec. 2, 3.
1890
Mar. 10.

DIXON *v.* RICHELIEU NAVIGATION COMPANY.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Common carrier—Special contract—Exemption from liability—Construction of terms—At owner's risk against all casualties.

The Commercial Travellers Association of Ontario, by written agreement with the defendants' company, obtained for its members for the season of 1885 special privileges in travelling by the company's boats, one of the terms of the agreement being that the members should receive tickets at a reduced rate "with allowance of 300 lbs. of baggage free, but the baggage must be at the owner's risk against all casualties." This agreement was continued during 1886 by verbal agreement between the manager of the company and the secretary and traffic manager of the association. D. a commercial traveller obtained a ticket for a passage on one of the company's boats under this agreement, paying the reduced fare, and took on board three trunks containing the usual outfit of a traveller for a jewellery house valued at about $15,000. The trunks were checked in the usual way and no intimation was given by D. to any of the officials on the boat as to their contents. On the passage the contents of the trunks were damaged by the negligence of the officers of the company and an action was brought by D. and his employers to recover damages for such injury.

Held, affirming the decision of the Court of Appeal (15 Ont. App. R. 647), that the agreement between the Association and the Company was in force in 1886; that the term "baggage" in the agreement meant not merely personal baggage, such as every passenger is allowed to carry without extra charge, but commercial baggage, and would include the outfit in this case; and that in the expression "must be at owner's risk against all casualties," the words "against all casualties" do not limit, control or destroy, but rather strengthen, the protection which the former words "at owner's risk" afforded the defendants.

PRESENT:—Sir W. J. Ritchie C. J. and Strong, Taschereau and Gwynne JJ.

1889
Dec. 4, 5, 6.
1890
Mar. 10.

MERCHANT'S BANK OF CANADA *v.* LUCAS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Forgery—Ratification—Estoppel.

Y., who had been in partnership with the defendants, trading under the name of the H. C. Company, but had retired from the firm and become the general manager of the company but with no

power to sign drafts, drew a bill of exchange for his own private purposes in the name of the defendants on a firm in Montreal, which was discounted by the plaintiff bank. Before the bill matured Y. wrote to defendants informing them of having used their name, but that they would not have to pay the draft. The bill purported to be indorsed by the company per J. M. Y. (one of the defendants), and the other defendant having seen it in the bank examined it carefully, and remarked that "J.M.Y.'s signature was not usually so shaky." J.M.Y. afterwards called at the bank and examined the bill very carefully, and in answer to a request from the manager for a cheque he said that it was too late that day but he would send a cheque the day following. No cheque was sent, and a few days before the bill matured the manager and solicitor of the bank called to see J.M.Y., and asked why he had not sent the cheque. He admitted that he had promised to do so and at the time he thought he would. Y. afterwards left the country, and in an action against the defendants on the bill they pleaded that the signature of J.M.Y. was forged, and on the trial the jury found that it was forged and judgment was given for the defendants.

Held, affirming the decision of the Court of Appeal (15 Ont. App. R. 573) which reversed that of the Divisional Court (13 O.R. 520), that though fraud or breach of trust may be ratified forgery cannot, and the bank could not recover on the forged bill against the defendants. *La Banque Jacques Cartier* v. *La Banque d'Epargne* (13 App. Cas. 118), and *Barton* v. *London and North-Western Railway Company* (6 L.T. Rep. 70) followed.

PRESENT :—Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

DIOCESAN SYNOD OF NOVA SCOTIA *v.* RITCHIE.

1890
Feb. 20.
Mar. 10.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Diocesan fund—Support of Clergymen—Condition as to participation.

The Diocesan Church Society of Nova Scotia holds a fund for distribution among the Church of England clergymen of the Province, and one of the rules governing its distribution is that no clergyman receiving an income of $1,000 and upwards from certain named sources shall be entitled to participate.

Held, affirming the judgment of the court below (21 N.S. Rep. 309) that a rector was not debarred from participating in this fund because the salary paid to his curate, if added to his own salary,

would exceed the said sum of $1,000, his individual income being less than that amount.

PRESENT :—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

1890

Mar. 21.

CARTER MACY & CO. *v.* THE QUEEN.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Customs laws—Teas in transit through United States to Canada—52 Vic. c. 14—Tariff Act (1886) *item* 781.

The plaintiffs made two shipments of tea from Japan to New York for transportation in bond to Canada. In one case the bills of lading were marked "in transit to Canada;" in the other the teas appeared upon the consular invoice made at the place of shipment to be consigned to the plaintiff's brokers in New York for transhipment to Canada. On the arrival of both lots at New York, and pending a sale thereof in Canada, they were allowed to be sent to a bonded warehouse as unclaimed goods for some five or six months and were finally entered at the New York Customs House for transportation to Canada, and forwarded to Montreal. There was nothing to show that the plaintiffs at any time proposed to make any other disposition of the teas, and there was nothing in what they did that contravened the laws or regulations of the United States or of Canada with respect to the transportation of goods in bond.

Held, affirming the judgment of the Exchequer Court (2 Ex. C.R. 126) Gwynne J. dissenting, that as it clearly appeared that the tea was never entered for sale or consumption in the United States; that it was shipped from there within the time limited by law for goods in transit to remain in a warehouse; and that no act had been done changing its character during transit, it was therefore "tea imported into Canada from a country other than the United States but passing in bond through the United States" and under s. 10 of the act relating to duties on Customs (R. S. C. c. 33) not liable to duty as goods exported from the United States to Canada. But see now 52 Vic. c. 14 (D).

PRESENT :—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

FORSYTHE *v.* THE BANK OF NOVA SCOTIA.

1890
May 6.

IN RE THE BANK OF LIVERPOOL.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Winding-up act—R.S.C. c. 129—Insolvent bank—Appointment of liquidators—Right to appoint another bank—Discretion of judge.

The winding-up act provides that the shareholders and creditors of a company in liquidation shall severally meet and nominate persons who are to be appointed liquidators and the judge having the appointment shall choose the liquidators from among such nominees. In the case of the Bank of Liverpool the judge appointed liquidators from among the nominees of the creditors, one of them being the defendant bank.

Held, affirming the judgment of the court below (22 N. S. Rep. 97) that there is nothing in the act requiring both creditors and shareholders to be represented on the board of liquidators; that a bank may be appointed liquidator; and that if any appeal lies from the decision of the judge in exercising his judgment as to the appointment such discretion was wisely exercised in this case.

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

ÆTNA INSURANCE CO. *v.* ATTORNEY GENERAL OF ONTARIO.

1890
June 2, 3.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire insurance—Construction of policy—Asylum for insane—Main building—Annex.

The Asylum for the Insane, London, consists of a centre building containing all necessary accommodation for patients, etc., and a kitchen, laundry, and engine room built of brick and roofed with slate, situate some fifty feet to the rear of the middle of the centre building, and connected with it by a passage or covered way with brick walls about ten feet high and also roofed with slate and with a tramway to convey food from the kitchen to the southern portion of the centre building. A policy of insurance against fire insured the "main building."

Held, affirming the judgment of the Court of Appeal and of the Divisional Court, that the policy covered the kitchen, laundry and engine room.

PRESENT :—Sir W. J. Ritchie C.J. and Strong, Fournier, Gwynne and Patterson JJ.

1890
Mar. 19.
June 12.

GRANT *v.* THE BRITISH CANADIAN LUMBER COMPANY,

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Company—Winding-up—Possession of books by manager—Refusal to deliver up—Evidence.

G. was the manager for the Ottawa District of a lumber company whose head-quarters were in Edinburgh and whose head office for Canada was in Toronto. The company having gone into liquidation an order was obtained from the Court of Sessions in Edinburgh for the delivery of its books by the manager to the liquidator or to some person appointed by him. This order not having been obeyed an action was brought by the company to recover possession of the books from G. who set up the defence that he had already given them up, and also that the company had no *locus standi* to maintain the action. The evidence given on the hearing showed that after the proceedings in liquidation were commenced G. was dismissed from his employment as manager, whereupon he demanded an audit of the books which was commenced but never completed, and G. swore that after handing over the books to the auditors he had never had possession of them. He also swore that they had never been in his control, having been kept in a safe of which a clerk of the company and the new manager alone had the combination. It was shown by the plaintiffs, however, that some time after the audit an agent of the liquidator went to Ottawa to get the books and saw G. who first agreed but afterwards refused to deliver them up, giving as the ground of his refusal that he was liable for the rent of the office, and for other debts of the company, and that he wished to retain what property of the company he had to protect himself. The agent, with the assistance of G's. landlord, then obtained access to the office where he saw some books which he took to belong to the company, and a safe in which he believed there were others, but G. coming in refused to allow him to remove them and ejected him from the office. On this evidence the trial judge made an order against G. directing him to deliver to the liquidator all the books and papers of the company in his possession or under his control. This decision was affirmed by the Divisional Court and the Court of Appeal. On appeal by G. to the Supreme Court of Canada :

Held, that the books having been shown to have been in the possession of G. at the date of the visit of the liquidator's agent to Ottawa, and the defendant not having attempted to show what became of them after that date, and his testimony that he did not know what had become of them having been discredited by the trial

judge, there was no reason for interfering with the order appealed from.

PRESENT :—Sir W. J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson JJ.

TITUS *v.* COLVILLE.

1890

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mar. 20.
June 12.

Evidence—Question of fact—Finding of trial judge—Interference with on appeal.

T. a solicitor, brought an action against the officers of the Liberal-Conservative Association of the East Riding of Northumberland for services alleged to have been rendered as their solicitor and counsel in the matter of an election petition against the return of the member for the Riding in the Legislative Assembly of Ontario. At the trial of the action the plaintiff swore that he was duly appointed solicitor to carry on the election petition by resolution passed at a meeting of the association, and that in consequence of such resolution he acted as such solicitor in the conduct of the petition. The defence to the action was that no such appointment was made, or if it was that the plaintiff agreed to render his services gratuitously, and the evidence given for the defendants was that the plaintiff offered his services free of charge, and that it was decided to protest the election in consequence of such offer. The trial judge held that no retainer of the plaintiff was proved and dismissed the action. His decision was reversed by the Queen's Bench Division, and their decision in its turn was reversed by the Court of Appeal and the judgment of the trial judge restored. On appeal by the plaintiff to the Supreme Court of Canada :

Held, affirming the judgment of the Court of Appeal, that the question being purely one of fact which the trial judge was the person most competent to determine from seeing and hearing the witnesses, and it not being clear beyond all reasonable doubt that his decision was erroneous but, on the contrary, the weight of evidence being in its favor, his judgment should not be interfered with on appeal.

PRESENT :—Sir W. J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson JJ.

1890
Nov. 3.

HALIFAX BANKING COMPANY *v.* SMITH.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Evidence—Improper admission—Cross-examination—Conversation partly given on examination in chief—Belief as to signature on note—Evidence of counsel.

To an action on a bond the defendants pleaded that it was given in settlement of promissory notes made by a brother of defendants the indorsements to which were forged to the knowledge of plaintiffs, which settlement was the only consideration for the execution of the bond. On the trial a verdict was given for plaintiffs which was set aside by the full court and a new trial ordered on the ground of improper admission of evidence as follows: 1st, evidence by a solicitor of what one of the officers of the plaintiff bank had told him relative to an admission by the alleged forger that the notes were genuine; part of this conversation, which related to a different matter, had been given in evidence by the same witness on direct examination, but the court below held that the balance could not be given on cross-examination as it was not connected with what had been already proved. Secondly, evidence by counsel for plaintiffs in the proceedings on the notes which had led to the making of the bond of his belief in their genuineness, which the court below held was not good evidence. On appeal to the Supreme Court of Canada from the judgment ordering a new trial:

Held: That the evidence objected to was properly admitted and that the judgment should be reversed.

PRESENT:—Sir W.J. Ritchie C.J., and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

1889
Dec. 10,11.

1890
Nov. 10.

ROGERS *v.* DUNCAN.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Easement—Adjoining lands—Way of necessity—License—Prescription—Agreement for right of way—Construction of.

In an action for obstructing a right of way the plaintiff claimed the use of such right both by prescription and agreement, and also claimed that by the agreement the way was wholly over defendant's land. The evidence on the trial showed that plaintiff had acquired the land from his father who retained the adjoining land which was eventually conveyed to defendant, and that after so acquiring it the plaintiff continued to use a track or trail over the adjoining land, and mostly through bush land, to reach the con-

cession line, and his claim to the use of the way by prescription depended on whether or not his user was of a well-defined road, or merely of an irregular track and by license and courtesy of the adjoining owner. Finally an agreement was entered into between the plaintiff and his brother, who had acquired the adjoining lot which he afterwards conveyed to defendant, by which, in consideration of certain privileges granted to him, the brother covenanted to permit plaintiff to have a right of way along a lane to which the way formerly used led, and extending forty rods east from the centre of the lot, so as to allow plaintiff free communication from defendant's lot along said lane to the concession line. The issue raised on the construction of this agreement was, whether the right of way granted thereby should be wholly or in part on plaintiff's land, or wholly on that of the defendant.

Held, reversing the judgment of the Court of Appeal (16 Ont. App. R. 3) and restoring that of the Divisional Court (15 O. R. 699) Ritchie C.J. dissenting, that plaintiff had no title to the right of way by prescription, the evidence clearly showing that the user was not of a well-defined road but only of a path through bush land and that he only enjoyed it by license from his father, the adjoining owner, which license was revoked by his father's death; but,

Held, affirming the judgment of the Court of Appeal, that under the agreement the right of way granted to the plaintiff was wholly over defendant's land the agreement, not being explicit as to the direction of such right of way, requiring a construction in favor of the plaintiff and against the grantor.

PRESENT :—Sir W.J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

ROYAL INSURANCE COMPANY *v.* DUFFUS.

1890

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Feb. 24, 25.

Dec. 9.

Evidence—Weight of—Admissibility—Grounds for admission urged at trial—New grounds taken on appeal—Effect of.

In an action on a policy of insurance against fire on a stock of goods the verdict for the plaintiff was moved against on the grounds of its being against the weight of evidence and of improper exclusion of evidence. The first ground was mainly urged in regard to the amount of damages. As to the second ground the evidence tendered related to the fact that a quantity of unburnt matches and shavings had been found near the part of the premises in which the fire occurred where the bulk of the goods were alleged to have been burnt. The evidence was rejected by the trial judge for the

reason that there was no defence pleaded that the fire was incendiary, and on appeal to the full court below it was for the first time urged that it was admissible as showing the nature and extent of the fire in the vicinity. The verdict for the plaintiffs was sustained by the full court. On appeal to the Supreme Court of Canada :

Held, Gwynne J, dissenting, that the decision of the court below should be affirmed.

Per Ritchie C.J., that though the amount of the damages found in the case was not satisfactory and might well have been submitted to a jury of business men as a question proper for their determination he would not dissent from the judgment dismissing the appeal. As to the other ground the evidence was rightly rejected. When evidence is tendered the judge and opposing counsel are entitled to know the ground on which it is offered and none can be urged on appeal that has not been put forward at the trial.

PRESENT :—Sir W.J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

1890

SEETON *v.* KING.

May 6, 7.
Dec. 11.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Evidence—Agreement for transfer of vessel—Absolute or conditional sale—Findings of fact.

In a suit for an account of the earnings of a steamer transferred to the defendants by the plaintiff the case had been heard and judgment given when defendants made application to be allowed to put in newly discovered evidence, which was refused by the court below but allowed by the Supreme Court of Canada, which latter court also gave leave to both parties to amend their pleadings. The original answer of the defendants to the action alleged that the transfer of the steamer was made by the plaintiff as security for all advances made or to be made, while plaintiff claimed that it was only as security for a fixed amount. After the order of the Supreme Court of Canada defendants set up a new case, namely, that the transfer was absolute in consideration of an annuity of $1,000 to be paid to plaintiff during his life. This defence was raised in accordance with the newly discovered evidence which consisted of an agreement purporting to be executed by plaintiff to transfer to to defendants said steamer and all power and control over the same in consideration of such annuity and to execute an absolute bill of sale thereof to defendant. Pursuant to the order of the Supreme Court evidence was taken of the execution of this agree-

ment and resulted in a judgment by the judge in equity, who heard the case, declaring that it did not contain the true agreement between the parties, that it was executed by plaintiff while intoxicated and incapable of transacting business and that the only consideration for the transfer to defendant was the fixed sum stated by plaintiff, and he ordered an account to be taken as to the state of the general accounts between the parties. This judgment having been affirmed by the full court :

Held, that under the evidence and considering the nature of the transaction and all the circumstances attending it the courts below could not have found otherwise than they did and their decision should be affirmed.

PRESENT :—Sir W.J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson JJ.

YON *v.* CASSIDY.

1890
May 17.
Dec. 11.

Promissory notes—Consideration—Transaction.

C. having purchased Y.'s interest in certain lands which were in the City of Montreal, and upon which there was a mortgage of $80,000, gave his promissory notes to Y. for the balance of the purchase price. Subsequently C. failed and Y. being liable for the mortgage C. agreed to take the necessary steps to obtain Y.'s discharge from the mortgagees on a payment of one thousand dollars, and Y. signed a document *sous seign privé*, dated 18th February, 1879, agreeing that all parties should be in the same position as if the deed of sale had never been passed. The mortgagees subsequently gave a discharge to Y. in conformity with the above agreement. In an action taken by Y. against C. on his promissory notes :

Held, affirming the judgments of the courts below, that there was no consideration given for the notes, and that C. was discharged from all liability under the document of the 48th February, 1879. See 33 L. C. Jur. 106.

PRESENT :—Sir W. J. Ritchie C. J. and Strong, Fournier, Gwynne and Patterson JJ.

ROSS *v.* HURTEAU.

1890
June 3, 4.
Dec. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Sale of goods—Non-delivery—Part of large parcel—Lien of unpaid vendor.

The defendant H. had over 4,000,000 feet of lumber in a yard in Rockland, Ont., and sold 1,500,000 through an agent to L. of

Montreal on six month's credit, ratifying the sale by a letter to the owners of the yard as follows :

MONTREAL, 12 JANY., 1887.

MESSRS. W.C. EDWARDS & Co.,
ROCKLAND, ONT.

GENTLEMEN,—

You will please ratify Mr. Lemay's order for one million feet 3 mill culls 8-13 feet and 493,590 feet 3 mill culls 14-16 feet sold to Mr. William Little, f.o.b., of barges with option to draw them from the piles, if he wants some during winter.

Yours truly,
Sd. N. HURTEAU ET FRÈRE.

A few days after the sale the agent gave an order on the owners of the yard for delivery of the lumber to L. which order was accepted by the owners. L. had given a six month's note for the price of the lumber and just before it matured he asked defendants to renew which they refused, and on L. saying that he could not pay defendant replied that he must keep his lumber, whereupon he was informed by L. of his agreement with the plaintiff made about a month after the purchase from defendant by which he pledged to plaintiff the warehouse receipt for the lumber as collateral security for advances to him by plaintiff. On the trial of an interpleader issue to determine the title to this lumber it was shown by the evidence that the quantity sold to L. had never been separated from the defendant's lot in the yard and that defendant had always kept it insured considering it his until paid for.

Held, affirming the judgment of the Court of Appeal, Strong and Gwynne JJ. dissenting, that the property in the lumber never passed out of H. the defendant.

PRESENT :—Sir W.J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson JJ.

1891

HARDMAN *v.* PUTNAM.

Feb. 17, 18. ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Practice—Nova Scotia Judicature Act rule 476—Motion for new trial—Disposal of whole case on—Directions to jury—Observations by judge on issue not pleaded.

In an action for winding-up a partnership in the gold mining business the defence pleaded was that there never was a partnership formed between the plaintiff and the defendants, or, if there was, that it had been put an end to by a verbal agreement between the par-

ties. The case was tried by a jury and the result depended on the credibility to be attached to the respective witnesses on each side who gave evidence as to the agreement that had been entered into. No issue of fraud was raised by the defendants but the trial judge, in charging the jury, made strong observations in respect to fraudulent concealment of facts from the plaintiff and submitted questions to the jury calling for findings in relation to such fraud. The plaintiff having obtained a verdict which was sustained by the Supreme Court of Nova Scotia :

Held, reversing the judgment of the court below Gwynne J. dissenting, that there should be a new trial.

Per Gwynne J. Unless either party desires to give further evidence the court should render the judgment on the evidence as it stands which the court below ought to have given.

Per Strong J. Under rule 476 of the Judicature Act the court can take a case which has been passed upon by a jury into its own hands and dispose of it if all the proper materials on which to decide are before it, but in this case the materials essential to the final disposition of the case are not before the court and there must be a new trial.

Per Ritchie C.J.—The Supreme Court, as an appellate court for the Dominion, should not approve of such strong observations being made by a judge as were made in this case, in effect charging upon the defendant's fraud not set out in the pleadings and not legitimately in issue in the cause.

Per Strong, Fournier, Taschereau, Gwynne and Patterson JJ. that the case was essentially an equity case and one in which a jury could advantageously have been dispensed with.

PRESENT :—Sir W. J. RitchieC.J. and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

SEATH *v.* HAGAR.

1891

Mar. 3, 4.

Jurisdiction—Appeal—Insolvent Act of 1875—40 *Vic. c.* 41, *sec.* 28—*Effect of.*

A final judgment of the Court of Queen's Bench for Lower Canada (appeal side), upon a claim of a creditor filed with the assignee of an estate under the Insolvent Act of 1875, is not appealable to the Supreme Court of Canada, the right of appeal having been taken away by 40 V. c. 41, s. 28 (D). *Cushing* v. *Dupuy*, 5 App. Cas. 409 followed.

PRESENT :—Sir W.J. Ritchie C.J. and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

1891

May 6.

GRANT *v.* CAMERON.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Statute of Limitations—Acknowledgement of debt barred by—Sufficiency of —Assignment of chose in action—Right of assignee to sue—Notice to debtor—R.S.N.S. 4 *ser. c.* 94, *ss.* 355 *and* 359.

The following letters written by a debtor to his creditor were held to take the debt out of the operation of the Statute of Limitations:

HOPEWELL, August 9th, 1876.

DEAR UNCLE FINLAY,—I received a letter from you some time ago about your money. I delayed writing because I did not know what to write. I did not know but something would turn up that would enable me to pay you. I have a good deal of property—too much for these hard times—and I want to sell some of it, but cannot in the meantime, as times are that bad that people do not want to buy anything, only what they cannot do without. But this state of matters will not continue long, and when the times get better I will make some arrangement to pay you your money. Be not afraid of it, as I have but a small family and no boys, I will have plenty to pay my debts. I did get somewhat behind hand by railway affairs, but have recovered, and I am now in possession of a good deal of property and in a fair way of doing well whenever the times get better. I regret very much keeping it from you so long; however, I hope the time will soon come when I will be able to pay you.

Yours very truly,

ALEX. MCDONALD.

HOPEWELL, June 19th, 1875.

DEAR UNCLE,—I am in receipt of yours of the 31st of May about your money, and must say I am not astonished at you for wanting it. You ought to have had it long ago, and you would have had it, only I was unfortunate in a railroad contract I took, on the railroad between Truro and Pictou, in which I lost considerable money, and got largely in debt besides. After giving up the work I hired with the Government to carry on part of the work. At this time James and I commenced to build a cloth factory on a small scale, in order to have some permanent work. I borrowed most of what I put in. The man who had your money on mortgage, after having it two years, left. I had to sell the property, which I took from him by deed, for one thousand dollars ($1,000), losing by this likewise. I then got an offer from the Government to go to the Red River and North-west Terri-

1890
May 6.

tory to explore there for two years among the Indians, and got back last winter. I have now my debt nearly paid and the amount of your claim secure in property, viz., land property, so that you will be as sure of your money in a short time as if you had it. Do not think, Finlay, that I intend to do you, or any other body, out of one shilling. So rest assured that I have your money secured in a manner that you will get it, although I cannot send it now. You had good patience, so I hope you will have a little more, and I will put you all right.

I believe I worked as hard and travelled far more than you did, and have been much more unfortunate than you were since you left ; but since two years I have done well, and hope soon to do well by you. Now, Finlay, rest assured that I have your money secured so that you will get it, whatever becomes of me.

MR. F. THOMPSON,
Port Ludlow, British Columbia.

Very truly yours,
ALEX. MCDONALD.

The Revised Statutes of Nova Scotia, 4 ser. c. 94, s. 355, authorises the assignee of a chose in action in certain cases to sue thereon in the Supreme Court as his assignor might have done, and sec. 357 provides that before such action is brought a notice in writing, signed by the assignee, his agent or attorney, stating the right of the assignee and specifying his demand thereunder, shall be served on the party to be sued. Pursuant to this section the assignee of a debt served the following notice :—

PICTOU, Nov. 21st, 1878.

ALEX. GRANT, Esq.:

Admr. Estate of Alexander McDonald, deceased.

DEAR SIR,—You are hereby notified in accordance with ch. 94 of the Revised Statutes, sec. 357, that the debt due by the above estate to Finlay Thompson has been assigned by him to Alexander D. Cameron, who hereby claims payment of twelve hundred dollars, the amount of the said debt so assigned to him.

S. H. HOLMES,
Att'y. of ALEX. D. CAMERON.

Held, affirming the judgment of the court below, that the notice was a sufficient compliance with the statute.

PRESENT :—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau, and Patterson JJ.

1891
June 16.

GRIFFITHS *v.* BOSCOWITZ.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Practice—Charge to jury—Misdirection—New trial—Taking accounts.

W., a trader, being in financial difficulties assigned all his property to B. who undertook to arrange with W.'s creditors. W. subsequently assigned his property in trust for the benefit of his creditors and the assignee and some of the creditors brought an action to have the transfer to B. set aside. On the trial, after the evidence on both sides was concluded, plaintiff's counsel asked the judge to instruct the jury as to what constituted fraud under the statute of Elizabeth, and he also urged that an account should be taken of the dealings between W. and B. The judge refused to define fraud to the jury as requested and the jury stated that they were unable to deal with the accounts. Judgment having been given for the defendants and affirmed by the full court :

Held, that the refusal of the judge to charge the jury as requested amounted to misdirection, and there should be a new trial; that the case could not be properly decided without taking the accounts : and that it could be more properly dealt with as an equity case.

PRESENT :—Sir W.J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson JJ.

1891
June 17.

PAINT *v.* THE QUEEN.

Expropriation—Prospective capabilities of property—Value to owner—Unity of possession—Advantage accruing to paper town from railway.

Appeal and cross-appeal from the judgment of the Exchequer Court on a claim arising out of an expropriation of land at Port Hawkesbury, N.S., for the purposes of the Cape Breton railway. The amount awarded to the claimant was $9,223.50, and the Exchequer Court judgment which is reported at length in 2 Ex. C. R. 149, was unanimously affirmed by the Supreme Court.

PRESENT :—Sir W. J. Ritchie C. J. and Strong, Fournier, Gwynne and Patterson JJ.

GENERAL ORDER.

No. 86.

Rules 51 and 52 are hereby repealed and the following substituted therefor:

In Controverted Election Appeals the party appellant shall obtain from the Registrar, upon payment of the usual charges therefor, a certified copy of the record, or of so much thereof as a Judge may direct to be printed, and shall have forty (40) copies of the said certified copy printed in the same form as hereinbefore provided for the *Case* in ordinary appeals, and immediately after the completion of the printing shall deliver to the Registrar thirty (30) of such printed copies, twenty-five (25) thereof for the use of the Court and its officers and five (5) thereof for the use of the respondent and to be handed by the Registrar to the respondent or his solicitor or booked agent upon application made therefor.

For printing in election appeals the same fees shall be allowed on taxation as for printing the *Case* in ordinary appeals.

Ottawa, September 25th, 1891.

Sd. W. J. RITCHIE C.J.
S. H. STRONG J.
T. FOURNIER J.
Sd. H. E. TASCHEREAU J.
C. S. PATTERSON J.

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decide every question which may or can arise between the parties relative to the execution thereof, and his decision shall be conclusive and binding upon both parties hereto. The aforesaid party of the second part hereby agrees, and binds himself, that upon the certificates of his Engineer that the work contemplated to be done under this contract has been fully completed by the party of the first part, he will pay said party of the first part for the performance of the same in full, for materials and workmanship. It is further agreed, by the party of the second part, that estimates shall be made during the progress of the work on or about the first of each month, and that payments shall be made by second party upon the estimate and certificate of his engineer, to the party of the first part, on or before the 20th day of each month, for the amount and value of work done, and materials furnished during the previous month, ten per cent. being deducted and retained by the party of the second part until the final completion of the work embraced in this contract, when all sums due the party of the first part shall be fully paid, and this contract considered cancelled." Upon completion of the contract the engineer made a final estimate fixing the value of the work done by the sub-contractor at $79,142.65, and after deducting the money paid to and received by the sub-contractor, and a clerical error appearing on the face of the certificate, a sum of $4,187.32 remained due to the sub-contractor. Upon an action brought by the sub-contractor to recover the sum of $36,312.12, the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, granted the plaintiff the amount of $4,187.32 with interest and costs. On appeal to the Supreme Court: *Held*, affirming the judgment of the court below, that the estimate as given by the engineer was substantially such a certificate as the contract contemplated, but if not the plaintiff must fail as a final certificate of the engineer was a condition precedent to his right to recover. GUILBAULT *v.* MCGREEVY — — — — 609

3—— *Public work—Sub-contract—Rescission—Quantum meruit — Arbitration — Setting aside award.*]—P. was a contractor with the Government of Canada for building a post office and K. was sub-contractor to do the mason and brick work for a lump sum, the sub-contract consisting simply of an offer to give the work for the sum named and an acceptance by K. P. being dissatisfied with the work done by K. took the contract out of his hands before it was completed and finished it himself. K. then brought an action for the value of the work done by him and on reference by the court to arbitration an award was made in K.'s favor. The Court of Appeal set aside the award and remitted the case to the arbitrator for further consideration, holding that though the contract did not authorize P. to take over the work and finish it at K.'s expense, and the latter was therefore entitled to recover on the *quantum meruit*, yet the cost of

completing the work was considerably in excess of the contract price. *Held*, reversing the judgment of the Court of Appeal, that as it appeared from the evidence that the arbitrator fully understood the matter and got all the information that could be obtained on the subject, and as no impropriety or mistake was shown to have been committed by him, no benefit could result from sending the award back for reconsideration, and the decree of the Court of Appeal was not justified. KENNEDY *v.* PIGOTT — — 699

4——*Contract of sale—Particular chattel—Representation.*] McD. bought at auction through an agent, a billiard table described in the auctioneer's advertisement as 'a full size 6 pocket English billiard table made by Thurston." etc., and wrote to M. & Co., makers of billiard tables in Toronto, describing his table and asking terms of exchanging it for a new one of another style. On receiving the information asked McD. wrote that he could not accept the terms offered. M. & Co. afterwards wrote the following letter:—Toronto, Oct. 2nd, 1886, D. C. McDougall, Esq., Agent Halifax Banking Co., Antigonish. DEAR SIR,—Your laconic reply to our letter of 24th instant to hand. We would drop the matter if it was not for an inquiry which we have just received from a private party in the far North-West who would like to purchase a good second-hand English table. We would therefore kindly ask you to make us your offer for the proposed exchange, and if we can possibly do it we will accept it. Give us as near a description as you can of your table, maker's name is essential, but as you have nothing with it but the billiard outfit (no life and pyramid balls and boards) you should not make your price too high, or a deal will be impossible. Awaiting your kind reply, we remain, yours truly, SAMUEL MAY & Co. To which McD. answered: I may just say I never saw our table yet, but am informed it is a very nice one, made by "Thurston" and very little the worse of wear, being in the private family of Sir Edward Kenny in his country residence near Halifax. This gentleman who purchased the table for us writes thus: "I got the 3 billiard balls and marker, and 19 cues, which is all that is needed for billiards. I am told the table is a great bargain, cost £200 in England, and is not much the worse for wear." The table is 6 x 12, and for particulars we would refer you to Jerry E. Kenny, Esq., or F. D. Clark, auctioneer, Halifax. Yours truly, D. C. MCDOUGALL. M. & Co. then wrote accepting the offer and adding, "We trust that the English table is fully as represented; and if you are satisfied, you may ship it at once, with billiard balls, markers, 19 cues, cloth, and what else there may be. In the meantime we will get up a 4½ x 9 Eclipse Combination table in best style, and with outfits for pool, carom and pin pool games. Awaiting your early reply, we remain, dear Sir, yours truly, SAMUEL MAY & Co. The table shipped by McD. on reaching Toronto was found to be an