# REPORTS

OF THE

# SUPREME COURT

OF

# CANADA.

REPORTER

**C. H. MASTERS, BARRISTER AT LAW.**

ASSISTANT REPORTER

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1898.

# JUDGES

OF THE

# SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

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The Right Hon. Sir Henry Strong, Knight, C. J.

The Hon. Henri Elzéar Taschereau J.

" John Wellington Gwynne J.

" Robert Sedgewick J.

" George Edwin King J.

" Désiré Girouard J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Hon. Sir Oliver Mowat, G.C.M.G., Q.C., LL.D.

" David Mills, Q.C.

SOLICITOR-GENERAL OF THE DOMINION OF CANADA:

The Hon. Charles Fitzpatrick, Q.C.

# ERRATA.

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

Page 207.—Add foot-note as follows :—" * PRESENT : Taschereau, Gwynne, Sedgewick, King and Girouard, JJ."

Page 314.—Line 19. For " impartiality " read " partiality."

Page 347.—Line 23. For " dismissal " read " allowance."

Page 350.—Line 7. For " (1) " read " (3)," and in the last line of the foot-notes, for " (1) " read " (3)."

Page 359.—Line 14. For " properly " read " purposely."

Page 393.—Instead of the third foot-note, as printed, read " (3) 11 R. L. 479."

Page 446.—Line 30. For " difference " read " deference."

Page 539.—Line 19. For " in high authority " read " is high authority."

# A TABLE

OF THE

# NAMES OF THE CASES REPORTED

## IN THIS VOLUME.

# TABLE OF CASES CITED.

## A.



## B.

## C.

## D.



## E.

## Mc.



## N.

## S.

## Y.

# 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.

THE TOWNSHIP OF SOMBRA AND PETER MURPHY (PLAINTIFFS) — APPELLANTS;

AND

THE TOWNSHIP OF CHATHAM (DEFENDANTS) — RESPONDENTS.

1897

*June 1, 2.

*Nov. 10.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Municipal Corporation—Assessment—Extra cost of works—Drainage—R. S. O.* (1877) *c.* 174—46 *V. c.* 18 (*Ont.*)—*By-law—Repairs—Misapplication of funds—Negligence—Damages—Re-assessment—Intermunicipal works.*

Where a sum amply sufficient to complete drainage works as designed and authorized by the by-law for the complete construction of the drain has been paid to the municipality which undertook the works, to be applied towards their construction, and was misapplied in a manner and for a purpose not authorized by their by-law, such municipality cannot afterwards by another by-law levy or cause to be levied from the contributors of the funds so paid any further sum to replace the amount so misapplied or wasted.

APPEAL from the judgment of the Court of Appeal for Ontario dismissing the plaintiff's action with costs

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

and reversing the decision of the trial judge in favour of the plaintiffs and ordering the defendants to complete certain drainage works at their own cost and enjoining them against assessing certain lands and roads for costs in connection with the same.

The facts of the case and questions in issue upon the present appeal are stated in the judgment now reported.

*Aylesworth* Q.C. for the appellants.

*Wilson* Q.C. for the respondent.

GWYNNE J.—The present action is one arising out of an action instituted in the year 1887 by the appellants against the respondents, and in which judgment was recovered by the plaintiffs therein, the present appellants. The questions raised in the present action differ from any which have been before the court in the various actions heretofore passed upon under the drainage clauses of the Municipal Acts of the Province of Ontario. Upon the 14th of October, 1881, the corporation of the township of Chatham, professing to act under the provisions of the drainage clauses of ch. 174 of the Revised Statutes of Ontario of 1877, passed a by-law for the construction of a drain along the northerly or Sombra side of the town line, between Sombra and Chatham, from the north branch of the River Sydenham on the east to a stream called the Channel Écarté on the west, according to a plan and specifications which were mentioned in the by-law, which was entitled :

A by-law to provide for draining parts of *the township of Chatham* by the construction of the Whitebread drain, and for borrowing on the credit of the municipality the sum of $6,109 for completing the same.

This sum was the contribution of the municipality of the township of Chatham and of the owners of lands therein to the construction of the drain. The municipality of the township of Sombra and the owners of

land therein contributed the sum of $6,042, which sum was raised by the township of Sombra and was paid over to the municipal corporation of the township of Chatham. By the by-law it was enacted that one W. G. McGeorge should be, and he was by the by-law, appointed commissioner of the township of Chatham to let the contract for constructing the said drain and works connected therewith by public sale to the lowest bidder (not exceeding the estimates), but that every such contractor with good and sufficient sureties should be required forthwith to enter into bonds for the due performance and completion of his contract according to said plans and specifications and within the time mentioned in such bond (unless otherwise ordered by the council) and that it should *be the duty of the said commissioner* to cause the said drain and works connected therewith to be made and constructed in accordance with such plans and specifications and not later than the 31st day of December, 1881, (unless otherwise ordered by the council), and it was enacted that *the drain when completed* should be kept in repair by the municipality of the township of Chatham, and at the joint expense of the municipality of the township of Sombra and of the lands in the said municipalities assessed for the construction of the drain, said municipalities and said lands paying in the same relative proportion as for construction.

The township of Chatham lies immediately south of the township of Sombra, and is a very low lying marshy township, the lands therein being lower than the township of Sombra, and so the natural fall and drainage of all water in Sombra flowing southerly is into the township of Chatham, where, by reason of that township being so low, there was a difficulty in providing an outlet for water flowing in and through it. Prior to the passing of the above by-law for the

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

construction of the Whitebread drain there had been constructed in Sombra in the years 1877, 1878 and 1879, three drains, known as Grape run or Government drain No. 1, which was in a natural watercourse from 10 to 15 rods wide, the Pacific drain and Buckingham drain, which, after crossing the town line between Sombra and Chatham had their outlet in Chatham and there discharged their waters brought from various parts of Sombra; and the object of the said Whitebread drain was, and the scheme for the construction thereof as adopted by the above by-law was designed, for the purpose of *cutting off all waters* coming down from Sombra into Chatham by the said three drains so as aforesaid constructed, and in fact of preventing *any water whatever* from flowing either naturally or by artificial means from Sombra into Chatham. Now, this having been the object of the drain the township of Chatham appears to have been mainly interested in its construction and the corporation of that township having been the devisers and originators of the work, and having charge of its construction, must be held to have been bound to take care in its construction that the three drains above mentioned which had been previously constructed by the township of Sombra should not be cut off and their waters let into the Whitebread drain until it should be so constructed as to be able to carry off into the River Sydenham on the one side and into the Channel Écarté on the other all water coming down those drains into the Whitebread drain, the waters in which when completed were, by the scheme designed, to have a continuous easterly to westerly flow at the rate of from two to three miles per hour. In the month of November, 1887, the present appellants commenced an action in the High Court of Justice in Ontario against the respondents, the corporation of

the township of Chatham and, therein, after alleging the passing of the said by-law by that corporation and that they had commenced to construct the drain but had never yet completed it, and that they had proceeded so negligently and unskilfully in what work they did in the premises that while they dammed up the said three drains and let their waters into sections of the new Whitebread drain which they were constructing before that drain had been so constructed as to be able to carry such waters to the Sydenham River on the one side, or to the Channel Écarté on the other, whereby the waters coming down the said three drains respectively, having no outlet, were forced back, and were still kept forced back, and the waters of some or one of them overflowed on to the land of the plaintiff Murphy, in the statement of claim mentioned and on to the roads of the municipality of Sombra to the damage of the said Murphy, and of the said municipality respectively, and they prayed

that the defendants, the corporation of Chatham, might be restrained by injunction from interfering with or stopping up the outlets of the said three drains so as aforesaid previously constructed in Sombra, or any of them, and from causing the waters coming down by them to be penned back and thrown upon the roads and lands of the plaintiffs, and that the defendants in the action should be ordered to complete the said drain in accordance with the provisions of the said by-law, and that the said defendants should be ordered to pay to the plaintiffs and each of them damages for the wrongful acts complained of, and the costs for the action, and for further relief.

The defendants in their statement of defence to that action insisted that the drain was completed from end to end, from the River Sydenham to the Channel Écarté, in accordance with the provisions of the said by-law of the said defendants in that behalf,

the earth excavated therefrom being placed (as they alleged) upon the town line, forming thereby a road and preventing the waters of Sombra from flowing upon the lands in Chatham, as it was intended to do.

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

They alleged further, that the drain did not at any point intersect the township of Chatham, or receive or carry any water from the lands of Chatham, and that it only benefited the lands and roads in the township of Chatham *by cutting off and carrying away waters brought down from Sombra upon the lands and roads in Chatham*, and they denied that the plaintiffs or either of them had sustained any damage through any defect in the construction of the drain, or negligence on the defendants' part, and finally, they submitted that having, as they alleged they had, constructed said work under the authority of the said by-law, the plaintiffs if entitled to any relief whatever, *should seek the same by arbitration under the provisions of the Acts in that behalf.* In this statement of defence the plaintiffs joined issue and the case came down for trial in the month of April, 1888. The only issues to be tried were whether or not the plaintiffs, or either of them had received damage *caused as they alleged by the wrongful, unskilful and negligent conduct of the defendants* in the construction of the drain, and by suffering the waters coming down from Sombra in the said three drains constructed in Sombra, or in any of them, to be penned back and let into the new drain before that drain had been constructed so as to carry off such waters to the River Sydenham or Channel Écarté as designed by the by-law, and whether the said drain had never yet been completed, as alleged by the plaintiffs. The learned judge who tried these issues after a long and exhaustive trial, found among other matters of facts as follows:

2nd. That *the said Whitebread drain was negligently, unskilfully and improperly constructed* and does not accomplish what it was intended for, *but on the contrary by reason of such negligent, unskilful and improper construction the waters which have a natural flow from and off Sombra into Chatham were prevented from passing off and are forced back and overflow lands in Sombra, amongst those of the plaintiff Murphy.*

3rd. That prior to the construction of the said drain there were and still are three other drains running in a southerly direction through Sombra into Chatham, known as Government drain No. 1, Pacific drain, and Buckingham drain, across which three drains the Whitebread drain has been dug and constructed on the county line between the two townships of Sombra and Chatham, whereby the original outlets of the above mentioned three drains have been stopped and the waters coming down the same made to flow into the Whitebread drain which I find has not sufficient capacity *in its unfinished state* to carry off said waters, whereby and by reason whereof the said waters are made to flow back on the Sombra lands, and among them on the lands of the plaintiff Murphy, as well as the roadways in Sombra.

4th. The said Whitebread drain was never completed according to the original plans and specifications, *owing to the negligence of the defendants or those employed by them to do and perform and superintend the work, and has been left in such a state of incompleteness* that the waters which flow into the same do not wholly flow out but back up and flow over the lands in Sombra, to the damage of the plaintiffs.

5th. That there was undue and unnecessary delay in the construction of the said drain, the same having been allowed to extend over several years, during which the ratepayers in Sombra and among them the plaintiff Murphy, were greatly injured pecuniarily by reason of the said Government drain, the Pacific drain, and the Buckingham drain being stopped during all that time, thereby preventing the waters of Sombra flowing away as they would have done, and of right should have done *had it not been for the unskilful and negligent manner* of constructing the said Whitbread drain.

6th. The learned judge found further, as matter of fact, that the proper bed of the Whitebread drain is indicated by the red line on the plan prepared by Mr. John Jones, Civil Engineer and P. L. S., put in by the plaintiff and marked exhibit 7.

And he ordered that judgment should be entered for the plaintiffs, and he assessed the damages sustained by the plaintiff Murphy *by reason of the negligence of the defendants in the premises* at the sum of $150, and he ordered that judgment for that sum with full costs of suit should be entered against the defendants. And he further ordered that the defendants be required to complete the said drain within the period of twelve calendar months in accordance with said plan marked exhibit 7. And the learned judge further found that

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

the amount assessed for and levied for the construction of the said drain and paid for by several ratepayers in Sombra and Chatham who were liable to be assessed for the same, was sufficient to complete the said drain as originally intended, and would have done so had the construction thereof been properly attended to and managed by the defendants, and he therefore ordered and declared that the plaintiffs were entitled to a declaration that the said drain be properly and efficiently completed as aforesaid, at the proper costs and charges of the defendants, and not at the cost and charges of those of the ratepayers who had already by special assessment, as aforesaid, contributed funds sufficient to have so constructed the same, with liberty to the plaintiffs to move if the same be not completed within the said period of twelve months.

In pursuance of these findings and directions of the learned trial judge, formal judgment was pronounced by the court in which the said action was pending whereby it was ordered and adjudged by the court:

1st. That the defendants do forthwith pay to the plaintiff Peter Murphy the sum of $150 for his damages in respect of the injuries complained of by him in the proceedings mentioned.

2nd. That the defendants do within one year from the 23rd day of October, 1888, complete the Whitebread drain in the pleadings mentioned, to the width and depth and in the manner provided by the plans and specifications upon which the said work was undertaken, the depth being that indicated by the red line on the plan prepared by John Jones, provincial land surveyor, put in by the plaintiffs at the trial and numbered Exhibit 7, and with proper and sufficient outlets to carry off the waters which enter the same from time to time.

3rd. That the amount provided for by the by-law for the construction of the said Whitebread drain, and which came to the hands of the defendants, was sufficient to complete the said drain in accordance with the said plans and specifications, and would have so completed the same but for the want of skill, negligence and unnecessary delay of the defendants in proceeding with and carrying on the work, and the court did order and adjudge that the works necessary to the completing the drain as ordered in paragraph 2, be defrayed by

the defendants, and that they should not be at liberty to levy or assess the same, or any part thereof, as a special rate against the lands and roads by the said by-law assessed for the cost of the construction of the said drain.

4th. And the court further ordered and adjudged that the defendants do pay to the plaintiffs their costs of the action after taxation thereof.

5th. And the court further ordered and adjudged that the plaintiffs, in addition to any other remedy to which they might be entitled, should be at liberty in the event of the defendants failing to complete the said drain as directed by paragraph 2, within the time thereby limited to apply to the court for such other relief in the premises as the plaintiffs might be entitled unto.

From this judgment the defendants appealed to the Court of Appeal for Ontario.

That court regarded the claim of the plaintiff Murphy in the action to be one merely for the damages alleged to have been sustained by him by the alleged wrongful, unskilful and negligent conduct of the defendants and the judgment in his favour to be one for the recovery merely of the damages sustained by him by reason of such wrongful, unskilful and negligent conduct, and the residue of the judgment directing the completion of the drain in accordance with the plan and specifications adopted by the by-law, etc., they regarded as being the relief granted and adjudged in favour of the corporation of the township of Sombra, and as regarding the said judgments it was ordered and adjudged by the said court upon the said appeal that the appeal should be, and it was allowed, as to the relief granted to the plaintiffs the township of Sombra, and that the action as to the plaintiffs the township of Sombra should be dismissed, and that neither the said appellants nor the said respondents the corporation of the township of Sombra should pay to, or receive from the other of them any costs of the said action or of the said appeal.

And it was further ordered and adjudged by the said court that as regards the plaintiff Murphy the

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

said appeal should be and the same was dismissed with costs to be paid by the appellants to the respondent Peter Murphy forthwith after taxation thereof.

The Chief Justice of the Court of Appeal in giving his judgment used the language following :—

I think there was ample evidence of negligence in the execution of this public work sufficient to support the judgment in favour of Murphy. In the execution of an authorized public work a large amount of inconvenience and possible loss may result to individuals without any remedy.

If, *as a necessary result* a legal injury is caused, the only remedy would be the statutable compensation on reference.

But for *clear palpable negligence on behalf of those entrusted with its performance, for an absurd and unnecessary process of construction certain to cause injury and extending the inevitable inconvenience of property owners which need not extend over a year, to a period of four or five years and allowing the whole work to fall into a state of inefficiency, I cannot but think that a cause of action is given to the injured party.*

But the learned Chief Justice expressed himself as unable to agree with the learned trial judge in his direction as to levying the moneys required for completion or due execution of the work.

Mr. Justice Burton thought the judgment in favour of the Township of Sombra should be reversed, and the relief asked by them refused, and the action in so far as it related to the relief asked by them should be dismissed.

Mr. Justice Osler entered very fully into the facts as they appeared in evidence and in the findings of the learned trial judge. Dealing with the claim of the plaintiff Murphy, he draws attention to the fact that although the time limited by the by-law for the completion of the work was the 31st December, 1881, the contracts for construction were not made until some time into the year 1882, and that then the work was let *piecemeal* to several small contractors, farmers, along the line of the drain, and then adds :

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

*The natural consequence* was that the work instead of being promptly and expeditiously done, extended over a number of years, and the drain was not accepted by the commissioner until the fall of the year 1886; at this date, however, he certified it to be complete.

Again he says:

Much evidence was given as to the condition in which the drain had *been actually left* by the contractors *when accepted by the defendants, whether it had ever really been completed in accordance with the plans and specifications or whether its then condition was owing to its having got into a state of disrepair after actual completion.*

Upon this question he says:

*There is, I think, abundant evidence in support of the learned judge's finding that the drain never was completed in accordance with the engineer's plan, report and specifications. In one part of it near the eastern end it had not been excavated to the depth required, by as much as three feet, and this for a distance of 47 feet. At the west end there was said to be a deficiency in depth of two feet. At other places in its course there were irregularities in the depth more or less serious, and the contractors had in some instances during the execution of the work left dams for the purpose of keeping water out of the cuttings which they omitted to remove.*

Again he says:

The learned judge expressly finds that *it was in consequence of this unfinished and incomplete condition of the drain* that it proved of insufficient capacity to carry off the waters brought into it by the three Sombra drains, and that those waters were thereby caused to back upon and flow over the plaintiff's property. *In that state of things, and upon these findings the plaintiff is entitled to recover damages against the defendants in an action. They have obstructed the outlets of the drains which formerly carried water from his land, and have so negligently constructed the Whitebread drain in the execution of the work, and in not completing it to the original design and stipulated depth as to fail in providing another outlet for the waters thus obstructed by them.*

And again:

*They have negligently failed to do what the by-law authorized them to do, and the result of their negligent interference was that the condition of things has been altered to the plaintiff's damage.*

He then points out that the judgment is not for a mandamus under section 538 of the Act, chapter 174 R. S. O. of 1877, *but a judgment directing defendants*

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

*to complete the drain* to the width and depth and in the manner required by the plans and specifications upon which it was undertaken. He then expressed the opinion that the plaintiffs were not precluded from contending that the drain had not been completed as required by the by-law, by the fact that the corporation of Chatham had accepted the work as completed upon the report to that effect by the commissioner appointed by the by-law to superintend the work. Upon this point he says:

> Though he was appointed commissioner by the by-law to superintend the construction, that was a mere matter of convenience. The council was not bound to appoint him. His legal position was simply that of a servant or agent of the corporation, and they cannot, as I respectfully think, be heard to say that *an incompleted drain* is the same thing as a drain which has become out of repair. *The drain never having been in fact completed the case does not come as one of non-repair within sub-section* 3 *of section* 583 *which is confined to the deepening, extending and widening of a work which has been fully made and completed in the language of that section.*

Then, in relation to the third paragraph in the judgment which relates to the mode of defraying the necessary expenses attending the completion of the work as directed by the judgment, he says:

> This limitation, imposed by this clause of the judgment, is of a most unusual character.

And again:

> This judgment casts the whole of the loss upon that part of the township which is outside of the drainage area and exempts the latter from sharing in it though quite as much a part of the corporation as the former.

For this reason and for others which it is not necessary to state here because they are the reasons upon which is rested the judgment against which the present appeal is taken and must needs therefore be considered later on, the court not only expunged from the judgment the said third paragraph but also the second

paragraph by which it was ordered that the defendants should complete the drain in accordance with the original plan and specifications notwithstanding that the court was of opinion that in truth, as had been found as a fact by the learned trial judge, the drain had never been completed as required by the by-law, and the judgment was by the said Court of Appeal rendered accordingly, as above set forth.

From this judgment the corporation of Sombra alone appealed to this court, and this court was of opinion that that corporation had good right under the facts appearing in the evidence and the findings of the learned trial judge thereon to maintain that learned judge's judgment for the completion of the drain, but that as there had been no issue raised upon the record as to the sufficiency of the amount which had been provided for the construction of the drain the corporation of the township of Chatham should not have been deprived as they were by the third paragraph of the learned trial judge's judgment of the power of availing themselves of the clauses of the statutes enabling them to raise further funds if the amount which had been raised was in truth insufficient for the purpose, and this court therefore maintaining the judgment of the trial judge as to the completion of the drain did by its judgment made the 28th June, 1892, order and adjudge that the defendants (the corporation of Chatham) should complete the said Whitebread drain in the pleadings mentioned to the width and depth in the manner provided for by the plan and specifications adopted by the by-law upon which the said work was undertaken, or do provide some substitution therefor under the provisions of the statute in that behalf, and that they should pay to the appellants, the corporation of Sombra, the costs incurred by them as well in the Court of Appeal at Toronto, as in this court.

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

The defendants duly paid to the plaintiff Murphy the damages and costs recovered by the judgment in his favour in the former action, and they also paid to the plaintiffs, the corporation of Sombra, the costs adjudged to be paid to them, but they did nothing towards the completion of the said drain, as directed by the said judgment, until after the commencement of the present action. Upon the 27th day of February, 1894, notwithstanding the said judgment had conclusively adjudged and determined that the said Whitebread drain had never been completed in accordance with the plans and specifications as required by the by-law of the 14th October, 1881, and had ordered and adjudged that the same should be completed by the defendants in accordance with the said plans and specifications, the said corporation of Chatham by its municipal council purporting to act under the clauses in the Acts in force in relation to drainage which authorize municipal corporations to pass by-laws *for repairing and defraying the expense of repairing* a drain already completely constructed under the Act, provisionally passed a by-law intituled,

*a by-law to provide for the repair of the Whitebread drain* and for borrowing on the credit of the Township of Chatham the sum of $3,105.78 to defray that portion of the expense of such repairs, and of the damages and costs payable by the Township of Chatham.

The total amount specified in the by-law as necessary for making what the by-law called repairs, was the sum of $4,742.80, and the damages and costs mentioned in the by-law consisted of the damages and costs paid to the said plaintiff Murphy under the judgment recovered by him in the said action amounting to the sum of $2,102.76, and these two sums together made the sum of $6,845.56, of which amount the sum of $3,105.70 mentioned in the by-law, was appropriated as the contribution of the municipal corporation of

Chatham, and the lands assessed therein, and the balance or $3,739.86 was appropriated as the sum to be contributed by the municipal corporation of the township of Sombra and the lands in that township assessed as being by the said by-law to be chargeable therewith. The said by-law so provisionally passed recited the passing of the said by-law of the 14th October, 1881, and also (notwithstanding the said judgment) recited that the said drain *had been duly constructed and had become out of repair*; it then recites the judgment recovered in the said action as above set out, and that the damages and costs recovered therein amounted to the sum of $2,102.76, and then proceeds thus:

> And the said council desires to charge the same as provided by law, and for that purpose has desired the engineers to add the same to the cost of making said repairs, and to assess the same against the lands and roads liable for *the construction and repairs of the said drain.*

The by-law then purported to enact that the said sum of $4,742.80, as for repairs of the said drain, and the said sum of $2,102.76 as for said damages and costs so by the said judgment recovered, amounting together to the said sum of $6,845.56, should be assessed against the lands and roads specified in a schedule annexed to the said by-law, which schedule comprised all the lands and roads in the said townships of Chatham and Sombra which had been previously assessed for the construction of the said drain, and also certain other lands and roads in the township of Sombra which had not been assessed for the construction of the drain.

Upon the 11th day of April, 1894, the present action was commenced in the Chancery Division of the High Court of Justice for Ontario, and immediately thereupon the plaintiffs caused the defendants therein to be served with a notice of a motion to be made to the said court for an order

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

to be made limiting the time within which the defendants should complete the said Whitebread drain as required by the said judgment in the said former action and for an order restraining the said defendants from proceeding to assess for the repair or maintenance of the drain any of the lands or roads assessed for the construction thereof until the said drain should be completed as required by the said judgment. An order was made upon the motion made in pursuance of such notice, by which order bearing date the 9th day of May, 1894, it was ordered by the court that the said motion should stand over to be heard and disposed of by the trial judge at or after the trial of the action in the Chancery Division so as aforesaid commenced on the 11th April, 1894, and that the costs of the application should be costs in the cause unless the new trial judge should otherwise order.

Thereupon the plaintiffs upon the 22nd day of May, 1894, filed their statement of claim and therein alleged the passing of the by-law of the 14th October, 1881, by the defendants, and the raising by them thereunder of the said sum of $6,109 as the contribution of that township towards the construction of the work in the by-law mentioned; and the contribution and payment by the corporation of Sombra of the sum of $6,042 to the corporation of the township of Chatham as the contribution of the township of Sombra towards the construction of the work. It then charged that the said two sums of $6,042 and $6,109 constituted a trust fund in the hands of the defendants for the purpose of the construction of the said work and that the plaintiffs and the other owners of lands assessed for the said work were and are interested therein and *cestuis que trustent* thereof and that the said moneys were amply sufficient to have constructed and completed the said drain in accordance with the plans and

specifications thereof and the terms of the said by-law. It then alleged the commencement of the work by the defendants, but that they had proceeded therewith so negligently and improperly that it had never yet been completed. It then alleged that the moneys in the hands of the defendants and applicable to the construction of the work *were more than sufficient to have completed the same, but that owing to the negligence and improper conduct of the defendants the same was wasted and misapplied.* It then charged certain acts of the defendants as constituting the negligence and improper conduct whereby the said funds were so wasted and misapplied. It then alleged the former action and the judgment recovered therein and claimed further damages as sustained by the plaintiff Murphy and the municipality of Sombra respectively since the recovery of the said judgment from the same cause as had been alleged in the said former action. It then alleged in the 14th paragraph as follows:

On or about the 1st day of December last past *the said defendants disregarding the said judgment and in contempt thereof* caused one W. G. McGeorge to make a survey of the said drain and an estimate of the *cost of alleged repair to be made thereof* and an assessment of the costs thereof upon the lands and roads assessed for the original cost of the said drain, and on the 27th day of February last provisionally passed a by-law adopting the said report and assessment imposing upon the lands and roads in the said two townships an assessment for the amount of the estimated cost of the *said pretended repairs* according to the said report, such cost amounting to the sum of $4,742.80, and they by the said by-law assumed to assess upon the said lands and roads the amount of the judgment recovered by the plaintiff Murphy against them, as aforesaid, and the costs of the said action.

And the plaintiffs in their said statement of claim submitted that until the defendants should complete the said drain in accordance with the said judgment they could not assess nor charge the roads and lands aforesaid with the cost of repairs to the said drain, and that no duty to repair was imposed by law until the

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

drain should be fully made and completed, and further, that the damages and costs recovered in the said action having been recovered by reason of the negligent acts of the defendants could not be charged upon the said lands and roads within the area assessed for the cost of the costruction of the said work but must be borne by the defendants, and further, that the moneys provided for the construction of the drain having been sufficient to have completed the same but for the negligence and breaches of trust of the defendants as in the statement of claim set forth, the defendants could not assess or charge upon the said lands and roads the cost of completing the said work, and the plaintiffs claimed, if necessary, an account of the moneys so received by the defendants and of their application thereof, and the plaintiffs in their prayer for relief claimed amongst other things:

1st. Damages for the wrongs and losses in the statement of claim set forth.

2nd. That the defendants should be restrained from passing and adopting the by-law of the 27th February, 1894.

3rd. That the defendants should be restrained from assessing or charging on the roads or lands of the plaintiffs any moneys for repairs to the said drain until the same should be fully made and completed in accordance with the said judgment, and from charging the said roads and lands with the damages and costs recovered in the said action.

4th. That the said defendants should also be restrained from assessing or charging the said lands and roads with the cost of the said work, and that if necessary an account might be taken of the moneys which had come to the hands of the defendants and which were applicable to the construction of the said work, and of the amount thereof properly expended in such

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

construction, and of the amount remaining or which ought to have remained in their hands for that purpose.

5th. That the defendants might be decreed to make good so much of the moneys so received by them as had been wasted or misapplied by them, and for further relief.

The defendants in their statement of defence alleged that the amount raised under the by-law passed for the original construction of the said drain was not sufficient for the construction thereof, and they denied all the negligence with which they were by the statement of claim charged and averred that the work of constructing said drain was carried on with all necessary diligence and without unnecessary delay, and that all the funds raised for the construction of said drain were properly applied and expended by the defendants in the construction of the drain, and *that said funds were insufficient for that purpose*, and that the defendants were compelled to pay and did pay $300 over and above the amount raised for said drain in completing the same. They then pleaded and averred the institution of the said former action and the recovery of judgment therein by the plaintiffs, and they said that in pursuance of the said judgment they took the proceedings in the statement of claim mentioned and provisionally passed the by-law in the statement of claim mentioned, which they did for the purpose of raising the funds necessary to comply with the said judgment *by completing the said drain and paying the damages and costs ordered to be paid by the defendants which they contended that they had a right to do under the provisions of the Municipal Act.* They then alleged that the plaintiff had appealed from the assessment adopted by the by-law to the referee under the Drainage Act of 1891, who, as they submitted, has full power and authority to determine all questions

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

and issues arising upon said appeal, and that the plaintiffs were estopped from proceeding with the trial of the present action pending the hearing and disposing of said appeal by said referee. They then denied that the plaintiffs had sustained damage, as alleged by them in their statement of claim, and they submitted as matter of law that the plaintiffs had not in their statement of claim shown any cause of action against the defendants. The plaintiffs upon the 9th June, 1894, joined issue upon this statement of defence and the case came down for trial upon the 20th April, 1895.

It thus appears that the defendants had provisionally passed the by-law of the 27th of February, 1894, as a by-law professedly for the purpose, in so far as the sum of $4,742.80 is concerned, of raising funds alleged to be required for making necessary repairs in the Whitebread drain, as a drain previously completely constructed under the provisions of the municipal Act in that behalf; whereas, in truth and in fact it had been conclusively adjudged and determined against the defendants by the judgment in the previous action that the drain had never been completed and the defendants were therefore adjudged and directed to complete it in accordance with the provisions of the by-law in that behalf; now in their statement of defence to the present action, abandoning the ground stated in the by-law in justification of it, they allege by way of justification for passing it that the amount raised for the construction of the drain was not sufficient for that purpose and upon this allegation *the only material issue of fact to be tried in the present action is joined.*

True it is that the defendants in their statement of defence deny that they had been guilty of any negligence or improper conduct in the construction of the work with which they were charged and that the

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

plaintiffs or either of them had sustained any damage occasioned by any negligence or improper conduct of the defendants, but upon these matters the judgment in the former action must be held to be conclusive against the defendants.

Upon this issue joined as to the sufficiency or insufficiency of the amount which had been raised for the construction of the drain much evidence similar to that given in the previous action was entered into, *not for the purpose* of establishing negligence and improper conduct of the defendants in the mode adopted by them for constructing the work, *but for the purpose* of establishing the contention of the plaintiffs that the funds raised had been abundantly sufficient for the complete construction of the drain in accordance with the by-law and that therewith the drain could have been completed but for the wrongful, negligent and improper mode of construction adopted by the defendant and not authorized by the by-law, whereby, as the plaintiffs contended, the defendants had wasted and misapplied funds raised and placed in their hands sufficient for the complete construction of the work.

It appeared in evidence at the trial and was found as matter of fact by the learned trial judge that upon the 21st day of December, 1885, the corporation of the township of Chatham passed a by-law professedly by way of amendment of the by-law of the 14th of October, 1881, whereby the lands and roads in Chatham which had been assessed by the by-law of 14th October, 1881, were assessed and charged with a further sum of $1,500 in addition to the $6,109 which had already been raised, as necessary to be provided by Chatham for the completion of the work; and wherein *it was recited that an agreement had been entered into between the said corporations that an additional sum should be raised and levied against the lands and roads in*

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

*Sombra settled at and limited to the sum of* $300, *which the township of Sombra had agreed to pay;* and the learned trial judge further found that as matter of fact the corporation of the township of Sombra had paid to the corporation of the township of Chatham the said sum of three hundred dollars, and that the amount raised under the two by-laws of October, 1881, and December, 1885, was amply sufficient to complete the work; that the evidence before him upon this point was of the most conclusive character; that, as matter of fact nothing had been done by the township of Chatham towards carrying out the judgment of this court in the former action until after the present action had been commenced; that what was then done was to remove the small dams left by the several contractors between the different sections and to clean out the silt that had been washed down while the work was progressing; *that this removal of dams and clearing out of the silt was not work of repair but work which was necessary to the completion of the drain* namely, as to 47 rods near the eastern outlet that had never been dug out to within two feet of the bottom according to the plan as designed for the construction of the drain.

And he held that until the drain should be completely finished in accordance with the by-law authorizing its construction no by-law could be passed assessing the drainage area for repair of the drain. The evidence showed that the drain had never been completed in accordance with the original plan and specifications until about the month of January, 1895. Upon the 30th of that month one A. McDonell, C.E., acting as a provincial land surveyor for and on behalf of the township of Chatham, and one John H. Jones, C.E., acting in like capacity for and on behalf of the township of Sombra, gave their joint certificate signed by

them respectively and addressed to the municipal councils of the townships of Chatham and Sombra whereby they certified that they had made an examination of the drain from the Chenel Ecarté to the Bear Creek and that *said drain was then completed in accordance with the original design reported by Mr. McGeorge, C.E., in* 1882.

Upon the evidence as taken before the learned trial judge and his findings of matters of fact thereon he pronounced judgment in favour of the plaintiffs, and by a decree of the Chancery Division of the said High Court bearing date the 7th day of August, 1895, it was ordered and adjudged:

1. That the defendants be and they were thereby restrained from passing and adopting the by-law so provisionally passed by the defendants on the 27th February, 1894, and from proceeding with or prosecuting the appeal to the drainage referee from the assessment made in the said by-law.

2. That the defendants should be and they were thereby restrained from assessing against, or charging any of the lands in the township of Sombra with any moneys for repairs of the Whitebread drain in the pleading mentioned until the said drain should have been fully made and completed in accordance with the judgment in the pleadings mentioned.

3. That the said by-law provisionally passed on the 27th day of February, 1894, should be and the same was thereby quashed.

4. That the defendants should account to the plaintiffs for the moneys which came to the hands of the defendants, and which were applicable to the construction of the said Whitebread drain and as to the amount thereof properly expended in such construction, and as to the amount remaining or which ought to have remained in the hands of the defendants for the said purpose, and that it should be referred to the local master of the court at Sarnia to take the said account.

5. And the court reserved further directions until the taking of the said account.

6. And the court did further order and adjudge that the defendants should pay to the plaintiffs their costs of the action.

By an order bearing date the 8th day of August, 1895, made in pursuance of the order of the 9th of May, 1894, upon the motion in that behalf as

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

aforesaid, it was ordered by the learned judge before whom the issues in the said action were tried that the defendants should on or before the 1st day of January, 1896, at their own costs and charges, complete the Whitebread drain to the width and in the manner provided for in the plans and specifications adopted by the by-law upon which the said work was undertaken, or provide some substitution therefor under the provisions of the statute in that behalf, and further, that the defendants should pay to the plaintiffs the costs of the said motion and the orders made thereon.

From the above decree and judgment so made in the said action upon the 7th day of August, 1895, and from the said order bearing date the 8th day of August, 1895, the corporation of the township of Chatham instituted an appeal to the Court of Appeal for Ontario, and upon argument thereof, it was ordered and adjudged by the said Court of Appeal as follows :—

> That the said appeals should be and the same were allowed with costs of the said appeal in the action in the Chancery Division of the High Court of Justice, to be paid by the respondents to the appellants forthwith after taxation thereof, and it was further ordered that judgment should be entered in the court below dismissing the said action in the said Chancery Divison, with costs to be paid by the plaintiffs to the defendant, and that there be no costs to either party of the said order pronounced on the 8th day of August, 1895. or of the appeal therefrom.

From this judgment the plaintiffs in the action have instituted the present appeal.

In the argument before us the appeal was argued and rested upon so much only of the judgment of the Court of Appeal for Ontario as related to the disposition of the action.

As to the order of the 8th of August, 1895, it had been proved in the action and was admitted by the appellants that the drain had been completed in

January, 1895, in accordance with the original plans and specifications, so that the order of the 8th of August, 1895, that it should be completed in accordance with such plans and specifications on or before the 1st of January, 1896, was plainly erroneous, and could not be supported. When that order was made there was nothing then that could have been adjudicated upon by it but the costs of the motion and of the order of the 9th May, 1894, and incident thereupon, as to which the appellants did not press, and we do not think that under the circumstances it would be proper to make any variation from the disposition made by the Court of Appeal for Ontario as to those costs. The main question argued before us and which alone has to be disposed of, was the judgment of the Court of Appeal in respect to the action in the Chancery Division of the High Court.

The question so raised is a novel one and apparently of the gravest importance to all parties concerned. It is to be observed that the former action was not instituted by the plaintiffs for any injury alleged to have been sustained by them or either of them as consequential upon the construction of the drain as authorized by the by-law passed by the defendants for its construction. Had the action been framed claiming relief in respect to any such damage it could not have been maintained. The contention of the plaintiffs was that although the defendants had undertaken to construct the drain in the manner authorized by the by-law, yet that what they had done was done in such a manner as in point of fact to defeat the plan as designed and adapted by the by-law for its construction; that in point of fact the drain had never been completed, but that the defendants *in violation of the provisions of the by-law had committed acts of tortious misfeasance whereby instead of constructing the drain as*

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

*authorized by the by-law, they had created a public nuisance which caused to the plaintiffs the particular damage of which they complained,* and had thereby given to the plaintiffs a good cause of action as for a wrong committed by the defendants for which no law afforded any justification, and the plaintiffs prayed compensation in damages for the injury already sustained, and that the defendants should be decreed to complete the drain and thereby to abate the nuisance they had created. The defendants on the contrary insisted that what they had done was authorized by the sections of the municipal Act relating to drainage, and that they had completed the drain in accordance with the provisions of the by-law. Issues having been joined upon the above matters of fact the learned trial judge determined those issues wholly in favour of the plaintiffs. The design of the work authorized by the by-law was to prevent any water entering the township of Chatham from the township of Sombra, although such was the natural course for Sombra waters to flow in, by the erection of a permanent dam or embankment on the Chatham side of the town line between Sombra and Chatham, to be constructed of the earth to be taken out in digging a continuous drain wholly on the Sombra side of the said town line and in the township of Sombra, whereby all the waters obstructed by the dam or embankment should be conveyed to the outlets specified in the by-law. Without such a continuous drain there was no justification whatever for obstructing, by the embankment, the waters flowing from Sombra into Chatham, but what the defendants in fact did was, that they constructed the embankment efficiently so as to prevent all waters from flowing from Sombra into Chatham, thereby accomplishing perfectly Chatham's object in passing the by-law, but they wholly failed in con-

structing the drain, as designed and adopted by the by-law which constituted the sole foundation in justification of the erection of the embankment, for instead of digging the drain as required by the by-law, and giving a continuous flow to the waters made to enter it to the outlets provided by the by-law, they dug it in sections with solid earth between the sections constituting dams which prevented the waters entering any section from flowing to the outlets, as designed by the by-law, and thereby forced all the waters flowing from Sombra into Chatham back upon Sombra, thus defeating the whole object of the by-law as regarded Sombra and creating a manifest nuisance, giving a good cause of action to all persons suffering particular injury therefrom. The learned trial judge held this mode of procedure to have been utterly unjustified by the municipal Act or by any law, and in this particular his judgment was sustained by the Court of Appeal for Ontario. The learned Chief Justice was of opinion that there was ample evidence to support the judgment of the learned trial judge in favour of the plaintiff Murphy. He was also plainly of opinion that the defendants in the discharge of the trust reposed in them for performance of the work specified in the by-law were guilty of clear palpable negligence, and that the process adopted by them for the construction of the work was *absurd, unnecessary and certain to cause injury*, as appears by the extract already quoted from his judgment.

The language of Mr. Justice Osler was equally emphatic and to the like effect. He was of opinion that there was abundant evidence in support of the learned judges finding that the drain never was completed in accordance with the original plans and specifications adopted by the by-law.

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

The learned judge very plainly points out, what the evidence had clearly established and what the learned trial judge had affirmed by his judgment, that the plaintiffs had rested their cause of action upon the fact that the defendants in direct violation of the provisions of the by-law had erected the embankment which efficiently obstructed the waters whose natural flow was into Chatham and had thus effectually served the object which Chatham had in view without providing the drain designed by the by-law for the purpose of carrying off the obstructed waters, and the providing of which was the sole justification relied upon for the erection of the embankment and the prevention of the flow of water from Sombra into Chatham.

This court, while concurring with the Court of Appeal for Ontario in their affirmation of the judgment of the learned trial judge in favour of Murphy, restored, upon the appeal of the corporation of Sombra, the relief which had been given by the learned trial judge but which had been expunged by the Court of Appeal for Ontario, by directing the defendants to complete the drain as originally designed and adopted by the by-law, thus decreeing the abatement of the nuisance of which the plaintiffs had complained as being particularly injurious to them. The right of the courts to make that adjudication in the exercise of their undoubted jurisdiction cannot be questioned and the judgment so rendered in the former action must now be taken to be a conclusive adjudication between the parties that the amount recovered by Murphy in the former action for his damages and costs was recovered in a cause of action against the defendants for their tortious misfeasance not justified in law, in their wrongful obstruction of the waters flowing from Sombra into Chatham, and not for damages arising from anything done by them under the authority of the by-law

mentioned in the action, or of the drainage clauses in the municipal Act, ch. 174 Revised Statutes of 1877, the Act in force at the time of the passing of the by-law, and that the costs incurred by the unfounded defence set up to so much of the action as averred that the defendants had never completed the drain as authorized by the by-law, and prayed that they should be decreed specifically to execute and complete the work in accordance with the original design, and with the plans and specifications adopted by the by-law whereby alone the design and purpose of the by-law could be accomplished, were incurred wholly by the wrongful and untrue defence urged by the defendants in answer to the just and reasonable demand in the plaintiff's statement of claim in that behalf. These matters having been so conclusively adjudicated upon, there remains to be considered the present action which at the time of its commencement appears to have been well founded in every particular, but the work having been completed after the commencement of the action but before it came down for trial, and the plaintiffs having abandoned all claim for damages subsequent to the former recovery, all that remains now to be considered is the question whether or not the defendants have the right in law which they claim to have, to repay themselves by the by-law provisionally passed on the 27th February, 1894, the amount recovered against them in the former action for damages and costs which amount has been paid by them, or the sum of $4,742.80 alleged in the by-law to be for necessary repairs, but which in point of fact if expended were expended by them in removing the nuisance wrongfully erected by them by the construction of an embankment which cut off all waters lawfully flowing from Sombra into Chatham without constructing

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

the drain designed by the by-law for the carrying off the waters so obstructed, which erection of the embankment in the manner aforesaid the judgment in the former action had conclusively determined to have been the wrongful act of the defendants, and which was not justified by any law.

The only question of fact involved in the present action is as to the sufficiency of the funds placed in the hands of the defendants for the construction of the drain by the contributors to the funds subscribed for that purpose, the plaintiffs alleging, and the defendants (notwithstanding the recitals in the provisional by-law that the drain had already been completed) denying, that the funds which had been provided for the construction of the drain and placed in the hands of the defendants were sufficient for the complete construction of the drain in accordance with the plan adopted by the by-law passed for its construction. Upon the issue joined between the parties upon this question the learned trial judge has found as matter of fact *that it was proved before him by the most conclusive evidence* that the amounts raised under the by-laws of October, 1881, and December, 1885, and placed in the hands of the defendants for the complete construction of the drain in accordance with the plan and specifications adopted by the by-law authorizing its construction were amply sufficient for that purpose. In effect he found that the deficiency, which the defendants alleged, arose wholly by the unjustifiable manner in which they, the defendants, had wasted those funds in the wrongful erection by them of the embankment obstructing the flow of waters from Sombra into Chatham without constructing the drain necessary to carry off the obstructed waters as designed by the plan and adopted by the by-law which alone authorized the construction of the embankment;

all of which wrongful conduct of the defendants had been the subject of and had been conclusively adjudicated upon in the former action. The correctness of the finding of the learned trial judge upon this matter of fact has not been called in question; we must therefore now regard it as a fact conclusively established that the amount placed in the hands of the defendants for the complete construction of the drain as authorized by the by-law passed for its construction was amply sufficient for that purpose, and that any deficiency, if any there was, arose by reason of the wrongful, wasteful, unjustifiable misappropriation by the defendants of the funds in a manner not authorized by the by-law or the statutes relating to the construction of drainage works, and the question becomes resolved into this, viz.: where a sum amply sufficient to complete the work as designed and authorized by the by-law for the complete construction of the drain was placed in the hands of the defendants to be applied by them in the construction of the drain and was wrongfully used and applied by them in a manner and for a purpose not authorized by the by-law which the defendants themselves had passed for the construction of the drain, whether the defendants can now by another by-law levy or cause to be levied from the persons who had contributed the sum so amply sufficient for the completion of the work a sum sufficient to reimburse to the defendants the amount supplied by them to replace the amount which they had so wrongfully wasted and misapplied.

The contention of the defendants is that they have by law such right, and the judgment of the Court of Appeal for Ontario has maintained such their contention. It is not contended that there is anything in support of this contention in chapter 174 R. S. O. of 1877, the Act in force at the time of the passing of the

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

by-law of October, 1881, in virtue of which that by-law purports to have been passed, but the contention is rested wholly upon section 31 of the Municipal Amendment Act of 1886 whereby section 592 of the Consolidated Municipal Amendment Act of 1883 was repealed and in substitution therefor it was enacted that:

> Where, *on account of proceedings taken under this Act or the Ontario Drainage Act* or other Acts respecting drainage work and local assessment therefor, damages are recovered against the corporation or parties constructing the drainage works; or other relief is given by any judgment or order of any court, or any award, *made under this Act*, all such damages, or any sum of money that may be required to enable the corporation to comply with any such judgment, order or award made in respect thereof shall be charged *pro ratâ* upon the lands and roads liable to assessment for such drainage works; provided always that if to enable the corporation to comply with any such judgment, order or award it shall be necessary or expedient to change the course of any drain or to make a new outlet, or otherwise improve or alter any drain or drainage works, the same shall for all purposes and in all respects be dealt with, and all works and operations in respect thereof shall be executed and performed as if the same were alterations and improvements within the meaning of section 586 of this Act and all provisions of this Act applying to or in respect of any work, alteration or improvement provided for by said section 586 shall apply to any work, alteration or improvement intended to be provided for by this section.

Now, whatever may have been the reasons for which the legislature made this alteration in the phraseology of this section 592, it is, I think, sufficient for the purposes of the present action to say, and I must say it appears to me to be very clear upon consideration of the frame of the former action and the proceedings and judgment therein as above detailed, that the damages and costs recovered therein were not damages which, within the meaning of the section so substituted by the Act of 1886, can be said to have been recovered *on account of proceedings taken under* any Act respecting drainage works, etc. Had the action been framed for the

purpose of recovering any such damages it could not, as already shown, and as appears by the extract taken from the judgments of the learned judges of the Court of Appeal for Ontario, have been maintained, but quite on the contrary the damages and costs recovered in that action were recovered *on account of acts done and proceedings taken* by the corporation defendants *in contravention of the by-law* which was the sole authority upon which they relied in support of their acts and proceedings, which acts and proceedings were of a nature plainly to constitute a nuisance causing to the plaintiffs the special injury of which they complained and were not justified by any act of the legislature; and the section cannot be construed so as to give to the corporation defendants power to indemnify themselves by assessing the property of persons injured by the nuisance for reimbursement of the damages recovered against the corporation for injuries occasioned by means of the nuisance.

It would have been quite sufficient for persons injured by the acts of the defendants which were the subject of the former action to have alleged in their statement of claim that the defendants had wrongfully obstructed the natural and lawful flow of the waters from Sombra into Chatham by erecting an embankment whereby all such waters were forced back and prevented from flowing in their natural and legal course and thereby caused the damages complained of. To an action so framed it is clear upon the evidence in the former action that the defendants could not have succeeded in establishing any justification under the section 592 or otherwise. The grounds of recovery in the former action were clearly the *tortious acts* of the defendants not justified by any law, and damages recovered upon such ground cannot be damages within the meaning of section 592 which the corporation can

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

recoup themselves for, by levying the amount under the provisions of that section. So neither, and for the like reason, can the relief granted by way of compelling the corporation to abate the nuisance of *their* creation by constructing the drain in accordance with the provisions of the by-law of October, 1881 without which drain they had no authority whatever to construct the embankment which obstructed the natural and legal flow of the waters from Sombra into Chatham, be said to have been relief given *on account of proceedings taken under any act of the legislature*; it was, on the contrary, relief given in the exercise of the ordinary jurisdiction of the courts to redress a wrong for committing which the defendants had no justification whatever in law.

The judgment in the former action being conclusive that the conduct of the defendants which constituted the ground of that action was wholly wrongful and unjustified by any law, nothing contained in that judgment can be held to come within the section 592 of the Act of 1886. It has been argued that the policy of the clauses of the Acts relating to drainage works is that the lands assessed under the by-law authorizing the construction of such works should bear and pay all charges attending the construction and maintenance of the works. That undoubtedly is so, as shown by the judgment of the Court of Appeal for Ontario in the former action, *in so far as all necessary expenses* are concerned and all expenses which are required to compensate parties injured by the works from causes consequential upon and incidental to the construction of this work in accordance with the by-law authorizing its construction, but neither the policy of the law nor the language of any Act goes any further, and in the present case the acts of the defendants which constituted the ground of the former action were acts

which were not authorized by such by-law but were in fact acts done in actual contravention of it and upon no principle of law can those who, as has been conclusively found by the learned trial judge in the present action, supplied the defendants with all the money necessary to complete the work as authorized by the by-law be charged with the damages, costs and liabilities incurred by the defendants as wholly consequential upon their own wrongful acts. Upon the whole, therefore, it appears to be established that the by-law provisionally passed on the 27th of February, 1894, cannot be supported as a by-law for making repairs, as it purports on its face to be, in a drain then already completed, nor consistently with the findings of the learned trial judge, upon the issues joined in the present action could any by-law be maintained under the clause of the Act authorizing the corporation defendants to raise a further sum as necessary to complete a work when a sufficient sum for that purpose had not been raised under a previous by-law passed for the purpose, so neither can it be supported, as already shown, as a by-law for reimbursing the defendants for damages and costs recovered against them in the former action for injuries occasioned by their own wrongful acts. Under these circumstances the judgment of the learned trial judge of the 7th August, 1895, with the exception of what is contained in the 2nd, 4th and 5th paragraphs of this judgment, must be restored. The account directed, no longer insisted upon as the issue upon the question whether the funds which had been placed in the hands of the defendants for the completion of the work in accordance with the original design adopted by the by-law authorizing the construction of the drain, was sufficient for that purpose, has been conclusively found in the affirmative, and the drain has been completed since

1897

THE TOWNSHIP OF SOMBRA v. THE TOWNSHIP OF CHATHAM.

Gwynne J.

the commencement of the present action. The appeal must therefore be allowed with costs in this court and in the Court of Appeal for Ontario, and the judgment of the learned trial judge varied as above indicated must be restored.

It was not argued in the former action that the by-law of October, 1881, was *ultra vires* of the municipality of the township of Chatham. From the frame of the statement of claim in that action it was not necessary for the plaintiffs to raise any question upon that point, for their contention was that, assuming the by-law to be, as they no doubt did assume it to be valid, the defendants of their own wrong and without the by-law having conferred any authority upon them to act as they did, committed the injuries complained of. The point was, however, casually referred to by Mr. Justice Osler in his judgment, but no question having been raised upon the point no judgment has been given upon it in any of the courts. It may be well, however, for the parties to consider whether in October, 1881, or at any time the municipality of the township of Chatham had jurisdiction to pass a by-law which, as plainly now appears upon the record in the present case, and upon the evidence, was not passed for the purpose of constructing a drain at any point within the township, nor for draining thereby any lands in Chatham, but for the construction of a drain wholly within the township of Sombra and with the earth excavated from such drain of erecting on the Chatham side of the highway between the townships an embankment for the purpose of thereby preventing any water flowing naturally or in an artificial channel, from flowing into Chatham from Sombra. It may be open to question whether the sections 594–5–6 and 7 of the Act of 1883, referred to by Mr. Justice Osler, gave any jurisdiction to the

municipality of Chatham to initiate for such a purpose the construction of a drain wholly within the limits of Sombra. It is to be noted that in the by-law of October, 1885, which was passed, as appears on its face, for the purpose of raising further funds as necessary for the completion of the work designed under the by-law of October, 1881, the lands and roads in Sombra assessed under this latter by-law were not charged with the funds required for the completion of the work in the manner provided by the drainage clauses of the Municipal Act, but that in lieu thereof an agreement appears to have been entered into between the councils of the respective municipalities as to the amount to be paid by the municipality of Sombra by way of contribution to the further amount required to complete the work. We think it right to draw the attention of the parties to these points without pronouncing any opinion much less judgment upon them, our judgment being rested upon the grounds which have been taken throughout the litigation involved in the case, that the plaintiffs are entitled to the relief granted even upon the assumption of the by-law of October, 1881, being valid.

*Appeal allowed with costs.*

Solicitors for the appellants: *Kittermaster & Gurd.*

Solicitors for the respondents: *Pegley & Sayer.*

1897

*June 3,4,5.
*Nov. 10.

*In re* FERGUSON.

ANNIE TURNER, MARGARET ANN GOODMAN AND MARY JANE WALSH (DEFENDANTS)... APPELLANTS;

AND

MARY ANN BENNETT (PLAINTIFF)...RESPONDENT;

AND

WILLIAM PURDY, CARRIE W. EGGLESTON, JANE H. EGGLESTON, FRANK PURDY EGGLESTON, EMILY BARNES, WILLIAM CHARLES BALL, EMERSON COATSWORTH, AND EMERSON COATSWORTH, JUNIOR, TRUSTEES OF THE LAST WILL AND TESTAMENT OF EDWARD FERGUSON, DECEASED (DEFENDANTS)..... RESPONDENTS.

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ANNIE TURNER (DEFENDANT).....APPELLANT;

AND

MARGARET JANE CARSON, MARY ANN BENNETT, EDWARD GALLEY, EMILY BARNES, AND WILLIAM JOHN BALL (DEFENDANTS)..... RESPONDENTS;

AND

EMERSON COATSWORTH AND EMERSON COATSWORTH THE YOUNGER (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Will, construction of—"Own right heirs"—Limited testamentary power of devisee—Conditional limitations—Vesting of estate.*

Under a devise to the testator's "own right heirs" the beneficiaries would be those who would have taken in the case of an intestacy

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1897

*In Re* FERGUSON.

TURNER *v.* BENNETT.

TURNER *v.* CARSON.

unless a contrary intention appears, and where there was a devise to the only daughter of the testator conditionally upon events which did not occur and, under the circumstances, could never happen, the fact of such a devise was not evidence of such contrary intention and the daughter inherited as the right heir of the testator.

APPEAL from a judgment of the Court of Appeal for Ontario (1) which reversed the judgments of the Chancellor upon the construction of the will in question in two actions entitled respectively *Coatsworth et al.* v. *Carson et al.* (2), and *Re Ferguson, Bennett* v. *Coatsworth* (3), for the construction of the will and administration of the estate of the late Edward Ferguson, deceased, which forms the subject of the controversy in this case.

The proceedings in this matter commenced by an order of the master in chambers on 3rd May, 1893, for the administration of the estate of the late Edward Ferguson, who died on the 9th January, 1874, having made his last will on 30th July, 1870, and leaving him surviving, his only child Jane" who died a spinster on the 1st January, 1892, and his widow who died on 1st February, 1893, without having re-married.

The testator had two sisters, Eliza Purdy, who predeceased him, and Jane Ball, who died in 1878. At the time of the death of his daughter there were nephews and nieces of the deceased testator alive, namely, three of the children of the late Jane Ball and a son and three grandchildren of his other sister, the late Eliza Purdy, besides a number of grandnephews and grandnieces on the side of the Ball family.

The testator by his will, after sundry special bequests, devised all his other real and personal property to executors to be held for the use of his wife and daughter jointly, so long as they both survived and

(1) 24 Ont. App. R. 61. (2) 24 O. R. 185.
(3) 25 O. R. 591.

1897

*In Re* FERGUSON.

TURNER v. BENNETT.

TURNER v. CARSON

his widow remained unmarried; and in the event of the widow remaining unmarried and surviving the daughter, for her use for life, and in case the daughter survived her mother then for the use of the daughter as her separate estate with power to dispose of the same by will in case she should marry; and he then directed that in case his daughter died without leaving issue "and without having made a will as aforesaid," that his trustees should (after the death of his widow, should she survive the daughter) sell all his estate real and personal and divide the same "equally" amongst his "own right heirs" who might prove relationship within a stated period.

An action, entitled *Coatsworth et al.* v. *Carson et al.* (1), was commenced in May, 1893, for the construction of the words "my own right heirs," in the will, and by the judgment therein the Chancellor held that these words signified such persons as would take real estate upon an intestacy and that the children of the heirs at law of the deceased were entitled to share *per stirpes*, and holding further that the testator's daughter was not empowered, by the clause in the will limiting her testamentary power, to devise the property in question, as she had predeceased the widow without issue. This judgment was amended on a petition presented by the appellants and thereupon the master-in-ordinary made his report. On an appeal therefrom, entitled *Re Ferguson, Bennett* v. *Coatsworth* (2), by some of the present respondents, the Chancellor held, having regard to his former judgment in *Coatsworth et al.* v. *Carson et al.*, that the "right heirs" were to be ascertained at the death of the testator's daughter, and that the whole estate was to be divided amongst them equally, share and share alike, and also that the expression *per stirpes* in the former judgment was im-

(1) 24 O. R. 185. (2) 25 O. R. 591.

providently used, due weight not having been given to the word "equally."

On appeal from this judgment the Court of Appeal for Ontario reversed both judgments of the Chancellor (1) and held that the testator's daughter was entitled to take as the "right heir" of the testator. From this latter judgment the present appeal is asserted.

The judgment appealed from, while reversing the Chancellor's decision, gave the appellants herein, who were respondents in the Court of Appeal, certain costs which were taxed and paid to the appellants out of moneys in court to the credit of the action.

*Macklem* on behalf of the respondents, moved to quash the appeal on the ground that the appellants by accepting payment of these costs had acted upon the judgment now under appeal and taken a benefit thereunder, and cited *Hayward* v. *Duff* (2); *Pearce* v. *Chaplin* (3); *Ball* v. *McCaffrey* (4); *International Wrecking Co.* v. *Lobb* (5); *Re Smart Infants* (6). After hearing counsel on both sides, the court reserved judgment until after the hearing upon the merits of the appeal.

*McCarthy* Q.C., *McCullough* Q.C. and *Lobb* for the appellants. If it is possible the court should give effect to the will as a whole; *Jodrell* v. *Seale* (7); *Leader* v. *Duffy* (8); and it is submitted that the scheme of the testator's will was to give certain lands to his daughter absolutely; to give his other property to his trustees to be held for the joint lives of his wife and daughter; if his wife married, one-third for his wife for life, and subject thereto for his daughter absolutely for life; if his wife did not

(1) 24 Ont. App. R. 61.
(2) 12 C. B. N. S. 364.
(3) 9 Q. B. 802.
(4) 20 Can. S. C. R. 319.
(5) 12 Ont. P. R. 207.
(6) 12 Ont. P. R. 635.
(7) 44 Ch. D. 590; [1891] A. C. 304.
(8) 13 App. Cas. 294.

1897

*In Re* FERGUSON.

TURNER *v.* BENNETT.

TURNER *v.* CARSON.

marry and survived the daughter, for his wife for life; after the death of his daughter without issue, for his wife for life; if his wife survived his daughter, and his daughter should leave issue, one-third for his wife for life, and at his wife's death all for his daughter's issue equally; if his daughter should survive his wife, all for his daughter absolutely; then (clause four) if his daughter should survive his wife, all for his daughter, and if she should marry a special power to her to make her will; and (clause five) if his wife survived his daughter and his daughter died without issue, (this event happened) or if his daughter survived his wife and died without issue, and without having made the will, his trustees should, (at the death of his wife, if she survived his daughter) sell and divide all equally among his "own right heirs" who proved relationship within six months from the death of his wife or daughter, whichever last took place.

The words "after the death of my wife if she survive my said daughter" can only apply to one event, the death of his daughter without issue before his wife, for his daughter might survive his wife and die without issue and, by clause four expressly, his daughter must survive his wife to be able to make a will. The ownership of the wife cannot apply if his daughter survives his wife. The first event may arise before his wife's death, but two events may arise after. The survivorship of the wife can only apply to the one event before his wife's death. If the daughter have issue and die before his wife, such issue take by his will; if she survive his wife, his daughter takes absolutely, and may then make her will. Nothing remained to be considered but the events:—What would happen if his wife survived his daughter and his daughter had died without issue; or if his daughter survived his wife and died without issue; and with-

1897

*In Re* FERGUSON.

TURNER *v.* BENNETT.

TURNER *v.* CARSON.

out having made the will spoken of? The testator directs that in these events his trustees shall sell all his estate. But his wife's life estate must be protected, therefore, the trustees can only sell after his wife's death if it should happen that she survived his daughter. *In re Wroe, Frith* v. *Wilson* (1); *Pond* v. *Bergh* (2).

Full effect must be given, too, to the words "as aforesaid," in the phrase "without having made a will as aforesaid." By clause three, the daughter takes if she survives his wife; clause four re-declares this and gives his daughter power then to make a will. Until clause five came to be drawn, the testator had not provided for the death of his daughter without issue before his wife. If his wife survived his daughter and his daughter died without issue she could not have made a will, for by clause five he provides for that event. The words "as aforesaid" point to the survivorship of the daughter, then her will, and if her will could only be made "as aforesaid" she had not a general power to dispose of the property by will unless she survived her mother. As far as they go, the trusts in *Lees* v. *Massey* (3) are identical with those in this will, but that will had no such context to control the last trust.

The testator could not mean to describe an only daughter as "my relations," and direct also the residue to be distributed among those relations; the words "my own right heirs who may prove their relationship" are equivalent to "my relations." *Jones* v. *Colbeck* (4).

Where the gift over is contained in the direction to pay and divide, the class is to be ascertained at the

(1) 74 L. T. 302.
(2) 10 Paige, N. Y. 140.
(3) 7 Jur. N. S. 534; 3 DeG. F. & J. 113.
(4) 8 Ves. 38.

1897

*In Re* FERGUSON.

TURNER v. BENNETT.

TURNER v. CARSON.

period of distribution. *In re Mervin, Mervin* v. *Crossman* (1); *In re Stevens, Clerk* v. *Stevens* (2).

The testator did not mean to die intestate; intestacy is not to be presumed, and his words "in case my daughter shall have died without issue," show that when his daughter and her issue can no longer take, his trustees are to find his own right heirs by proof of their relationship within six months *after the death* of his wife or daughter, whichever may last take place. *Wharton* v. *Barker* (3); *In re Rees, Williams* v. *Davies* (4); *Doe d. King* v. *Frost* (5); *In re Taylor, Taylor* v. *Ley* (6); *Pinder* v. *Pinder* (7); *Clark* v. *Hayne* (8).

As to right to give devisee power to make a will without husband's consent, see *Powell* v. *Boggis* (9).

As to the daughter inheriting under the last clause of the will, see *Bullock* v. *Downes* (10); *Thompson* v. *Smith* (11); *Wharton* v. *Baker* (3). It would go to the daughter without this clause and it was not intended for her benefit. *Long* v. *Blackall* (12).

*Mortimer Clark* Q.C. and *Macklem* for the respondents Carson, Bennett, Ball and Purdy, and the trustees and executors. The property goes to the daughter's representatives; it passed to her as property not specially disposed of by the will, or at least it passed to her as the right heir, and the clause in question contains an implied power to the daughter to dispose of the property by will, as she did. As to implication from use of words "right heirs" see *Humphreys* v. *Humphreys* (13). The devise to the daughter and on her death

(1) [1891] 3 Ch. 197.
(2) [1896] W. N. 24.
(3) 4 K. & J. 483.
(4) 44 Ch. D. 484.
(5) 3 B. & Ald. 546.
(6) 52 L. T. 210, 839.
(7) 28 Beav. 44.
(8) 42 Ch. D. 529.
(9) 35 Beav. 535.
(10) 9 H. L. Cas. 1.
(11) 23 Ont. App. R. 29; 27 Can. S. C. R. 628.
(12) 3 Ves. 486.
(13) L. R. 4 Eq. 475.

without issue then over implies that if she left issue they would take. *Houghton* v. *Bell* (1).

The fact of the daughter having devised the property by her will absolutely prevented the possibility of the occurrence of the events upon which the devise to the right heirs depended. Between the years 1859 to 1873, there was doubt as to a married woman's right to will property unless empowered by the instrument under which she acquired it. See Armour on Titles (2 ed.) pp. 314–315; *Re Weekes's Settlement* (2). This provision can only have the purpose of removing any disability by reason of marriage to dispose of the property by will, and the words "as aforesaid" in the last clause are there used to continue in that clause the removal of any such disability. This final clause therefore means "in case my daughter shall have died without having made a will, which I empower her to make notwithstanding her coverture, etc., etc." The only other words the testator could have intended the words "as aforesaid" to stand for would be the words "of all or any part of the said property," immediately following the word "will" in the fourth clause of the will. In this case the clause would read "in case my daughter shall have died without leaving issue her surviving and without having made a will of all or any part of the said property."

As to construction of devise see *Doe* v. *Lawson* (3); *Mortimore* v. *Mortimore* (4).

The law favours early vesting and since 1860 the rule in similar cases is that the property goes to those who were the testator's heirs or his heir at his death, and that immediately upon his death the estate vests in the heir notwithstanding any particular intervening limited estates, whether the same were in favour

(1) 23 Can. S. C. R. 498.
(2) [1897] 1 Ch. 289.
(3) 3 East 278.
(4) 4 App. Cas. 448.

1896

*In Re* FERGUSON.

TURNER v. BENNETT.

TURNER v. CARSON

of the heir or of any other person; *Bullock* v. *Downes* (1); and the rule applies although the tenant for life be the sole next of kin or one of the next of kin at the death of the testator and at the date of the will (2). The rule can only be overcome by a clear declaration that the heirs are to be ascertained at some future time to that of his death, which has not been done in this case. The fact of the testator having left a life estate or other limited estate to his heir on the determination of which the estate is to go to his heirs is not sufficient to take the case out of the general rule. The fact that, at the time his will is made and at his death, his heir is only one individual to whom he has given a life estate and on whose death the estate shall go to "his heirs" is not sufficient to deprive his sole heir under the ultimate devise of the fee. *Re Ford, Patten* v. *Sparks* (3); *Re Nash, Prall* v. *Beaven* (4); *Brabante* v. *Lalonde* (5); *Re Barber's Will* (6); *Wrightson* v. *McCauley* (7); Jarman on Wills, 8th ed., pp. 86 and 136; *Thompson* v. *Smith* (8); R. S. O. cap. 109, sec. 31; *Grundy* v. *Pinniger* (9); *Holloway* v. *Holloway* (10); *Tylee* v. *Deal* (11).

On a perusal of the whole will, it seems clear that the daughter takes everything subject to a life estate and it is only if his daughter dies childless and without having disposed of the property by will, that the property goes to the "right heirs." There is no benefit to any particular persons or intention to exclude any one by this last devise, but if all the limitations fail,

(1) 9 H. L. Cas. 1.
(2) Hawkins on Wills (2 ed.) pp. 99-100.
(3) 72 L. T. 5.
(4) 71 L. T. 5.
(5) 26 O. R. 379.
(6) 1 Sm. & Gif. 118.
(7) 14 M. & W. 214.
(8) 23 Ont. App. R. 29; 27 Can. S. C. R. 628.
(9) 14 Beav. 94.
(10) 5 Ves. 399.
(11) 19 Gr. 601.

1897

*In Re* FERGUSON.

TURNER v. BENNETT.

TURNER v. CARSON.

he allows the law to give the property to those who would be entitled if he had died intestate.

The property vested in the daughter at the time of his death; *Mays* v. *Carroll* (1); there is no other definite period indicated in the will, and there is no excuse for speculating as to any fictitious class of heirs to be ascertained at any other time. *Re Bradley*, *Brown* v. *Cottrell* (2); *Druitt* v. *Seaward* (3); *Clark* v. *Hayne* (4).

The ordinary legal meaning must be given to the words used in a will, and the court cannot speculate as to the testator's intention, but should construe the will according to the meaning of the words which the testator has actually used. *Houghton* v. *Bell* (5); *King* v. *Evans* (6); *Grey* v. *Pearson* (7).

*Hodgins* for the respondents, the trustees under the will of E. Ferguson and the executor of the will of Jane Ferguson submitted their rights to the court, and asked that provision should be made for their costs out of the estate in any event. Lewin on Trusts (9 ed.) pp. 381, 384, 390, 1121; *Bennet* v. *Going* (8); *Westcombe's Case* (9); *Eparte Stapleton* (10); *Westcott* v. *Culliford* (11) at page 274; *Reade* v. *Sparks* (12); *Rashleigh* v. *Master* at page 205 (13); *Moore* v. *Frowd* at page 49 (14); *Re Love*, *Hill* v. *Spurgeon* (15); *Re Medland* at page 492 (16); *Banque Franco-Egyptienne* v. *Grant* (17); *Nicholson* v. *Falkiner* a page 559 (8).

(1) 14 O. R. 699.
(2) 58 L. T. 631.
(3) 31 Ch. D. 234.
(4) 42 Ch. D. 529.
(5) 23 Can. S. C. R. 498.
(6) 24 Can. S. C. R. 356; 21 Ont. App. R. 519.
(7) 6 H. L. Cas. 61.
(8) 1 Moll. 525.
(9) 9 Ch. App. 553.
(10) 10 Ch. D. 586.
(11) 3 Hare 265.
(12) 1 Moll. 8, 11.
(13) 1 Ves. 201.
(14) 3 Mylne & Cr. 45.
(15) 29 Ch. D. 348.
(16) 41 Ch. D. 476.
(17) [1879] W. N. 165.

1897

*In Re* FERGUSON.

TURNER *v.* BENNETT.

TURNER *v.* CARSON.

Taschereau J.

TASCHEREAU J.—The motion made at the hearing to quash this appeal must be dismissed with costs as stated in the written judgment to be delivered by my brother Gwynne, and also for the reasons stated therein the appeal must be dismissed with costs.

GWYNNE J.—This appeal must be dismissed with costs. The case appears to be free from doubt. A testator devised his residuary, real and personal property, to his executors upon trust after payment of his debts, &c., to hold the same to the use of his wife and daughter Jane, jointly, as long as they should both live, and his wife remain unmarried, but if his wife should marry again during the daughter's life, then upon trust to pay the wife during her natural life one-third of the net income arising from the property so devised in trust and, subject to such provision for the wife, to the use of the daughter for her life as her separate estate. But in case the wife should not marry again during the lifetime of the daughter and should survive the daughter, then upon the death of the daughter without leaving issue her surviving, upon trust to hold the property to the use of the wife for life, but if the daughter should have died leaving issue her surviving then upon trust to hold one-half of the property to the use of the wife for life, and subject thereto to hold all the property so devised to the use of such issue in equal shares. And in case the daughter should survive the wife then upon trust to hold all the said property to the use of the daughter, her heirs and assigns forever as her separate estate. The will then contained a clause the precise object of a part of which it is difficult to perceive, seeing that it relates expressly to the case only of the daughter surviving her mother when the whole estate becomes vested in the daughter who would then have

no need for the power of making a will professed to be granted to her by the clause.

The clause is as follows :—

And I declare that the provision herein made for my said wife is in lieu of dower and all other claims upon my estate, real or personal, and that if she elects to take her dower in place of such provision she shall take nothing of my estate, real or personal, *and further that in the event of my daughter surviving my said wife,* in which case my property becomes hers, as aforesaid, *I empower her notwithstanding her coverture in case she shall marry* to dispose by will of the whole or any part of the said property.

Now by the above will it appears that the testator had provided for every possible contingency except one, namely, what disposition should be made of the capital of the residuary real and personal property, so devised in trust in the event of the daughter dying *without issue* in the lifetime of the wife; and a clause was inserted for no other apparent purpose than for providing for such a contingency, and it must, in my opinion, be construed as having been introduced for that purpose for without it the capital in the event which has happened must have passed to testator's daughter as his sole heiress and next of kin. It is as follows :—

I direct that in case my daughter shall have died *without leaving issue her surviving and without having made a will as aforesaid, my trustees shall after the death of my wife, if she survive my said daughter,* sell all my estate, real and personal, and divide the same equally *amongst my own right heirs* who may prove to the satisfaction of my said trustees their relationship within six months from the death of my wife or daughter, whichever may last take place.

Now, the contention of the appellants upon this clause is that, the words " without having made a will *as aforesaid* " must by force of the words *as aforesaid* be construed as relating to the clause professing to empower the daughter to make a will *in the event of her surviving her mother*, and to a will made in that event; but so construing the clause it is sufficient to

1897

*In Re* FERGUSON.

TURNER v. BENNETT.

TURNER v. CARSON.

Gwynne J.

say, that as that event has not happened the devise in the event of its happening can never take place. The only possible way to enable the devise over to take effect in the event of the daughter dying without issue in the lifetime of the mother, which is the event which has happened, is to construe the clause as providing for that event; that is to say, in case the daughter should die in the lifetime of the mother without leaving issue her surviving and without having made a will *as aforesaid*, that is as already provided in the case of her dying after the death of the mother, then over—but as this event has not happened either the devise over can never take effect, and it is quite unnecessary to inquire who would be the persons competent to take the testator's bounty under the clause if the event upon the happening of which the devise to them was to take effect had happened. In the events which have happened there can, I think, be no doubt that the devisees under the daughter's will take the whole.

It only remains to dispose of the costs of the motion to quash which was heard at the same time as the appeal, for having given judgment on the merits in the appeal, it is scarcely necessary to say that we think the reception by the appellants of the costs mentioned in the affidavits in support of the motion was in no way inconsistent with the appeal against the judgment upon the construction of the will. We give no counsel fee on opposing the motion, but simply order that the solicitor's costs in opposing the motion be set off against the respondents' costs on dismissal of the appeal.

SEDGEWICK J. concurred.

KING J.—The testator provides that in certain events which the appellants claim to have happened (but

which, upon their construction of the will, respondents do not admit to have happened) the property in question is to go to his "own right heirs." The question is, who are meant? The rule of law is that the expression "right heirs" or a similar term, means the heirs in the ordinary sense, namely, the person or persons who would be entitled to take at the testator's death in case of his dying intestate, unless the contrary sufficiently appears from the will, and the contrary does not sufficiently appear merely from the fact that by the will a prior particular estate is limited to a particular person, who presumably would, and in fact did, turn out to be the person filling the character of right heir. The law was so settled in *Bullock* v. *Downes* (1), and acted on in *Mortimore* v. *Mortimore* (2) and *Re Ford* (3), and recently in this court in *Thompson* v. *Smith* (4), the observations in which latter case are applicable to this case as well. The clause in question here is not indeed free from doubt, but upon the whole there does not appear in the will to be any sufficient indication that the words are used in a non-natural sense. It is consistent with what is expressed that the testator meant that, in certain contingencies, he would leave his property to those whom the law should deem his right heirs, be they whom they might. The observations of Bowen L. J. in *Re Rawlins's Trust* (5) are not inapplicable on the question of particular intent.

In the result I agree with Hagarty C.J.O., and also concur in his reasons.

GIROUARD J. agreed that the motion should be dismissed with costs as stated in the judgment of His

(1) 9 H. L. Cas. 1.
(2) 4 App. Cas. 448.
(3) 72 L. T. 5.
(4) 27 Can. S. C. R. 628.
(5) 45 Ch. D. 299.

1897

*In Re* FERGUSON.

TURNER *v.* BENNETT.

TURNER *v.* CARSON.

Girouard J.

Lordship Mr. Justice Gwynne, and that the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellants: *McCullough & Burns.*

Solicitor for the respondent, Wm. John Ball: *John Hoskin.*

Solicitors for the respondents, Bennett and Carson: *Mortimer, Clark & Gray.*

Solicitors for the respondents, Purdy and Eggleston: *Denison & Macklem.*

Solicitors for the respondents, Coatsworth and Galley: *McMurrich, Coatsworth & Hodgins.*

Solicitor for the respondents, Barnes and W. C. Ball: *J. R. L. Starr.*

CHARLES RIOU (DEFENDANT).....APPELLANT; 1897

AND *Oct. 5. *Dec. 9.

JULIEN RIOU (PLAINTIFF).....RESPONDENT.

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

*Deed—Construction of—Servitude—Roadway—User—Art.* 549 *C. C.*

In 1831 the owners of several contiguous farms purchased a roadway over adjacent lands to reach their cultivated fields beyond a steep mountain which crossed their properties, and by a clause inserted in the deed to which they all were parties they respectively agreed "to furnish roads upon their respective lands to go and come by the above purchased road for the cultivation of their lands, and that they would maintain these roads and make all necessary fences and gates at the common expense of themselves, their heirs and assigns." Prior to this deed and for some time afterwards the use of a road from the river front to a public highway at some distance farther back, had been tolerated by the plaintiff and his *auteurs*, across a portion of his farm which did not lie between the road so purchased over the spur of the mountain and the nearest point on the boundary of the defendant's land, but the latter claimed the right to continue to use the way. In an action (*négatoire*) to prohibit further use of the way:

*Held*, affirming the decision of the Court of Queen's Bench, that there was no title in writing sufficient to establish a servitude across the plaintiff's land over the roadway so permitted by mere tolerance; that the effect of the agreement between the purchasers was merely to establish servitudes across their respective lands so far as might be necessary to give each of the owners access to the road so purchased from the nearest practicable point of their respective lands across intervening properties of the others for the purpose of the cultivation of their lands beyond the mountain.

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*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1897

RIOU v. RIOU.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing the decision of the Court of Review (2), and restoring the judgment of the Superior Court, District of Kamouraska, which maintained the plaintiff's action with costs.

The plaintiff brought his action (*actio negatoria servitutis*) to prohibit the user of a roadway which the defendant claimed over certain of his lands by virtue of a title by deed and long usage, the plaintiff contending that the title claimed applied only to certain other lands and not to the particular strip of land in question in this case. In the trial court the action was maintained, but this judgment was reversed in the Court of Review by a majority of the judges, Larue J. dissenting. On appeal to the Court of Queen's Bench, the judgment of the Court of Review was reversed, the judgment of the trial court affirmed and the plaintiff's prayer granted with costs in all courts. From this decision the defendant appealed to the Supreme Court of Canada. A full statement of the case is given in the judgment of His Lordship Mr. Justice Gwynne now reported. A diagram of the lands affected by the dispute also appears in the judgment of His Lordship Mr Justice Girouard.

*Langelier* Q.C. (*Choquette* with him,) for the appellant. The conduct of the parties in permitting the user of the way shows the construction placed by them upon the deed, and that the intention was to establish the servitude. *The City of Quebec* v. *The North Shore Railway Co.* (3); *Les Président, etc., de la Commune de Berthier* v. *Denis* (4).

*Pelletier* Q.C. (*Riou* with him,) for the respondent. The strip of land in question was used at all times as a roadway by mere tolerance of the owner and was

(1) Q. B. 5 Q. B. 572.
(2) Q. R. 9 S. C. 144.
(3) 27 Can. S. C. R. 102.
(4) 27 Can. S. C. R. 147.

never affected by the agreement between the purchasers to furnish roadways to permit of passage round the mountain by the road purchased from Martial Riou. No title has been proved. Art. 549 C. C. The extent of servitude established by the deed was no greater than might be required to get round the foot of the mountain and back again over the lands contiguous to the mountain side and in rear of it. It cannot be aggravated. Arts. 541, 545, 558 C. C.; 8 Laurent no. 261, 263; 12 Demolombe 849, 854, 926; 40 Dal. Rep. Jur. "Servitude" nos. 910, 1002, 1159, 1204; 3 Aubry & Rau 93; 2 Toullier, Des Biens, nos. 602, 647, 648; 2 Marcadé no. 668 (1). The use by the former proprietor who had unity of possession gives no title, as he executed no writing specifying the nature, extent or situation of any servitude. Art. 551 C. C.; 44 Dal. Rep. Jur. "*Voirie, par terre*" nos. 145-7; 12 Demolombe no. 644.

TASCHEREAU J.—I concur with my brother Girouard and for the reasons stated by him I am of opinion that this appeal should be dismissed.

GWYNNE J.—The present action was instituted by the respondent against the appellant to have it declared that certain land of the respondent in the first concession of the parish of Trois Pistoles, in the province of Quebec, situate between an old road which was in existence prior to 1831 along the River St. Lawrence in front of the said concession, and a new road constructed and opened across the said concession in 1850 at the distance of about twelve and three-quarter arpents south of the said old road, and in substitution therefor, is not subject to a servitude in favour of certain land of the appellant in the same concession and parish giving a right to the appellant as claimed by

(1) Art. 702 C. N.

1897

RIOU
v.
RIOU.

Gwynne J.

him, of passing and repassing on foot and with carriages, &c. It is only to this land of the respondent situate between the said old road and the road constructed in 1850 that the present action relates.

The Superior Court maintained the contention of the plaintiff the now respondent, and rendered judgment in his favour. A majority of the Court of Review (Mr. Justice Larue dissenting) reversed that judgment and rendered judgment for the defendant; the Court of Queen's Bench in appeal unanimously reversed the judgment of the Court of Review and restored the judgment of the Superior Court, from which judgment the defendant in the action now appeals.

For some time prior to the year 1831, but for how long did not appear, Etienne Riou the great-grandfather of both the plaintiff and the defendant owned and occupied the lands now owned and occupied by the plaintiff and the defendant respectively, and also other adjoining lands. Upon which part of the tract owned by him he had his dwelling-house did not appear, but it would seem to have been, or at least probably was, on the land occupied now by the plaintiff for he had on that a farm road extending from the river bank in a southerly direction for the cultivation and enjoyment of his land. When Etienne Riou died did not appear. He had three sons named respectively Ignace, Germain and Julien, to each of whom the old man (whether by deed in his life time or by will did not appear) gave equal portions of his land. This must have taken place prior to 1831, for in that year they were in occupation of their several portions, that of Ignace being situate west of and adjoining to land owned and occupied then by one Martial Riou, that of Germain being situate west of and adjoining to the land of Ignace, and that of Julien west of and adjoining to the land of Germain. West of and adjoining to

the land of Julien was land occupied by one Herménégelde Boucher; whether he was or was not a relation of the brothers Riou did not appear. In and prior to 1831 the three brothers Riou and Herménégelde Boucher lived in houses on their respective lands built near the river, and Julien's brothers, Ignace and Germain, and Herménégelde Boucher, not in virtue of any title whatever, but by the mere permission of Julien, were allowed to use the road on his land for the purpose of thereby reaching the rear of their respective lands. The reason for this permission being granted by Julien, apart from relationship and a neighbourly disposition, appears to have been that, at about the distance of five or six arpents from the river, the lands rose to a considerable height forming a ridge which crossed all the lands, and that upon the lands of Julien alone had a road as yet been made to ascend that height, and it was argued upon behalf of the defendant that it was so made in consequence of the height being of much greater difficulty to ascend upon any of the lots than upon that of Julien, but the evidence does not support that contention. On the contrary there does not appear to have been any greater difficulty attending the making of a road to ascend the height on the land now owned by the defendant than there was on the land now occupied by the plaintiff. The question is only one of cost, which one of the plaintiff's witnesses, and one witness also of the defendant, places it at about $50, while another of defendant's witnesses places it at about twice that amount; but what the cost would really be, or what the motive of Julien was in giving such permission for the use of a road on his land, are matters of no importance, for it is not alleged or pretended on behalf of the defendant that his *auteurs* had any right whatever to use the road in question otherwise than by the favour and mere permission of

1897
RIOU
v.
RIOU.
Gwynne J.

Julien Riou (who was grandfather of the plaintiff), prior to the execution of a deed of the 10th May, 1831, in virtue of which the defendant now asserts title to the servitude on plaintiff's land, now claimed by him; and the simple question therefore before us, is as to the construction of that deed.

It will be convenient, however, to state here that at the distance of about eighteen arpents south of the old road there was a great mountain which crossed all the lands west of the land of Martial Riou, and extended over the line between the lands of Ignace and Martial into the land of Martial where it abruptly terminated. It was impossible to cross this mountain for farm purposes from the lands on its north side to the lands on its south side, so that the parties owning land on the north side could not cultivate the lands on the south side although their lots extended over the mountain to the distance of twenty arpents from the foot of the mountain on its south side. South also of the new road which was opened in 1850, there extended "*un petit rocher*," across the lands of Ignace and Germain which terminated abruptly on the lands of their brother Julien, just across the line between the lands of Germain and Julien.

Now, upon the 10th of May, 1831, by deed of that date, Martial Riou conveyed a strip of his land to Ignace, Germain and Julien Riou, and Heménégelde Boucher, their heirs and assigns, purchased by them for a road round the mountain from the line separating the land of Ignace from the land of Martial on the north side to the same line continued on the south side of the mountain. This deed contained a clause that:

> It has been expressly agreed between the purchasers that they shall furnish respectively roads upon their respective lands to go and come by the said above purchased road for the cultivation of their lands

and that they will maintain these roads and make all necessary fences and gates at the common expense of themselves, their heirs and assigns forever.

Now here it is observed that no particular locality or line for the roads upon the respective farms of the purchasers for the purpose of giving access to the road purchased from Martial is specified or indicated. The defendant however contends that this clause in the deed constituted a grant of a servitude imposed upon the land of Julien in favour of the lands of Ignace and Germain Riou and Herménégelde Boucher respectively, giving to them respectively and to their respective heirs and assigns forever, owners and occupiers of said lands, a right to pass and repass on foot and with carriages, &c., over the farm road so as aforesaid being on the land of Julien from the old public road in front on the bank of the river to and from all parts of their respective lands. This contention is not rested upon any express provision in the deed to that effect, but simply upon this, that as all the purchasers of the strip of land from Martial were living in 1831, when the deed was executed, on their lands abutting on the old public road in front, on the bank of the river, it must be assumed to have been intended that each should have access from his dwelling-house in front to all parts of his land above the height near the front for the culture of all his land, as well that lying north as that lying south of the mountain, and that it was but reasonable to hold that the road on Julien's place which all had been in the habit of using before the execution of the deed of May, 1831, should be continued to be used as formerly and should be the road to be furnished by Julien under the terms of the deed; but granting such an expectation to have been entertained, as there is not a word in the deed having any reference whatever to such previous user the use of the road after the exe-

1897

RIOU v. RIOU.

Gwynne J.

cution of the deed if continued must be attributed to the same origin as before, namely, the mere favour and permission of Julien and not to any other authority whatever, much less to a title sufficient to create a servitude within art. 549 C. C.

If this contention were well founded the servitude would still continue even though the respective purchasers of the road on Martial's land, or any of them, or their or any of their heirs or assigns, should sell to other parties the portions of their respective farms which lie south of the mountain; such a construction is in direct opposition to the express terms of the agreement in the deed which is relied upon as creating the servitude, for all that the agreement provides for is that each of the purchasers of the road from Martial shall have free access to such road from their respective farms across the intervening lands. This appears to me to be the plain natural construction of the language used. No place is stated in the deed where any of the purchasers shall enter on the land of his adjoining neighbour for the purpose of obtaining access to the purchased road round the mountain, but the natural construction of the deed is that each should enter from his own farm on to the road to be given on the land of his neighbour lying in the direction of the purchased road, not, as is contended by the defendant, that the purchasers of the road from Martial (whose lands lie east and west of Julien's land) and their respective heirs and assigns forever should have a common right of passing and repassing from the front of their respective farms, on to the old public road, on the river's bank, and to travel along such road, some more, some less than a quarter of a mile until they should reach the point where Julien's farm road entered upon such old public road and then travel up Julien's farm road to the point where he should enter upon Germain's

1897

LOU
v.
RIOU.

Gwynne J.

land on the way to the purchased road. There is no suggestion offered in the deed, or outside of it indeed, why such a servitude should be imposed upon Julien's land without any consideration given to him therefor, a servitude liable to be increased in the event of any of the parties to the deed, their heirs or assigns, dividing their respective farms, as has already been done in respect of Germain's farm, the west half of which is now owned by the defendant, and east half by one Prudent Belanger. The deed suggests no reason why each party should not enter from his own farm directly on to the roadway across his farm to be given by him under the provisions of the deed of May, 1831, to provide access for his adjoining neighbour to the west reaching the purchased road. The deed does not suggest any difficulty necessitating a different provision, nor in point of fact does there appear to have been any other than that attending the providing of a small sum of money which would be necessary in each case. There is nothing contained in the deed, nor has any reason been offered outside of it, which would justify the imposition of such a servitude upon Julien's land for the purpose of relieving the other parties to the deed from making farm roads through their own farms for the purpose of reaching the road across their farms to be given by them respectively under the deed of May, 1831, for the convenience of their next adjoining neighbour.

The plaintiff, however, appears to have always acted in the same liberal and neighbourly spirit as governed the acts of his *auteurs* in the old times, before the execution of the deed of May, 1831, by giving permission to his neighbours to use his farm road, and the defendant might still have enjoyed that privilege but for the abuse of it in which, in the estimation of the plaintiff, he has indulged in recent years. What the

1897

RIOU v. RIOU.

Gwynne J.

plaintiff is insisting upon now merely is that there is nothing in the deed of May, 1831, which would justify the construction that it converted a user which had previously been enjoyed as a mere favour by the permission of plaintiff's *auteurs* into a servitude imposed upon the plaintiff's land forever.

The new road opened in 1850 crossed the plaintiff's farm road near the place where the "*petit rocher*" terminates on the plaintiff's land just across the line which separates the land of the defendant from that of the plaintiff. Upon the road having been opened in 1850 the parties formerly residing near the river removed to the new road where they now reside, having built houses for themselves on the new road. The defendant's house is situate on the north side of the road and his farm buildings on the south side on the west half of the land formerly owned by Germain Riou. One Prudent Belanger resides on the east half of the same lot, upon which he has constructed a way for himself across the "*petit rocher*" to the road across the lot furnished for access by the plaintiff and the owner of Herménégelde Boucher's land to the purchased road. There is nothing to prevent the defendant making a similar roadway for himself upon his half of the Germain lot, but nevertheless the plaintiff's *auteurs* and he himself ever since 1850 have kept and maintained, on the land now the plaintiff's, a road leading from the public road of 1850 round the "*petit rocher*" to the road across the defendant's land on the south side of the "*petit rocher*," leading to the purchased road round the mountain; by this route the defendant has had and still has access to and from the road round the mountain, and this, as the plaintiff insists, affords complete compliance with all that under the agreement in the deed of 1831 he can be required to give even if the deed can be construed as relieving

the defendant from making on his own land communication with the road made across his land for giving access from the plaintiff's land to the purchased road; but as the present action relates only to the plaintiff's farm road, extending from the public road of 1850 in a northerly direction, wholly away from the purchased road, all that it is necessary to say is that as to this road the defendant has not by the deed of 1831 or otherwise acquired any servitude over the plaintiff's land and the judgment of the Court of Queen's Bench in appeal should therefore be affirmed and this appeal therefrom dismissed with costs.

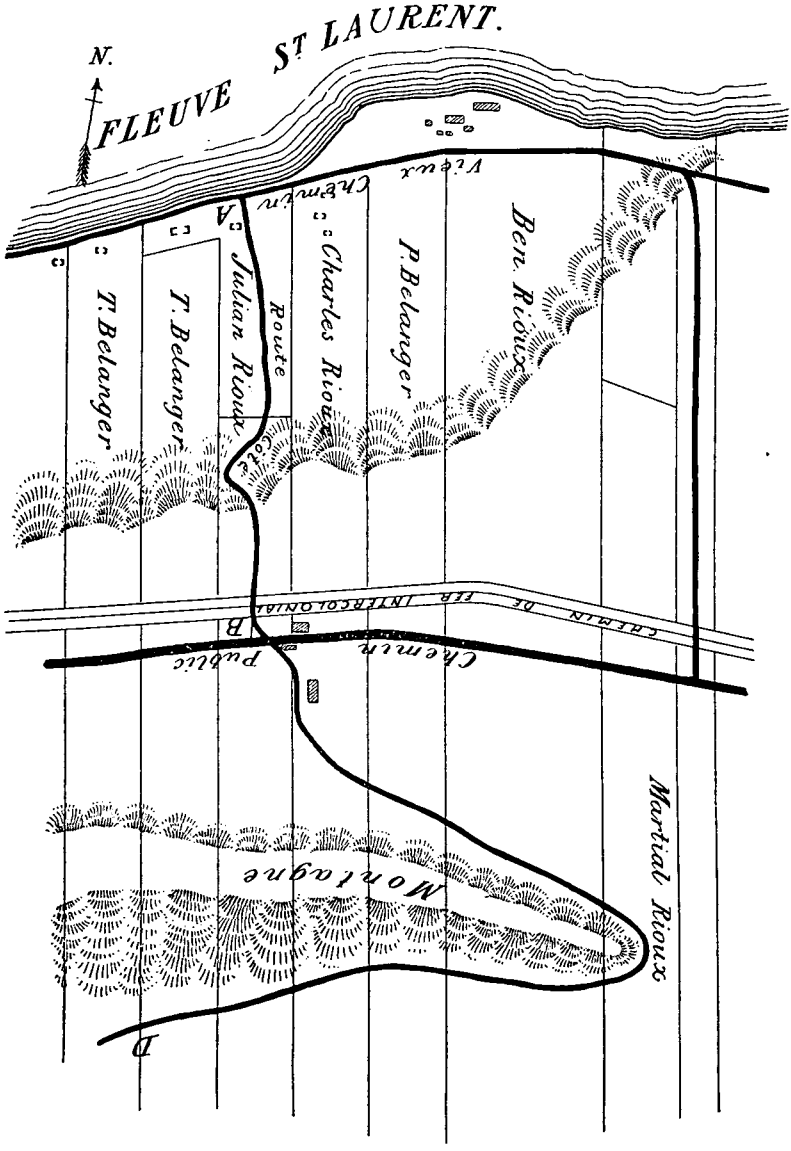
SEDGWICK and KING JJ. concurred.

GIROUARD J.—Le plan suivant explique la situation des lieux et sert considérablement à l'intelligence du litige entre les parties : (*Voir croquis, page* 64.)

Le demandeur, Julien Riou, nie au défendeur, Charles Riou, tout droit de passage entre le vieux chemin et le chemin public actuel. Le but du contrat de 1831 était d'assurer aux propriétaires qui y sont dénommés un accès à la partie de leurs terres qui se trouvait en arrière de la montagne au sud. Pour l'éviter, ils achètent un chemin de Martial Riou et puis il conviennent :

> Il a été expressément convenu entre les acquéreurs qu'ils se fourniront respectivement des chemins sur leurs terres respectives pour aller et venir par le dit chemin ci-dessus vendu pour la culture de leurs terres et qu'ils entretiendront ces chemins et feront toutes les clôtures et barrières nécessaires à frais communs entr'eux ainsi que leurs hoirs et ayants cause à perpétuité.

Cette convention est claire, et il n'est pas nécessaire d'examiner la conduite des parties pour en déterminer la portée ; le faire serait contredire, l'acte authentique. Or cette convention n'établit pas une servitude d'un chemin sur toutes les terres qui y sont indiquées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FLEUVE ST LAURENT.
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P. Belanger
Ben Rioux
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Montagne
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en faveur de toutes les parties intéressées "pour la culture de leurs terres." Ces chemins n'existent que "pour aller et venir au chemin ci-dessus vendu," c'est-à-dire, le chemin de Martial Riou. La convention ne permet pas, par exemple, à Charles Riou de monter sur la terre de Julien Riou pour se rendre au chemin acheté de Martial Riou; elle l'autorise simplement à passer sur la terre de P. Bélanger et de Benjamin Riou, en montant sur sa propre terre jusqu'à ce qu'il arrive au chemin de la Montagne, qui n'existe chez lui que pour son utilité et celle de T. Belanger et Julien Riou. Ce dernier ne lui conteste pas néanmoins le droit de passage au sud du chemin public actuel. Ce n'est qu'entre le vieux chemin et le chemin actuel au sud, qu'il lui nie cette servitude. Même lorsque Charles Riou et ses voisins avaient leurs résidences sur le vieux chemin, ils n'avaient pas le droit d'user de la terre de Julien Riou comme ils le faisaient à titre de pure tolérance et bon voisinage de la part de Julien Riou et de ses auteurs, auquel il peut mettre fin quand il lui plaît. A plus forte raison, doit-il en être ainsi, depuis qu'ils ont transporté leurs bâtisses et leurs résidences sur le chemin nouveau, près de l'Intercolonial. On ne peut pas certainement prétendre que quand Charles Riou se dirige vers l'ancien chemin, c'est "pour aller et venir par le dit chemin ci-dessus vendu," c'est-à-dire, le chemin de la Montagne. L'appel est renvoyé avec dépens.

*Appeal dismissed with costs.*

Solicitor for the appellant: *P. A. Choquette.*

Solicitor for the respondent: *S. C. Riou.*

1897

*Oct. 7.

*Dec. 9.

ALFRED DELORME (DEFENDANT).....APPELLANT;

AND

GUILLAUME CUSSON (PLAINTIFF).....RESPONDENT.

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

*Appeal—Jurisdiction—Title to land—Petitory action—Encroachment—Constructions under mistake of title—Good faith—Common error—Demolition of works—Right of accession—Indemnity—Res Judicata—Arts.* 412, 413, 429 *et seq.*, 1047, 1241 *C. C.*

An action to revendicate a strip of land upon which an encroachment was admitted to have taken place by the erection of a building extending beyond the boundary line, and for the demolition and removal of the walls and the eviction of the defendant, involves questions relating to a title to land, independently of the controversy as to bare ownership, and is appealable to the Supreme Court of Canada under the provisions of the Supreme and Exchequer Courts Act.

Where, as the result of a mutual error respecting the division line, a proprietor had in good faith and with the knowledge and consent of the owner of the adjoining lot, erected valuable buildings upon his own property and it afterwards appeared that his walls encroached slightly upon his neighbour's land, he cannot be compelled to demolish the walls which extend beyond the true boundary or be evicted from the strip of land they occupy, but should be allowed to retain it upon payment of reasonable indemnity.

In an action for revendication under the circumstances above mentioned, the judgment previously rendered in an action *en bornage* between the same parties cannot be set up as *res judicata* against the defendant's claim to be allowed to retain the ground encroached upon by paying reasonable indemnity, as the objects and causes of the two actions were different.

An owner of land need not have the division lines between his property and contiguous lots of land established by regular *bornage*

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*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1897

DELORME v. CUSSON.

before commencing to build thereon when there is an existing line of separation which has been recognized as the boundary.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing the judgment of the Superior Court, District of Montreal (2), which dismissed the plaintiff's action with costs.

A statement of the facts and questions at issue in this case will be found in the judgment of His Lordship Mr. Justice Girouard now reported. At the hearing of the appeal a motion was made on behalf of the respondent to quash the appeal on the ground that the action was merely possessory in its nature and did not involve any question as to title to lands so as to bring it within the appellate jurisdiction of the Supreme Court of Canada. Judgment on the motion was reserved and counsel were directed to proceed with the argument on the merits.

*Geoffrion* Q.C. for the appellant. The whole question is whether or not the appellant is a trespasser, or whether or not, after having erected his building on the present site with the consent of his neighbour, he can be ordered to demolish the walls when the common error is discovered. The building was erected with the consent of the proprietor (3), and two *fins de non recevoir* (estoppel) can be opposed by the trespasser who was in good faith; if the proprietor gave his consent knowingly, he has no action so long as the building exists; if he consented by error, the encroacher is bound to indemnify his losing neighbour to the extent of the value of the land encroached upon and of the depreciation of the remaining property. The neighbour cannot ask for the

(1) Q. R. 6 Q. B. 202. (2) Q. R. 10 S. C. 329.
(3) [Compare *Liggins* v. *Inge*] 7 Bing. 682.

1897

DELORME v. CUSSON.

removal of the walls when he discovers his error, but only for the indemnity. The builder cannot be punished for imprudence, for he had the consent of his neighbour; the latter was equally imprudent when he gave his consent; the builder is negligent, only when he builds on a line selected and determined by himself alone, and without consulting his neighbour.

See in support the above contentions: 9 Demolombe, no. 691 *ter et seq.*; 38 Dal. Rep. Jur. "Propriété," no. 452; *Grandbarbe de Rigoulène* v. *Phalippont* (1); Baudry-Lacantinerie, Des Biens, nos. 372, 377; *Carr* v. *London and North-Western Ry. Co.* (2) at page 749; *Sheridan* v. *Barrett* (3); *Somersetshire Coal Canal Co.* v. *Harcourt* (4).

The argument as to *res judicata* has nothing to support it, for the two actions seek different ends and involve different questions. The *bornage* was necessary in the first place to ascertain whether error actually existed as to the boundary, or if the acknowledged line formed by fences, sheds and so forth was correct as formerly supposed; *Martin* v. *Jones* (5). The error being ascertained the defendant is now entitled to set up all pleas and exceptions for the defence of his rights placed for the first time in jeopardy. *Grassett* v. *Carter* (6) applies inversely here; the defendant is not estopped but was kept in error and deceived by the plaintiff's conduct. Compare remarks of Taschereau J. at page 345, in *Joyce* v. *Hart* (7).

As to the question of jurisdiction, the action seeks to destroy a servitude or a modified title to real property, and questions the defendant's right to the accession of the land on which he was permitted to build his wall in good faith, whilst he was in undis-

(1) Dal. 1891-1-182.
(2) 23 W. R. 747.
(3) 4 L. R. Ir. 223.
(4) 2 DeG. & J. 596.
(5) 15 L. C. Jur. 6.
(6) 10 Can. S. C. R. 105.
(7) 1 Can. S. C. R. 321.

puted possession (1). The land thus used became the property of the builder of the wall subject to payment of reasonable indemnity (2). The buildings of which the demolition is sought are themselves immoveable property and they and the land are incorporated together (3). This controversy consequently involves a title to real estate.

*Fortin* for the respondent. There is no issue in this case affecting the title to the land. The defendant admits our title and the action involves only the right of possession and the demolition of the works constructed; *Wineberg* v. *Hampson* (4); *The Emerald Phosphate Co.* v. *The Anglo-Continental Guano Works* (5). The appellant has proved no title and is merely a trespasser. There is no right of eminent domain vested in private individuals (6). It would be against all principles of the law of ownership to allow the respondent to retain this property upon payment merely of its proportionate value.

It is true that he commenced to build in good faith and believed at that time that the buildings were on the division line, but the evidence does not show that he accepted such line as the division line. It was incumbent upon him to ascertain the true division line before commencing to build. Moreover, if the appellant had acquired any rights to the property he should have urged them in the action *en bornage*, before the homologation of the report of the land surveyor and the judgment in that case is now *res judicata* and bars his claims.

In the judgment of the trial court the learned judge considered the extent of land as being insignificant and applied the maxim "*de minimis non curat lex.*"

(1) Arts. 417, 1047 C. C.
(2) Arts. 435, 436 C. C.
(3) Art. 413 C. C.
(4) 19 Can. S. C. R. 369.
(5) 21 Can. S. C. R. 422.
(6) Art. 407 C. C.

1897

DELORME v. CUSSON.

Taschereau J.

Seventeen inches of land in a city may have a great value. The learned judge reached that conclusion by taking into consideration the nine inches of land that each neighbour is bound to furnish for the construction of a common wall. But the wall in question is not a common wall, and consequently the respondent was not bound to furnish one inch of his land. In addition to the authorities cited in the judgment appealed from we add the following:—*Hellot* v. *Leclerc-Morlet* (1); *Oursel* v. *Delaroche* (2); *Joyce* v. *Hart* (3); *Kough* v. *Nolin* (4).

TASCHEREAU J.—J'ai éprouvé beaucoup de difficulté a en venir à une conclusion dans cette cause, et je suis encore loin d'être sûr que l'appelant doive réussir. Il me serait inutile cependant de retarder le jugement, ou d'entrer un dissentiment. Je concours, *dubitante.*

The judgment of the court was delivered by:

GIROUARD J.—L'appelant et l'intimé sont propriétaires d'emplacements contigüs, situés sur la rue Visitation de la cité de Montréal, qui, jusqu'à l'année 1890, étaient la propriété de M. St.-Jean, leur auteur commun. L'intimé acquit le premier et avait sa résidence, le siège de ses affaires et un clos de bois sur son lot; l'appelant n'avait qu'un locataire dans une vieille maison sur le sien. En juin 1894, il ouvrit une rue sur son terrain, qu'il appela l'avenue Delorme, et se décida à démolir les anciens bâtiments et à bâtir un pâté de logements en briques, plaçant l'arrière-mur le long de la ligne séparative. Il s'agit de savoir si le propriétaire qui, en bâtissant, empiète de bonne foi sur le fonds de son voisin, au su et au vu de ce dernier, sans protestation de sa part, et même avec son consen-

(1) S. V. 1822-24, 1, 234.
(2) S. V. 41, 1, 836.
(3) 1 Can. S. C. R. 321.
(4) Q. R. 5 Q. B. 206.

tement, mais par suite d'une erreur commune sur la véritable ligne de division, peut être forcé à démolir et enlever ses constructions. Il faut bien remarquer que le consentement du voisin n'est pas seulement tacite comme résultant de sa présence sur les lieux et de son défaut de protestation, lorsque les constructions ont été commencées et faites, mais il est formel et exprès à raison des dires et gestes des parties. L'architecte Simard rédigea même un écrit de leur entente qu'il leur proposa de signer, mais l'intimé et l'appelant ont tous deux répondu que cette formalité n'était pas nécessaire, "vu que la ligne était là." Il existait en effet une vieille ligne—consistant en une clôture et une vieille boutique—qui fut acceptée par les parties au moins pour les fins de l'érection des constructions de l'appelant comme la véritable ligne de division—l'intimé aidant même à l'enlever bien que sur son terrain (ainsi qu'il l'apprit plus tard), pour faire place aux nouvelles constructions. C'est dans cette vieille ligne qu'elles ont été élevées apparemment sur le terrain de l'appelant et sans mitoyenneté.

Ce n'est qu'en juillet 1894, après que les logements furent presque parachevés à l'extérieur (le mur de briques le long de la ligne de division l'était certainement), que l'intimé découvrit qu'il était dans l'erreur d'au moins dix pouces; il ne demanda pas alors à l'appelant de démolir ses constructions; jusqu'ici, il avait été avec lui dans les meilleurs rapports de voisinage; il se contenta de lui communiquer sa découverte sans protester. L'appelant lui proposa de l'indemniser en lui donnant cinq pouces de terrain sur la devanture de son emplacement, sur lesquels ils n'avait pas bâti, formant trois cents quinze pieds de terre valant environ 70 centins le pied, ou en tout $220; en réalité c'était huit pouces de large sur soixante-trois pieds que l'appelant avait

1897

DELORME v. CUSSON.

Girouard J.

laissés. L'intimé accueillit la proposition de l'appelant comme suit :

R. Je n'ai rien dit là-dessus. J'ai dit : si vous faites toutes les réparations que vous devez faire, on verra cela. Il devait faire son pignon de maison sur le mien et la cheminée à la hauteur de la loi et me laisser les cinq pouces. Mais après avoir bâti la maison en avant, il n'a rien fait. Alors je lui ai dit : donnez-moi mon terrain.

Il paraît que l'intimé aurait même fait signifier un protêt notarié ; mais à quelle date et quelle fut sa teneur ? Impossible de le dire. Le protêt n'est pas produit. Il paraît qu'il contient des admissions que l'intimé a plus tard désavouées. C'est ce qu'affirme le témoin Lacroix.

Ce n'est que l'année suivante, le 18 juin 1895, lorsque la bâtisse était finie, qu'il fait constater contradictoirement son erreur par un arpenteur, dans une action en bornage, sans cependant alléguer l'empiètement et sans prendre de conclusions en éviction. Ce n'est que du jour de l'institution de cette action que la bonne foi du défendeur a pu cesser d'exister ; art. 412 C. C. différent du Code Napoléon, art. 550.

Le terrain de l'intimé avait été anticipé de dix-sept pouces à sa profondeur sur une longueur en rétrécissant jusqu'à rien de soixante pieds le long de la ligne de division, formant quarante-deux pieds de terre en superficie, valant 30 centins le pied ou en tout $12.60. Sur le reste de la ligne, savoir, soixante-trois pieds de long, l'appelant se trouvait avoir bâti sur son terrain à environ huit pouces de la ligne, sur lesquels se trouvait la vieille maison en bois de l'intimé.

L'appelant n'a pas plaidé à l'encontre de la demande en bornage. L'on prétend que ce bornage forme chose jugée de la présente demande, aux termes de l'article 1241 du Code Civil. Mais les deux demandes n'ont pas le même objet. L'une est en bornage et l'autre au pétitoire et en démolition de constructions élevées sur

le terrain d'autrui. D'ailleurs les deux actions n'ont pas la même cause ; l'une est fondée sur les titres des parties et l'autre sur leur erreur commune et sur des faits étrangers à ces titres. Si l'intimé eût voulu établir chose jugée, il lui était facile de prendre des conclusions en éviction. Il ne l'a pas fait, parce qu'il n'y songeait pas encore sérieusement.

Ce n'est que près de deux mois après ce bornage, que l'intimé, par ses avocats, fit sommer l'appelant de démolir et enlever ses constructions, conformément au bornage; il s'y était lui-même conformé, en reculant volontairement sa maison. L'appelant ne fit rien ; l'intimé demandait $300 à $400 pour le terrain empiété. Le 16 septembre 1895, sans offrir aucune indemnité, et sans demander à se faire relever de son erreur, l'intimé intenta une action pétitoire pure et simple, car il était trop tard pour procéder au possessoire. La Cour Supérieure a jugé que dans les circonstances, l'intimé n'avait droit qu'à la valeur de son terrain et renvoya l'action, réservant le recours en dommages. La Cour d'Appel décida que ni la bonne foi de l'appelant, ni l'erreur commune des parties ne le justifiait de construire sans s'assurer de la véritable ligne de division entre les deux héritages. Il appelle de ce jugement à cette cour.

Le juge en chef Lacoste, qui a rendu le jugement de la Cour d'Appel, constate que tout s'est fait à la connaissance de l'intimé, qui croyait réellement dans le temps que l'appelant bâtissait dans la ligne même. Non seulement c'était la croyance de l'intimé, c'était aussi celle de l'appelant et c'est l'intimé qui nous le dit dans son témoignage :

Q. Et en arrière, vous étiez tous les deux sous l'impression que les bâtiments étaient construits dans la ligne ? R. Oui.

Comment concilier avec cette preuve le motif du jugement de la Cour d'Appel que l'intimé n'avait pas

1897

DELORME v. CUSSON.

Girouard J.

accepté la dite ligne? La ligne fut acceptée dans le temps, mais par erreur; elle n'était pas conventionnelle en ce sens qu'elle liait les parties et délimitait les deux héritages à toujours; elle ne fut acceptée que pour les fins de l'érection des constructions nouvelles. C'était une fausse ligne, selon les titres des parties. Voilà la source de tout le trouble.

Ajoutons que dans toute cette affaire, l'appelant, plus ou moins ignorant de la ligne de division, paraît s'en être entièrement rapporté à l'intimé, qui paraissait familier avec les lieux, et disait en avoir même l'arpentage, du moins à l'égard du départ de la ligne à la devanture de leurs immeubles sur la rue Visitation.

L'équité est évidemment en faveur de l'appelant.

Pothier (1), parlant de l'accession, dit que si la chose principale est presque de nulle valeur en comparaison du prix de la chose accessoire, c'est la chose accessoire qui doit l'emporter, à la charge de payer la valeur de la chose principale. Dans la présente cause, le terrain empiété avait une valeur insignifiante comparée à celle des constructions élevées sur ce terrain. Pothier ne dit pas si cette règle s'applique seulement à l'union des choses mobilières; il le laisse cependant entendre, puisque les exemples qu'il en donne sont de biens de cette nature; et telle est d'ailleurs l'opinion générale. (Dalloz, Propriété, n. 398; 6 Laurent, n. 252; C. C. art. 429 et suiv.) Quant aux immeubles, le possesseur se trouvait en face de l'article 187 de la Coutume de Paris, reproduit aux articles 413 et suivants du Code Civil:

Qui a le sol a le dessus et le dessous, s'il n'y a titre au contraire.

Disons de suite que le droit Romain protégeait la bonne foi du possesseur qui bâtissait sur le fonds d'autrui. Il ne pouvait en être évincé sans indemnité (2).

Cette règle paraît être fondée même sur le droit naturel. Selon Grotius et Puffendorf, la bonne foi du pos-

(1) Propriété, n. 173.

(2) Inst. liv. 2, tit. 1er, l. 30.

sesseur lui tient lieu de propriété (1). Barbeyrac ajoute en note :

Ainsi, quels que puissent être les réglemens des lois civiles, je crois qu'à ne considérer que le droit naturel, dans toute cette matière, la bonne foi produit le même effet en faveur du possesseur, que la propriété réelle, comme les jurisconsultes Romains l'établissent eux-mêmes (2).

C'est l'application de ce principe que l'on trouve aux articles 411 et 417 du Code Civil, qui déclarent que le possesseur de bonne foi fait les fruits siens et a droit à la valeur de ses impenses et améliorations.

Nous croyons le jugement de la Cour d'Appel contraire à l'esprit et au texte même du Code Civil.

Un bornage régulier n'est pas requis pour qu'un propriétaire puisse bâtir ; il suffit qu'une ligne séparative existe ou qu'un alignement soit donné par les deux voisins. Voir Guyot, v° Alignement ; Desgodets, p. 67 ; Code Perrin—Rendu, n. 83, 513 ; Bugnet, n. 75, 80-82 ; Vasserot, p. 128 ; *Levesque* v. *McCready* (3).

Il n'est pas question non plus que l'appelant garde la propriété de l'intimé, " non payant la valeur," ainsi que la Cour d'Appel le déclare dans un de ses considérants. L'appelant offre dans son plaidoyer de payer cette valeur.

Il ne s'agit pas encore de savoir si un propriétaire peut être forcé de céder sa propriété, excepté pour des causes d'utilité publique. L'intimé n'a pas été dépouillé ; il s'est dépossédé lui-même, par erreur si l'on veut ; mais le fait n'est pas moins vrai que, sous l'effet de cette erreur, il a laissé son voisin se mettre de bonne foi en possession d'une partie de son terrain et y bâtir. Son consentement étant entaché d'erreur, il n'a pas perdu son droit de propriété, mais ne doit-il pas souffrir le tort que cette erreur de sa part a causé ? Sans doute, il ne doit pas être permis au voisin, même de bonne foi et victime d'une erreur commune, de s'enri-

(1) Puffendorf, liv. 4, ch. 13. (2) T. 1er, p. 609.
(3) 21 L. C. Jur. 70.

1897

DELORME v. CUSSON.

Girouard J.

chir aux dépens d'autrui ; il devra indemniser le propriétaire en lui payant la valeur de son terrain et même il devra souffrir l'éviction, si offre lui est faite de lui payer le dommage que cette erreur lui a causé, dommage que nous n'avons pas à définir, puisque l'intimé ne lui fait aucune offre, et demande simplement l'enlèvement des travaux. Ces obligations ne sont que la conséquence rigoureuse de l'article 1053 du Code Civil.

Elles résultent aussi de l'article 1047, qui s'applique aux immeubles comme aux meubles. On lit à la page 97 des Instructions faciles sur les Conventions, au sujet de l'erreur de fait :

Le juge doit observer l'état où les choses sont ; si on avait déjà agi en conséquence de cet acte ; si la rescision faisait tort à d'autres, le juge ne pourrait l'accorder.

Domat observe que la condition de celui qui reçoit par erreur

doit être le même que s'il avait été le maître de la chose (1).

"La découverte de l'erreur commune aux deux parties, dit Toullier,

ne peut avoir d'effet rétroactif, annuler ce qui a précédé, ni donner lieu contre lui à d'autre action qu'à la restitution de ce dont il s'est enrichi (2).

Marcadé :

Alors même que l'erreur sera constante, l'autre partie pourra toujours, en vertu des art. 1382 et 1383 (3), se faire indemniser du tort qu'elle éprouve (4).

Demolombe :

Le contrat sera rescindable, sauf bien entendu, l'obligation à la charge de la partie qui aurait commis cette erreur, d'indemniser l'autre partie du préjudice qu'elle aurait pu lui causer ; ce qui est un principe général dans cette matière (5).

Demolombe réfère à Pothier, No 19 ; 2 Larombière art. 1110 *n.* 13. A cette endroit Larombière remarque que

la bonne foi doit être indemnisée par l'erreur.

(1) Liv. 2, tit. 7, sect. 3, n. 2.
(2) Vol. 11, p. 120.
(3) Art. 1053 C. C.
(4) Vol. 4, p. 369.
(5) Vol. 24, n. 111.

Dumoulin et Pothier enseignent également que le créancier qui a reçu de bonne foi, par suite d'une erreur, n'est sujet à rendre, qu'en autant qu'il n'en souffrira aucun préjudice et qu'il sera remis au même état où il était avant de recevoir. C'est pourquoi, ajoute Pothier, la répétition n'a lieu que jusqu'à concurrence de ce qu'il en a profité (1).

Il est douteux qu'il soit possible de trouver un seul auteur qui enseigne que celui qui, par erreur, cause du tort à autrui n'est pas tenu à le réparer.

On dit que l'intimé n'a pas été seul à causer ce préjudice; l'appelant y a aussi contribué en partageant cette erreur. Pour cette raison, ce dernier ne pourra garder le terrain sans indemniser le premier, qui de son côté ne pourra démolir ou faire démolir les constructions sans en payer la valeur. Voilà la conséquence rigoureuse de leur erreur commune.

Sans cette erreur, l'intimé aurait été lié sans espérance d'indemnité même jusqu'à concurrence de la valeur de son terrain, du moins tant que les constructions dureront. L'erreur rend ce consentement non pas nul de plein droit, mais simplement annulable (2). Or l'intimé ne demande pas à être relevé de cette erreur, qui n'est pas même suggérée dans sa déclaration. Le consentement pur et simple lui est donc opposable; mais comme l'appelant allègue cette erreur dans sa défense et en conséquence offre de l'indemniser, il n'est que juste que l'intimé ait le bénéfice de cette offre.

On cite Aubry et Rau, Dalloz et Laurent contre les prétentions de l'appelant, mais ces commentateurs ne supposent pas le cas de l'erreur commune des deux propriétaires au sujet de la ligne de division: tous ne discutent que celui de la simple bonne foi du propriétaire qui a anticipé sur son voisin, sans considérer la

(1) Obl. n. 256. (2) C. C., art. 1000.

1897

DELORME v. CUSSON.

Girouard J.

conduite de ce dernier. Les deux cas ne sont pas identiques; ils sont cependant assimilés en droit.

Domat, liv. 3, tit. 5, s. 3 n. 5 éd. Remy (1), nous dit que

la bonne foi d'un possesseur a cet effet, qu'il peut se considérer comme étant le maître; et cet état qu'il a droit de prendre pour la vérité, doit lui en tenir lieu.

Voir aussi page 206. Pothier, Propriété, n. 337, 341, enseigne la même chose, invoquant la maxime: *Bona fides tantum dem possidenti præstat quantum veritas.* Le possesseur de bonne boi a donc le droit de bâtir et, par conséquent, de garder son bâtiment, ou au moins d'en avoir la valeur avant de déguerpir. Voilà le droit commun Français et aussi le droit Romain et le droit naturel, ainsi que nous l'avons vu

Les commentateurs du Code Napoléon ne sont pas d'accord sur le point de savoir si l'article 555 s'applique au cas de l'empiètement d'un propriétaire de bonne foi, qui bâtit à l'insu de son voisin. Il n'a alors que sa bonne foi et sa possession à invoquer. Cela suffit-il? Maleville, Demolombe (2), Baudry-Lacantinerie et le Code Perrin-Rendu, n. 3962, enseignent l'affirmative. On oppose Aubry et Rau, Dalloz et Laurent.

Pour ce qui est des compilations publiées sous le nom de Dalloz, les deux opinions y trouvent des défenseurs une de cet éminent jurisconsulte favorable à l'appelant, dans le Répertoire (3), et un autre de ses continuateurs, MM. Griolet et Vergé, au Supplément (4), qui lui est contraire. Encore ces derniers observent-ils que

le propriétaire ne pourrait exiger la démolition dans le cas où il aurait autorisé la construction soit expressément, soit tacitement.

Laurent soutient que l'article 555

suppose qu'une construction a été faite en entier sur un fonds possédé par un tiers détenteur.... il suppose un tiers possesseur, et non un propriétaire qui empiète sur le terrain du voisin en construisant (5).

(1) Vol. 2, p. 132.
(2) Vol. 9, p. 691 ter.
(3) Propriété, nn. 450 et 451.
(4) Propriété, n. 203.
(5) Vol. 6, n. 143.

1897

DELORME v. CUSSON.

Girouard J.

Mais ce propriétaire n'est qu'un tiers possesseur quant au terrain anticipé. Pourqui faire une distinction entre la possession d'une partie du terrain et celle de la totalité lorsque le code n'en fait pas? Ce serait bien le cas de dire: Plus le tort est considérable, plus la protection de la loi est grande.

Maleville, vol. 2, p. 34 dit:

Celui qui a anticipé sans opposition sur le fonds d'autrui, doit en être quitte en payant la valeur du sol et les dommages-intérêts dûs au propriétaire.

Beaudry-Lacantinerie répond à Aubry et Rau:

Quelles que soient l'imprudence et la négligeuce de celui qui bâtit sans faire opérer un bornage préalable, il est cependant de bonne foi, s'il croit être propriétaire jusqu'à la limite des constructions élevées par lui (1).

Il ajoute:

Il faut supposer que l'empiètement n'a pas été commis avec le consentement exprès ou tacite du voisin, ce qui supprimerait toute difficulté.

Puis il renvoie au n° 372, où il dit:

L'art. 555 statue en vue de constructions faites à l'insu du propriétaire du terrain. Si les constructions ont été faites à sa connaissance et surtout avec son autorisation, il ne pourra pas les revendiquer comme lui appartenant, ni forcer le constructeur à les démolir. Il intervient, en pareil cas, entre le propriétaire du terrain et la constructeur un contrat *sui generis*, en vertu duquel le propriétaire du sol autorise le constructeur à jouir des constructions pendant un certain temps, autant qu'elles dureront. Il y a création au profit du constructeur d'une sorte de droit de superficie.

Si le doute est possible sous l'empire du Code Français, il semble qu'il ne l'est guère sous celui du Code de Québec. Les Codificateurs nous informent qu'ils n'ont pas cru devoir adopter la rédaction défectueuse des articles correspondants du Code Napoléon, et il faut ajouter que la législature a cru devoir modifier le projet du Code Canadien et s'éloigner davantage du Code Napoléon. Ainsi le projet de l'article 555 du Code

(1) Des Biens, n. 377.

1897

DELORME v. CUSSON.

Girouard J.

Napoléon ne parlent que des constructions faites par un *tiers évincé*. Mais l'article 417 du Code de Québec se contente de mentionner les "améliorations," c'est-à-dire, "les constructions et ouvrages," dont parle l'article 416, "faites par un possesseur avec ses matériaux." Les droits du tiers détenteur évincé sont sauvegardés non seulement en l'article 417, mais aussi aux articles 418 et 419 qui ne se trouvent pas au Code Napoléon. A lire tous ces articles de notre Code, il est impossible d'arriver à une autre conclusion que le possesseur de bonne foi ne peut jamais être forcé à démolir et enlever ses constructions, sans indemnité. Leur application n'est pas restreinte, non plus, à un tiers détenteur; elle a lieu dans tous les cas de constructions ou travaux faits par le possesseur sur un immeuble ou partie d'icelui, qu'il soit de bonne ou de mauvaise foi. Dans le premier cas, le propriétaire du fonds ne pourra les faire enlever; dans le second au contraire, il le pourra, s'il le demande. Voilà le principe général sujet à certaines modifications dans des cas particuliers signalés aux articles C. C. 462, 582, 729, 958, 1546 et 1640.

La solution à laquelle nous sommes arrivés est sans précédent identique. Non pas que les tribunaux n'aient pas eu à se prononcer sur des cas d'empiètements de la part du voisin qui bâtit. Les exemples ne manquent pas en France et au Canada où ils ont été commis avec ou sans le consentement du propriétaire du fonds; mais je n'ai pu trouver un seul cas où ce consentement fut attaqué pour cause d'erreur.

Basnage (1), cite un arrêt du Parlement de Normandie, du 30 avril 1618, qui se prononça contre la démolition dans un simple cas de bonne foi. Et il faut bien remarquer que cet arrêt n'était pas appuyé sur un texte particulier de la Coutume de Normandie, silencieuse

(1) Vol. 1er p. 108.

sur le point comme celle de Paris. Il reposait uniquement sur les principes du droit Romain qui formait le droit commun de la France. Comme dans la présente cause, le propriétaire du fonds disait "qu'aucun ne peut être forcé à vendre ou à céder son héritage." On répondait que

quand dans la rigueur du droit étroit, il seroit tenu d'abatre, dans l'équité qu'on devoit plutôt suivre, on ne pouvoit le condamner qu'à l'estimation et aux intérêts du demandeur, plutôt que de démolir un grand édifice ; c'étoit la véritable espèce de l'action de *tigno juncto*, qui n'étoit fondée que sur cette équité, *ne diruantur œdificia* en l'action *fin reg. permittitur judici, ut ubi non poterit fines dirimere, adjudicatione fines dirimat.* 1, 2 et 3, ff. fin. reg. Ulpian, in frag. t. 19. Il fut jugé de la sorte, ajoute Basnage.

Sous l'empire du Code Napoléon, les tribunaux ont assez fréquemment eu l'occasion de décider des espèces de cette nature. Le premier arrêt est celui de la Cour de Cassation du 22 avril 1823 (1), que l'intimé invoque ; mais cet arrêt est appuyé sur le motif que les constructions du voisin avaient été faites, nonobstant l'opposition du propriétaire du fonds, et par conséquent de mauvaise foi. L'arrêt déclare qu'il y a lieu d'appliquer l'art. 555. S'il est applicable au cas de la mauvaise foi, il doit l'être aussi à celui de la bonne foi.

Le second arrêt, aussi cité par l'intimé, est celui du 26 juillet 1841 (2). Le tribunal de première instance renvoya la prétention du voisin qui avait anticipé, faute de preuve légale du consentement du propriétaire ; mais la bonne foi du constructeur ne paraît pas avoir été plaidée, ni prise en considération. La Cour Royale de Rouen, siégeant en appel, renversa cette décision pour les motifs qui suivent :

Attendu que les premiers juges, dans les motifs de leur décision, ont constaté que, d'après les explications données par les parties, si le sieur Delaroche avait, en construisant son mur, empiété de quelques centimètres sur le terrain du Sieur Oursel, il y aurait été autorisé verbale-

(1) S. V. '23, 1, 234. (2) S. V. '41, 1, 836.

1897

DELORME v. CUSSON.

Girouard J.

ment par celui-ci à titre de tolérance et de bon voisinage ; Attendu que, dans cet état de choses, le sieur Delaroche, au même titre de tolérance, est fondé à conserver dans l'alignement actuel et jusqu'au moment de sa destruction, le mur qu'il a nouvellement élevé * * ; Par ces motifs, émendant, dit à tort la demande formée par Oursel en démolition du mur le long de l'allée dont il s'agit ; décharge, à cet égard, Delaroche des condamnations prononcées contre lui, réserve néanmoins le sieur Oursel, lorsqu'il y aura nécessité de reconstruire le mur en question, à exiger du sieur Delaroche la retraite du dit mur dans son ancien alignement.

La Cour de Cassation a renversé ce jugement, mais uniquement parce que le consentement du propriétaire du fonds n'était pas légalement établi :

Attendu que le tribunal de première instance de Bernay, qui avait été à même d'apprécier ces explications, ne les a pas trouvées suffisantes pour justifier l'anticipation de Delaroche ; qu'au contraire on lit, dans un des motifs de son jugement, que Delaroche a allégué avoir fait l'anticipation avec le consentement d'Oursel, mais qu'il n'en a pas justifié, et qu'il doit être condamné à reculer son mur.

Cette décision, loin d'être contraire à l'appelant, lui est favorable. Sa preuve est complète et personne ne peut en attaquer la légalité, puisqu'elle résulte des admissions de l'intimé lui-même dans son témoignage. Les arrêtistes observent en note :

La permission donnée par un propriétaire de bâtir sur sa propriété lui ôte évidemment, à moins de réserves contraires, le droit de demander la suppression de ces constructions, tant qu'elles sont en bon état et qu'elles ne menacent pas ruine ; autrement cette permission, loin d'être une faveur pour celui qui l'obtient, deviendrait un piège, et serait la cause d'un dommage certain, alors qu'elle ne devait avoir pour but que son avantage.

Puis vient l'arrêt du 1er avril 1890 (1), qui, comme celui de 1841, repose uniquement sur une autorisation prétendue de la part du propriétaire du fonds.

Jugé :

Lorsqu'une construction faite sur le terrain d'autrui l'a été au vu et au su du propriétaire et sans protestation de sa part, qu'il est au contraire démontré qu'il y a consenti, il ne peut en exiger la destruction. (rés. par la cour d'Appel.)

(1) Dal. 91, 1. 181.

Dans ce cas, son consentement, lorsqu'il est gratuit, ne constitue pas une donation, ni un abandonnement à un titre quelconque de la propriété de la parcelle anticipée, mais une convention particulière qui doit produire effet, et qui empêche le propriétaire d'exiger la démolition des constructions. (rés. par la cour d'Appel).

Ce jugement fut rendu par la Cour d'Appel de Limoges, mais fut renversé par la Cour de Cassation, uniquement parce qu'il avait admis la preuve testimoniale du consentement du propriétaire. Or ce reproche ne peut être fait dans la présente cause. Les réponses de l'intimé, examiné comme témoin, font une preuve suffisante de son consentement; à tous événements, elles forment un commencement de preuve par écrit, qui est complété par la preuve testimoniale.

La même affaire fut portée l'année suivante devant la Cour de Poitiers, qui le 6 mai 1891, déclara que si le demandeur a fait la preuve légale qu'il a été autorisé par le propriétaire du fonds à construire en partie sur son terrain, il ne peut être condamné à démolir (1).

Les arrêtistes, Griolet et Vergé, observent en note sur l'arrêt du 1er avril 1890 (2).

Ces solutions paraissent sans précédent. La Cour de Cassation toutefois a décidé que lorsque l'usufruitier d'une maison, qui est en même temps propriétaire de la maison voisine, fait faire, tant sur son héritage propre que sur celui dont il a l'usufruit, des constructions au moyen desquelles il réunit les deux bâtiments, et que le nu-propriétaire n'y forme pas opposition et même approuve le travail, les tribunaux peuvent, dans ce cas, ordonner la vente des deux immeubles s'il est impossible de les séparer, sans nuire aux intérêts des propriétaires (3). Ce n'est pas là contrevenir aux principes qui veulent que nul ne puisse être contraint de céder sa propriété hors les cas exceptés par la loi, et qu'il n'y ait lieu à licitation qu'autant que l'immeuble est commun entre les parties. Un tel état de choses constituerait donc une propriété qui, sans être commune, serait pourtant indivisée (4). V. aussi Jur. gén. v° Propriété, nos. 450 et 451.

L'espèce ci-dessus se présentait dans des conditions différentes. Il résulte des dispositions des art. 552 et 553 C. Civ. que le propriétaire

(1) S. V. 92, 2 108.
(2) Dal. 91.1.181. (*n.* 1)
(3) Besançon, 5 avr. 1887, D. P. 88.2.222.
(4) Civ. rej. 23 mars 1825 ; Jur. Gén., v° Usufruit, no. 745.

1897

DELORME v. CUSSON.

Girouard J.

du terrain sur lequel une partie de la maison voisine a été construite devient propriétaire de cette partie de maison en vertu du droit d'accession. Lorsque le constructeur est de bonne foi, le propriétaire du sol ne peut en exiger la démolition, mais il a le choix ou de rembourser la valeur des matériaux et du prix de la main-d'œuvre, ou de rembourser une somme égale à celle dont le fonds a augmenté de valeur (1). Fallait-il, dans l'espèce, faire application de l'art. 555 C. Civ.? La Cour de Limoges ne l'a pas pensé et avec raison ; la solution qu'elle a donnée dérive d'autres principes. En effet, le constructeur dont s'occupe l'art. 555 est un constructeur non autorisé, il a pu être de bonne ou de mauvaise foi quant à la propriété du sol, mais c'est toujours sans autorisation qu'il a construit. Le texte laisse donc en dehors de ses prévisions le cas où celui qui empiète sur le fonds voisin a exécuté ses travaux au vu et au su du voisin (2). Il s'agissait, dès lors, uniquement de rechercher quelles pouvaient être les conséquences juridiques de ce fait que le propriétaire avait laissé élever des constructions sur son propre terrain sans s'y opposer et même en y consentant, puisqu'il avait déterminé la limite de l'anticipation qu'il autorisait.

Un tel consentement ne saurait rester sans effet. Emportait-il abandon à titre gratuit de la propriété de la fraction de terrain anticipé? La cour a hésité à aller jusque-là, préoccupée qu'elle était du vice de la donation, car aucun acte notarié n'avait été dressé. A défaut de donation de la propriété, il y avait du moins une convention d'une nature spéciale s'expliquant par les relations de bon voisinage entre les parties et qui (en la supposant régulièrement prouvée) devait être respectée. Un propriétaire peut parfaitement renoncer au droit d'accession établi en sa faveur par les art. 552 et 553 C. Civ., et conférer ainsi au constructeur le droit de jouir du terrain tant que les constructions le couvriront. C'est là une sorte de concession de droit de superficie temporaire, de servitude qui grève le fonds et dont il sera affranchi quand le constructeur voudra rebâtir ou se trouvera dans la nécessité de le faire (3). L'autorisation donnée par le propriétaire de la parcelle usurpée l'empêche, en tous cas, d'exiger la suppression des travaux, en créant contre lui une fin de non-recevoir, une véritable exception de dol, car la règle qui domine en pareille matière est celle de l'appréciation souveraine des juges du fait.

Voilà ce que la doctrine et la jurisprudence française enseignent et nous pouvons en conclure que celui qui

(1) C. N. 555.

(2) Demolombe, Traité de la propriété, t. 1er, no. 691 *ter.*

(3) Conf. Rouen, 28 févr. 1838 sous Civ. cass. 26 juil. 1841 ; Jur. gén. v° Propriété, no. 452.

bâtit en anticipant sur le terrain d'autrui, avec le consentement de ce dernier donné en pleine connaissance de cause, ne peut être forcé à démolir ; il se trouve en effet protégé non pas précisément par l'article 555 C. N., mais en vertu de l'autorisation donnée par le propriétaire du fonds dûment prouvée bien entendu. Cette autorisation constitue ce que des auteurs appellent une renonciation au droit d'accession, d'autres un droit de servitude, d'usufruit ou de superficie du sol ; de l'aveu de tous, elle forme une convention qui doit être respectée et recevoir son exécution. Cette conclusion admise, il n'est pas difficile de décider l'espèce qui nous occupe, savoir le cas où le propriétaire, croyant ne rien céder du sien, a donné son consentement par erreur. Il faudra invoquer les règles ordinaires du droit qui régissent la matière de l'erreur et que nous avons indiquées plus haut. L'erreur invalidera le consentement, mais en payant l'indemnité ; mais ici le demandeur demande la démolition purement et simplement.

Remarquons bien qu'il n'est pas nécessaire que l'autorisation soit expresse ; il suffit qu'elle résulte des circonstances. Les autorités que nous avons citées sont unanimes à considérer que le fait que des constructions ont été faites, au su et vu du propriétaire du fonds et sans protestation de sa part, constitue une autorisation tacite ; et à la liste d'arrêts mentionnés plus haut, nous pouvons ajouter les suivants : Colmar, 19 novembre 1830 (1) ; Dijon, 23 janvier 1874 (2) : Pau, 29 novembre 1874 (3).

Enfin, d'après l'opinion de plusieurs commentateurs, qui d'ordinaire font autorité, entr'autres, Maleville, Dalloz, Demolombe, Baudry-Lacantinerie, Perrin et Rendu, l'article 555 Code Napoleon s'applique et protège la simple bonne foi du constructeur indépendamment de

(1) S. V. 31, 2, 286. (2) Jour. du P. 74, 361.
(3) S. V. 75, 2, 31.

1897

DELORME v. CUSSON.

Girouard J.

toute convention, formelle ou tacite. Nous croyons devoir suivre ces autorités de préférence à Laurent, Aubry et Rau et les continuateurs de Dalloz ; elles sont en harmonie avec la jurisprudence des tribunaux, tandis que pas un seul arrêt dans l'ancien ou le nouveau droit, ne peut être cité en faveur de l'opinion contraire ; elles sont d'ailleurs plus en accord avec le texte de notre Code Civil, art. 417, beaucoup plus large que celui du Code Napoléon, art. 555 ; et enfin elles reposent sur des principes de justice incontestables, qui ont reçu la sanction de Domat, Pothier, Grotius et des plus grands interprètes du droit Romain et du droit naturel.

En Louisiane, on paraît suivre les mêmes règles, *Ridell* v. *Jackson* (1).

La jurisprudence de la province de Québec est dans le même sens. Ainsi la Cour de Revision de Montréal (MacKay et Torrance JJ., Mondelet J. dissident), jugea le 30 septembre 1869 dans *Martin* v. *Jones* (2), que la démolition des travaux ne pouvait être demandée dans un pareil cas. Il est vrai que l'un des considérants du jugement fut qu'il n'y avait pas eu de bornage régulier, mais la cour décida en même temps que le consentement seul donné par le voisin anticipé était une fin de non recevoir à l'action pétitoire. Même le juge dissident, qui avait rendu le jugement en première instance, n'avait pas ordonné la démolition pure et simple des travaux ; il avait condamné le défendeur à rendre le terrain anticipé ou à payer $200. En Revision, il ajoutait que cette somme pouvait être réduite, si elle était trop élevée. C'est précisément la position prise par l'appelant ; il offre de payer la valeur du terrain.

La décision de la Cour d'Appel, Dorion C. J., Monk, Tessier, Cross et Baby JJ., dans *Lareau* v. *Dunn* (3),

(1) 14 La. An. 135. (2) 15 L. C. Jur. 6.
(3) 7 Legal News 218.

rendue le 31 mai 1884 n'est pas sans à-propos. Voici ce qu'elle déclare dans un de ses motifs.

Et considérant que lors même que le lot que l'appelant a possédé depuis plus de vingt ans ne serait pas celui qu'il a acquis par l'acte du 18 mars 1857, sa possession, qui a duré plus de vingt ans sans interruption à la connaissance des intimés et de leur auteur, aurait été de bonne foi, et dans le cas d'erreur, aurait été basée sur une erreur commune, et qu'à raison de sa bonne foi, et en vertu de l'article 412 du Code Civil, l'appelant a fait les fruits siens, et qu'il ne pouvait être condamné à payer une somme de $1,184.50, mais qu'au contraire, il aurait le droit de répéter ses impenses et améliorations aux termes de l'article 417 du même code.

Enfin nous avons la cause de *Joyce et Hart* (1) qui a été décidée par cette cour le 28 juin 1877, et où la démolition des travaux fut ordonnée; mais dans ce cas, il y avait eu dès l'origine des protestations formelles de la part du voisin; et encore l'option fut donnée au défendeur qui avait bâti sur un mur de division mais non mitoyen, d'en acquérir la mitoyenneté et d'éviter ainsi la démolition; l'on peut facilement déduire de l'opinion des juges que la conclusion aurait été bien différente, si le propriétaire eût consenti expressément ou même tacitement, à l'érection des constructions.

Strong J: When the plaintiff, by his conduct, has induced the defendant to proceed with his works in error, or in the belief that the plaintiff acquiesced in the prejudice caused to his rights, I take it for granted that an exception, analogous to an exception of fraud, might be opposed to the action. Take, for instance, the case of the defendant making a large expenditure in building on his own lands to the prejudice of an insignificant servitude of the plaintiff, the plaintiff could not, after passively awaiting the termination of the work, in either a possessory or petitory action, insist on the demolition of the buildings. Again, if the defendant believed himself to be building on his own land, whilst the plaintiff knew he was on the plaintiff's land, it would be conduct amounting to fraud on the part of the plaintiff silently to permit the defendant to complete his erections and then turn round, assert his title, and ask to have the buildings destroyed.

In the present case nothing of this kind occurred, for the protest made by the ministry of a notary, in due form of law, gave early

(1) 1 Can. S. C. R. 321.

1897

DELORME v. CUSSON.

Girouard J.

notice to the defendant that he was infringing on the plaintiff's rights, and put him in such a position that all he did subsequently was done with full knowledge, and at his own risk and peril.

J. T. Taschereau J. : Je crois le jugement bon, tout en déclarant que lors de la plaidoirie devant nous, mon impression était en faveur de l'appelant, et ce qui contribuait alors à me faire considérer la position des intimés sous un jour très défavorable était le fait (lequel ne semblait pas nié par eux) que les travaux dont les intimés se plaignaient avaient été commencés et complètement terminés par l'appelant au vu et su des intimés et sans protestation de leur part. Je me disais et je crois avec raison, qu'après avoir vu l'appelant faire les ouvrages en question, sans objection de leur part, il y avait consentement tacite, sinon formel de leur part à ce que l'appelant acquit ainsi la mitoyenneté et que la question de l'indemnité n'était que secondaire entre des voisins et devait se régler à l'amiable ;—et dans ce cas il me semblait remarquer une grande rigueur dans le jugement dont est appel, lequel, condamnait l'appelant à payer des dommages pour avoir fait ce qu'il pouvait faire sous certaines conditions préalables, il est vrai, mais dont les intimés me semblèrent le dispenser en ne s'y opposant pas, ou en ne protestant pas. Mais la lecture du dossier m'a convaincu que l'appelant a été protesté dès le commencement des travaux faits par lui, et que sous le prétexte que le protêt notarié qu'il reçu était rédigé en langue française, il avait renvoyé ce protêt aux intimés.

Un mot sur la question de juridiction de cette cour, soulevée lors de la plaidoirie. Nous n'hésitons pas à décider qu'il s'agit ici du titre à un terrain indépendamment du titre à la nue propriété, qui n'est pas contesté. Mais qui a le domaine utile ? C'est ce que nous avons à décider. La défense de l'appelant va droit au titre de l'intimé. Les bâtiments dont on demande la démolition sont aussi immeubles, et il s'agit de savoir si l'appelant en a le titre. Enfin, le droit de les faire démolir sans indemnité, ou de retenir l'immeuble tant qu'elle ne sera pas payée ou que les constructions dureront, s'attaque directement au titre du terrain.

Nous sommes donc d'avis d'infirmer le jugement de la Cour d'Appel et de renvoyer l'action de l'intimé avec dépens devant toutes les cours. L'appelant gardera le terrain sur lequel les constructions ont été élevées, en

1897

DELORME v. CUSSON.

Girouard J.

payant l'indemnité due à l'intimé, que la Cour Supérieure avait réservée, mais que nous croyons devoir de suite fixer à la somme de $50, tant pour la valeur du terrain anticipé que pour les dommages causés par l'empiètement au reste de sa propriété.

*Appeal allowed with costs.*

Solicitors for the appellant: *Geoffrion, Dorion & Allan.*

Solicitors for the respondent: *Fortin & Laurendeau.*

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1897

*Oct. 7, 8.

*Dec. 9.

YVON LEFEUNTEUM (PLAINTIFF).....APPELLANT;

AND

CORDELIE BEAUDOIN (DEFENDANT)..RESPONDENT

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

*Appeal—Questions of fact—Evidence—Affirmative testimony — Interested witnesses—Art.* 1232 *C. C.—Arts.* 251, 252 *C. C. P.—Title to land —Prescription—Limitation of actions—Equivocal possession—Mala fides—Sheriff's deed—Nullity.*

The Supreme Court of Canada will take questions of fact into consideration on appeal, and if it clearly appears that there has been error in the admission or appreciation of evidence by the courts below, their decisions may be reversed or varied. *The North British and Mercantile Insurance Company* v. *Tourville* (25 Can. S. C. R. 177) followed.

In the estimation of the value of evidence in ordinary cases, the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative.

The evidence of witnesses who are near relatives or whose interests are closely identified with those of one of the parties, ought not to prevail in favour of such party against the testimony of strangers who are disinterested witnesses.

Evidence of common rumour is unsatisfactory and should not generally be admitted.

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*PRESENT:—Taschereau, Gwynne, Sedgewick, King, and Girouard JJ.

1897

LEFEUNTEUM v. BEAUDOIN.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), affirming the decision of the Superior Court, District of Bedford, which dismissed the plaintiff's action with costs.

A statement of the case appears in the judgment of His Lordship Mr. Justice Girouard, now reported.

*Belcourt* and *Beaubien* for the appellant. A title null by reason of informality cannot serve as a ground for prescription by ten years possession. Art. 2254 C. C.; *Barbotte* v. *Hamard* (1) (*Cass* 8 *janv.* 1838); 36 Dal. Rep. Jur. "Prescription Civile," no. 900; 2 Troplong, Prescription, no. 900; 7 Toullier 718; 24 Merlin, 142. The respondents and their predecessors in title cannot shew good faith, for they have been holding in bad faith or under equivocal circumstances from which bad faith must be presumed. 36 Dal. Rep. Jur. "Prescription Civile" no. 915, 920, 921; *Anon* (*Cass. Rennes*, 18 *juin*, 1821); 2 Troplong, nos. 20, 926, 937; 21 Duranton, no. 586. Error in law cannot serve as an excuse.

The court below has failed to give proper weight to the evidence, and has erred in accepting the testimony of interested witnesses, some of whom even were warrantors of the title in dispute. The court below has failed in the proper appreciation of the affirmative testimony on behalf of the plaintiff in contradiction of bare denials of the facts by the defendant's witnesses. This court can reconsider the evidence with the fullest propriety as it was all taken by depositions at *enquête* and not in the presence of the trial judge.

As there could be no good faith in the respondent's possession, the improvements belong, without compensation, to the real owner of the soil (2) and he is also entitled to receive the value of use and occupation, rents, issues and profits. Under the circumstances the

(1) 31 Jour. du P. 282.

(2) Art. 417 C. C.

1897

LEFEUNTEUM v. BEAUDOIN.

respondents are bound by the decision in the former case of *Lefeuntun* v. *Véronneau* (1), respecting the lands in question although not made parties because they purchased with knowledge of the litigation pending, and took the risk of the sheriff's deed being annulled. The Supreme Court judgment in that case relates back to the date of the institution of the action, and is *res judicata* against the present respondents. *The Grand Trunk Railway Co.* v. *McMillan* (2); art. 715 C. C. P.; Héricourt, Vente des Immeubles, 292; 1 Pigeau 778. All possible notice was given by registration; art. 2098 C. C.

*Lajoie* and *Lussier* for the respondent. The respondent and her *auteurs* held the land for over ten years prior to action under titles regularly issued in proper form and properly registered; 2 Aubry & Rau, 377; Pothier, Prescription, no. 57. It matters not that the original vendor had no valid title himself. The immediate title of the party invoking the ten years prescription is the only one in issue. The fact that there may have been irregularities in the proceedings leading to the sheriff's sale cannot be set up against defendant to show that his own title is not valid. The possession of Paul and Hormisdas Larocque is a possession in good faith. Good faith existed in the mind of the purchaser that he bought from the real proprietor (3). This is a question of fact upon which the six judges of the courts below have been unanimous and this court should not interfere. *Grasset* v *Carter* (4); *Senesac* v. *Vermont Central Railway Co.* (5); *Ryan* v. *Ryan* (6), at page 406; *Schwersenski* v. *Vineberg* (7). Good faith is

(1) 22 Can. S. C. R. 203.
(2) 16 Can. S. C. R. 543.
(3) 36 Dal. Rep. Jur. "Prescription Civile," nos. 881, 882, 885, 900; Vazeille, no. 487; Troplong, Prescription, no. 873, 874; 32 Laurent no. 359, 361.
(4) 10 S. C. R. 105.
(5) 26 Can. S. C. R. 641.
(6) 5 Can. S. C. R. 387.
(7) 19 Can. S. C. R. 243.

1897

LEFEUNTEUM v. BEAUDOIN.

presumed. The burden of the proof was on the plaintiff to show that the defendant and his *auteur* were in bad faith at the time of the purchase. (Art. 2202 C. C.) Subsequent knowledge of the defendant that his vendor was not the real proprietor would not constitute bad faith.

Article 2253 C. C. is more complete than article 2269 of the Code Napoleon, and it has been shewn that Hormisdas Larocque was in good faith when he bought from Paul Larocque in 1884 and that the latter was in good faith when he purchased from Langlois in 1881. It is immaterial whether bad faith may have existed at any other period. The evidence as to notoriety of the litigation respecting the property in question at the time of the purchase does not attach to the respondent or her vendors any personal knowledge or improper dealing from which they could be charged with bad faith. Had they suspected a flaw in the title they would never have purchased at the price they paid.

Whilst in possession of the land they improved it considerably and expended large sums of money upon it. Their possession and even the possession of Langlois and the other proprietors before him was peaceable and uninterrupted. The appellant did not protest nor register notice of his proceedings to have the sheriff's sale set aside and when Paul Larocque purchased Langlois appeared as proprietor without any entry whatever in the registers to show the contrary.

There is no authority for the contention that prescription did not run while the proceedings *en nullité de décret* were pending. Appellant should have made the Larocques parties to his suit or taken a special action to interrupt prescription. He failed to do so and there is no binding decision against the respondents. Arts. 1241, 2224, C. C.

1897

LEFEUN-TEUM v. BEAUDOIN.

Taschereau J.

TASCHEREAU J.—The appellant's factum in this case refers to and gives long extracts of notes of the judge who gave the judgment of the Superior Court. Now, there is no such document forming part of the case. I need hardly say that the appellant should not so have referred to notes that are not regularly before us. It is very much to be regretted that by consent or acquiescence of counsel on both sides, we are deprived of the opinions or reasons for judgment delivered by the judges in the courts below, as we have been in this case of the reasons of the Superior Court judge. Under rule 2 of this court, it is the written opinions (when any) of the judges in all the courts through which the case has passed, that must form part of the printed case, not only those of the court directly appealed from, and if counsel on both sides will settle a case without such notes we shall have to insist that the affidavit required by the rule be produced in each case The certificate of the clerk of the Court of Appeal covers only the notes of the court appealed from. Why counsel for respondent in this case allowed the printed case to be settled or made up without notes that supported the judgment he had obtained, is more than I can understand.

I fully agree with my learned colleague, Mr. Justice Girouard, and for the reasons by him given, that this appeal should be allowed.

I have only one additional reason to give for our interference upon a question of fact with the concurrent findings of the two courts below. It is that it appears to me to have been lost sight of that it is a rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negantibus*, because he who testifies to a negative may have for-

1897

LEFEUNTEUM v. BEAUDOIN.

Taschereau J.

gotten a thing that did happen, but it is not possible to remember a thing that never existed.

Then, as to the various conversations upon which an important part of the case turns, the following sentence of the Master of Rolls in *Lane* v. *Jackson* (1), has full application.

> I have frequently stated that where the positive fact of a particular conversation is said to have taken place between two persons of equal credibility, and one states positively that it took place, and the other as positively denies it, I believe that the words were said, and that the person who denies their having been said has forgotten the circumstance. By this means, I give full credit to both parties.

In *Chowdry Deby Perad* v. *Chowdry Dowlut Sing* (2), Mr. Baron Parke remarks:

> In estimating the value of the evidence, the testimony of a person who swears positively that a certain conversation took place, is of more value than that of one who says that it did not, because the evidence of the latter may be explained by supposing that his attention was not drawn to the conversation at the time.

GWYNNE, SEDGEWICK and KING JJ. also agreed with Mr Justice Girouard.

GIROUARD J.—Il s'agit des effets d'un jugement annulant un décret enregistré à l'encontre des tiers acquéreurs subséquents aussi inscrits. Armé de ce jugement, le véritable propriétaire se présente pour rentrer en possession de son bien. Le possesseur lui répond que durant les dix-sept années que dura son procès, il a acquis l'immeuble par juste titre et qu'il en a la possession décennale. L'appelant, qui se trouve dans la position de ce plaideur plus malheureux que malchanceux, commence son factum par un appel touchant à la sympathie de cette cour. Ces appels, tolérés dans un procès par juré, déparent un factum, d'ailleurs bien fait, devant un tribunal d'appel. Si l'appelant a eu tant de trouble, il faut bien qu'il prenne sa bonne

(1) 20 Beav. 535.

(2) 3 Moo. Ind. App. 347.

1897

LEFEUNTEUM v. BEAUDOIN.

Girouard J.

part de blâme, n'ayant pris aucune des procédures conservatoires que la prudence la plus ordinaire lui suggérait. Si la sympathie pouvait être prise en considération, l'intimée serait peut-être excusable dans les circonstances d'avoir ajouté foi à l'adage populaire, partagé par son notaire, qu'un titre du shérif ne se détruit pas. Ce fut là son malheur. Les titres du shérif, comme tous les contrats, ne sont valides que s'ils sont exécutés selon les lois du pays. Les parties n'ont ici que leurs droits stricts à faire valoir. Voici les faits.

Le 13 octobre 1866 et le 17 juin 1867, par titres notariés en bonne forme et dûment enregistrés, l'appelant acquit une terre nouvelle de soixante et sept arpents et demi, 15 x 4½, formant les numéros 406 et 412 du cadastre de la paroisse de Saint-Valérien de Milton, à moitié défrichée et sans bâtisse. Le 17 août 1876, elle fut vendue par le shérif sur l'appelant, à la poursuite de Narcisse Bolduc, qui avait obtenu jugement contre lui pour $433.46. Bolduc en devint l'adjudicataire pour $55 et fit de suite enregistrer son titre.

Le 23 février 1877, l'appelant produit une requête en nullité du décret qu'il n'a fait signifier qu'à Bolduc. Durant l'intervalle, ce dernier avait vendu à Cardinal et Dufresne, par acte de vente passé le 23 novembre 1876, et enregistré le 26 du même mois, et cette vente fut suivie de plusieurs autres qui sont indiquées plus bas.

La requête en nullité de décret fut renvoyée le 28 juin 1889 par la Cour Supérieure à Montréal, où l'action originaire était pendante, et ce jugement fut confirmé par la Cour d'Appel le 18 janvier 1892. Ces deux jugements furent infirmés par cette cour le 24 juin 1893 (1). La présente action à l'effet de rentrer en la possession de l'immeuble—une action pétitoire—

(1) 22 Can. S. C. R. 203.

1897

LEFEUNTEUM v. BEAUDOIN.

Girouard J.

a été intentée le 1er août 1893 devant la Cour Supérieure du district de Bedford, où se trouve situé l'immeuble. La Cour Supérieure de Bedford et la cour d'appel ont renvoyé l'action et donné gain de cause à l'intimée pour deux raisons. 1°. Le jugement sur la requête en nullité de décret n'était pas chose jugée contre le défendeur qui n'était pas dans la cause et n'y était pas représenté; et 2°. Le défendeur était devenu propriétaire par la possession de dix ans avec juste titre.

Il n'est pas surprenant que durant ces dix-sept années de litige, de 1876 a 1893, la propriété ait subi plusieurs mutations. Voici la liste qu'en a faite M. le Juge Blanchet qui a prononcé le jugement de la Cour d'Appel, et elle est complète :

> Le 17 août 1876, vente par le shérif sur l'appelant. Le 23 novembre 1876, l'adjudicataire Bolduc revend à Cardinal et Dufresne. Le 15 octobre 1877, Cardinal cède sa part à Poirier. Le 23 mars 1880, Poirier et Dufresne retransfèrent leurs droits à Cardinal. Le 3 novembre 1880, Cardinal vend à Philias Langlois. Le 27 août 1881, Langlois revend à Paul Larocque, et le 31 octobre 1884, celui-ci revend à Hormisdas Larocque, son frère, représenté maintenant par sa veuve, l'intimée. Les trois derniers actes seuls paraissent avoir été enregistrés.

Un supplément au certificat du bureau d'enregistrement produit devant nous constate que la vente du 17 août 1876, celle du 23 novembre 1876 et celle du 3 novembre 1880, ont aussi été enregistrées.

L'appelant ne peut donc repousser le plaidoyer de prescription qu'en prouvant la mauvaise foi d'Hormisdas Larocque le 31 octobre 1884, ou à tout événement celle de Paul Larocque, son vendeur, le 27 août 1881. Nous voilà en présence d'une simple question de fait décidée par deux cours : Nous avons déjà jugé que nous étions les juges des faits, et que si la preuve démontre clairement qu'elles ont erré dans l'appréciation qu'elles en ont faite, notre devoir est de rendre le

jugement qui aurait dû être rendu (1). Ici la preuve est conclusive.

Nous avons une raison particulière d'intervenir, c'est que la Cour d'Appel et la Cour Supérieure paraissent avoir violé une règle fondamentale concernant la preuve testimoniale ; ils ont attaché autant de foi aux témoins intéressés qu'aux étrangers ; et cet intérêt n'est pas seulement celui d'un parent ; il est même plus fort que celui de la partie ; c'est l'intérêt du garant.

Il faut encore observer que l'enquête s'est faite hors la présence du juge qui n'a pas eu meilleure occasion que les juges d'appel de juger la physionomie et la crédibilité des témoins. Ce que les juges des tribunaux inférieurs ont vu, nous pouvons le voir aussi ; mais ne perdant pas de vu cette règle cardinale que malheureusement trop souvent l'intérêt est la mesure des témoignages comme des actions, nous sommes arrivés à une toute autre conclusion.

Nous ne voulons pas nous arrêter un seul instant à la preuve par la commune renommée que l'on a tenté de faire, et qui est toujours plus ou moins vague et dangereuse et n'est tolérée que dans des cas rares et presque privilégiés, par exemple, ceux des mineurs contre les tuteurs qui ont négligé de faire inventaire. Ecartant donc une forte partie des témoignages qui sont devant nous, et qui ne portent que sur la commune renommée, nous sommes d'avis que l'appelant a fait une preuve précise, circonstanciée et complète de la mauvaise foi de Paul et Hormisdas Larocque avant et au moment même de leurs acquisitions respectives. Nous ne savons pas exactement comment la Cour Supérieure a apprécié cette preuve, car les notes du savant juge ne sont pas devant nous. Voici tout ce que M le Juge Blanchet en dit :

(1) *The North British and Mercantile Ins. Co.* v. *Tourville* (25 Can. S. C. R. 177).

1897

LEFEUNTEUM v. BEAUDOIN.

Girouard J.

Quant aux faits particuliers que l'appelant a voulu établir afin de prouver que l'intimée et son auteur savaient, avant leur acquisition, qu'il réclamait la propriété en question, ils sont tous contredits de la manière la plus formelle possible ; et d'ailleurs la plupart des faits relatés par les témoins de l'appelant sont postérieurs à l'acquisition de Paul et Hormisdas Larocque.

" Contredits de la manière la plus formelle possible." Oui, mais par qui ? Par des personnes aussi intéressées que les parties ; quelques-unes même plus, comme les garants de l'intimée.

C'est d'abord Philias Langlois qui, par acte notarié produit, s'est engagé à indemniser le défendeur des conséquences de ce procès.

C'est aussi Paul Larocque, le vendeur avec garantie et le rentier d'Hormisdas, le défendeur décédé durant l'instance et représenté par l'intimée, sa veuve et sa légataire. L'avocat de l'intimée s'efforce de le désintéresser, parce qu'il est garanti par Philias Langlois qui est solvable, dit-on. Paul Larocque et son frère Hormisdas avaient évidemment des doutes sur l'entière solvabilité de Langlois, puisqu'après l'institution de la présente action, ils ont exigé de lui le transport de trois hypothèques dont il était le créancier et qui se montent en tout à $1,300, c'est-à-dire $300 de moins que le prix de vente, sans parler des impenses et améliorations, frais, dommages et intérêts.

Philias Langlois et Paul Larocque sont pourtant les deux principaux témoins de l'intimée, qui contredisent ceux de l'appelant ; c'est leurs témoignages que l'intimée invoque, et à la plaidoirie orale et dans son factum, pour repousser la preuve de l'appelant, mais nous croyons qu'ils n'ont pas plus d'autorité que le témoignage des parties elles-mêmes, d'autant plus qu'ils contredisent des étrangers sans intérêt.

Le Code Civil, art. 1232 dit :

Le témoignage par l'une des parties dans l'instance ne peut être invoqué en sa faveur.

1897

LEFEUNTEUM v. BEAUDOIN.

Girouard J.

Voir aussi l'article 251 du Code de Procédure Civile.

Puis viennent les proches des parties, les fils du demandeur et le père et les frères du défendeur qui se contredisent carrément. Si nous avions à décider cette cause par leurs seuls témoignages, nous serions peut-être disposés à ajouter foi aux témoignages des jeunes Lefeunteum de préférence à ceux des Larocque. Leurs réponses sont claires et franches ; il n'y a aucune incertitude, ni hésitation. Au contraire, les réticences et les contradictions des Larocque démontrent que l'intérêt qu'ils portent au succès des Larocque les domine. Mais, il y a dans la cause nombre de témoins étrangers et désintéressés qui établissent hors de tout doute la mauvaise foi de Paul et Hormisdas au moment de leurs acquisitions et auparavant ; et il faut bien remarquer que leur caractère et leur réputation n'ont pas été attaqués ; quelques-uns sont même des amis ou parents éloignés de la famille Larocque ; et d'après notre manière de voir, il est impossible de rejeter ce qu'ils attestent sur les seules négations des parties ou de leurs proches. Nous mettons néanmoins de côté la déposition d'Alfred Ménard qui paraît avoir pris fait et cause pour l'appelant durant les différentes phases de ce procès : nous préférons en effet nous en rapporter entièrement aux témoignages de personnes étrangères et aux parties et à la cause.

Clément Rivet :

J'ai entendu Paul Larocque et Hormisdas Larocque parler des difficultés qui existaient sur la dite terre, avant qu'ils en fussent propriétaires. Le plus vieux des fils du demandeur était alors présent, ainsi que les deux frères Larocque, chez M. Arthur Malo à Saint-Valérien. C'était un jour qui faisait mauvais et nous ne travaillions pas. Moi, j'ai dit que c'était de valeur d'enlever cette propriété aux Yvon qui avaient été vendue et que ce n'était pas juste. Nous causions tous ensemble, y compris les Larocque. Les deux Larocque eux-mêmes ainsi que d'autres ont dit que c'était bien de valeur et que ce n'était pas juste d'enlever ainsi cette propriété aux Yvon.

1897

LEFEUNTEUM v. BEAUDOIN.

Girouard J.

Malo n'a pas été entendu, et il en est de même de Bourdeau et Aldéric Quintal que le témoin nomme en transquestion comme étant présents à la conversation.

Thaddé Poirier, qui avait passé quelques années aux Etats-Unis comme les Larocque :

J'ai eu connaissance de certaines difficultés judiciaires à propos de cette propriété. J'ai entendu parler de ces difficultés il y a quinze ou seize ans quand je suis venu dans le pays. Dans bien des circonstances, j'ai alors causé avec le défendeur, et son frère et les autres membres de la famille des difficultés qui existaient sur cette terre. J'étais alors et je suis encore l'ami intime de la famille Larocque. Je rencontrais alors les Larocque au village, chez eux et à différentes places. Quelques fois j'allais chez la famille Larocque par affaire, et quelquefois en visite, en allant voir les jeunes demoiselles.

J'ai eu connaissance de quelques transactions qui ont été faites au sujet de la terre que réclame le demandeur. J'ai eu connaissance de la vente que Langlois a faite à Paul Larocque. C'était chez M. Cardinal où les marchés se sont faits, et ensuite chez le notaire de Grandpré à la passation du contrat. On a alors parlé de certains difficultés existant sur cette terre ; ce fut M. Paul Larocque qui a soulevé ces difficultés ainsi que M. Larocque le père. La propriété a été vendue à bon marché, à cause de la crainte que le propriétaire avait de la garder. L'acheteur a soulevé ces difficultés et après des pourparlers, Paul Larocque et son père ont exigé qu'une clause soit insérée dans l'acte à l'effet que M. Langlois fut garant de tous les troubles qui pouvaient résulter du procès.

L'acte de vente contient en effet la clause de garantie de tous troubles. Le notaire de Grandpré, qui a une mauvaise mémoire jusqu'au point d'avoir oublié exactement le nombre d'années qu'il exerce sa profession, peut-être à cause de son grand âge, car sa déposition ne donne pas son âge, admet que Poirier aurait pû être présent à la passation du contrat, mais il ne s'en rappelle pas. Enfin, si l'on considère la rente viagère qui fait la considération de la vente de Paul à Hormisdas. Paul achetait à bon marché.

Etienne Ménard :

Je connais le défendeur en cette cause et sa famille ; il est mon cousin germain.

1897

LEFEUNTEUM v. BRAUDOIN.

Girouard J.

J'ai eu connaissance des difficultés qui existent au sujet de cette propriété depuis longtemps. J'ai entendu parler de ces difficultés par le public en général. J'ai entendu parler de ces difficultés par le frère du défendeur Paul Larocque ; il y a à peu près quinze ans de cela, chez M. Pierre Harnois à un *bee* ou corvée. Les personnes présentes étaient Paul Larocque, Jean-Baptiste Larocque et Antoine Larocque, aujourd'hui décédé. Il a été alors question des difficultés sur la propriété. Tout en travaillant, il est venu l'àpropos de parler de la propriété du demandeur au sujet du procès qui existait alors entre le demandeur et Narcisse Bolduc. Paul Larocque a dit que celui qui disait qu'il y avait crainte d'acheter cette propriété-là était un fou. Moi, j'ai dit que c'était pas prudent d'acheter cette propriété-là, à cause du procès. Il a répondu que si le marché lui allait, il l'achèterait, puis il n'aurait pas peur de cela, parce que jamais Yvon pourrait gagner sa terre avec Bolduc, parce qu'il n'en avait pas les moyens—un petit jobbeur de terre neuve comme Yvon, le demandeur, ne pouvait pas arriver avec Bolduc, parce qu'il ne pouvait pas faire assez d'argent.

Auguste Gauthier référant à Paul Larocque :

Lui-même m'a raconté la manière dont lui avait été introduite cette terre ; qu'on lui avait dit qu'il n'y avait pas de soin, qu'elle avait été vendue par le Shérif, que ça effaçait toutes prétentions, et que personne ne pouvait revenir dessus. C'était Cardinal, le défunt Cardinal, qui lui avait dit que cette terre avait été vendue. J'en ai parlé, comme ça en différents temps, leur disant que Lefeunteum reviendrait pour sa terre ; qu'il était en procès et que ça continuerait jusqu'à ce qu'il l'ait définitivement. Ils ne croyaient pas ça ; ils se basaient sur le contrat du Shérif.

Cette preuve n'a rien d'étrange. Bien au contraire. Il est difficile de s'imaginer qu'un procès aussi important ait passé par toutes les cours du pays sans avoir été connu généralement des habitants de la paroisse de Saint-Valérien, et en particulier des divers acquéreurs de la terre qui en faisait le sujet, surtout si l'on considère que les Lefeunteum, qui paraissent avoir la langue bien déliée, résidaient alors dans la localité même. La chose est possible, mais n'est pas probable. Les détenteurs antérieurs aux Larocque connaissaient ce procès et il est même en preuve que plusieurs d'entr'eux ont disposé de la terre pour en éviter les conséquences. Bolduc, Cardinal et Dufresne qui ont acheté de lui avant la production de la requête en nullité de décret,

1897

LEFEUNTEUM v. BEAUDOIN.

Girouard J.

paraissent avoir seuls acquis de bonne foi; mais ils ont redouté le dénouement du litige avant d'acquérir la prescription, et ils se sont empressés de vendre. Egalement c'est pendant que Bolduc était possesseur que M. le curé Côté n'aurait pas eu d'objection à acheter. Quoiqu'il en soit, la mauvaise foi des Larocque, avant et au moment de l'acquisition, est particulièrement établie et ils doivent en subir les conséquences. L'intimée doit rendre l'immeuble à l'appelant et lui tenir compte des fruits et revenus, déduction faite des impenses et améliorations qui étaient toutes nécessaires.

La pratique ordinaire en pareil cas est d'ordonner une expertise; mais eu égard aux circonstances de cette cause qui traine devant les tribunaux depuis plus de vingt ans, et considérant que nous avons au dossier ample preuve pour adjuger sur cet incident, nous croyons devoir d'abord déclarer les impenses et améliorations compensées par une plus forte somme qui représente les fruits et revenus et en sus d'accorder à l'appelant $200 avec intérêt, pour l'excédent des dits fruits et revenus.

Sans nous prononcer sur la question de chose jugée soulevée par l'appelant, nous sommes d'avis de le déclarer propriétaire de l'immeuble qu'il revendique et de condamner l'intimée à le lui rendre dans l'état où il se trouve, dans un délai d'un mois à compter de la signification du jugement, et de plus à lui payer la somme de deux cents piastres, avec intérêt sur icelle à compter du jour de l'institution de l'action, à titre de fruits et revenus, en sus des impenses et améliorations que le défendeur réclame et qui sont déclarées compensées comme susdit, le tout avec dépens contre l'intimée devant toutes les cours.

*Appeal allowed with costs.*

Solicitor for the appellant: *C. P. Beaubien.*

Solicitors for the respondent: *Lussier & Gendron.*

THE MANUFACTURERS LIFE INSURANCE COMPANY (DEFENDANT) ..... APPELLANT;

AND

JOSEPH NAPOLEON ANCTIL (PLAINTIFF) ..... RESPONDENT.

1897

*Oct. 11, 12.

*Dec. 9.

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

*Insurance, life — Wagering policy — Nullity — Waiver of illegality— Insurable interest—Estoppel—14 Geo. III. c. 48 (Imp.)—Arts. 2474, 2480, 2590 C. C.*

A condition in a policy of life insurance by which the policy is declared to become incontestable upon any ground whatever after the lapse of a limited period, does not make the contract binding upon the insurer in the case of a wagering policy.

Judgment of the Court of Queen's Bench reversed, Sedgewick J. dissenting.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court sitting in Review at Quebec, and ordering judgment to be entered for the plaintiff with costs.

The action was tried in the District of Kamouraska, before Mr. Justice Cimon and a jury, and upon the answers by the jury to the questions submitted both the plaintiff and the defendant moved for judgment, the defendants also moving alternately for a new trial, before the Superior Court sitting in Review at Quebec, where judgment was rendered by the majority of the court (Cimon J. dissenting), dismissing the plaintiff's motion for judgment, and granting the defendants' motion for a new trial. On appeal the Court of Queen's Bench reversed the Superior Court judgment

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

and ordered a judgment to be entered upon the verdict for $2,000 in favour of the plaintiff with costs. From the latter judgment the defendant appealed.

The case is sufficiently stated in the judgments reported.

*Casgrain* Q.C. for the appellant. Combining the findings of the jury with the admissions, it appears that at the time of the application for insurance and afterwards, the insured was without means, and unable to pay the premiums; that he was not related to the respondent, but only very remotely a connection of the latter's wife; he owed the respondent nothing at the time he made the application; and the respondent had then no pecuniary or other interest in his life; he never had the intention of insuring his life and paying the premiums, but executed the application upon being assured that the respondent would pay the premiums as agreed previously on condition that the policy should be made payable to him. The respondent participated in the application by entering into a contemporaneous agreement to give Pettigrew what he needed, provided the policy should be so issued, and never regarded the policy otherwise than as a speculation. The undertaking by the insured to pay the premiums was therefore only colourable, and devised to mask the fact that the respondent intended to pay the premiums in return for the benefit of the policy, and that he was the sole party interested. Compare *The North American Life Assurance Co.* v. *Craigen* (1) and remarks by Strong J. at pages 291-292. See also Imperial Statute, 14 Geo. III, c. 48, Arts. 2474, 2480, 2590 C. C. and *Vézina* v. *The New York Life Insurance Co.* (2). The facts that the insured lent himself to the device of ostensibly insuring his life

(1) 13 Can. S. C. R. 278. (2) 6 Can. S. C. R. 30.

and undertaking to pay premiums that he knew were far beyond his means and position in life, and that the company's agent connived at the contrivance, cannot alter the essence of the policy. From its inception it was a wager by the respondent on the length of another person's life. The respondent's interest was not in Pettigrew's life, but in his death. We also refer to *Connecticut Mutual Life Insurance Co.* v. *Schaefer* (1); *Bloomington Mutual Benefit Association* v. *Blue* (2); Crawley on Life Insurance, p. 26; *Wainewright* v *Bland* (3), *Shilling* v. *Accidental Death Insurance Co.* (4).

The Court of Queen's Bench, considered that the effect of the clause declaring the policy to be indisputable, was to require proof of moral fraud, or intentional concealment, contrary to the doctrine laid down in *Venner* v. *The Sun Life Insurance Co.* (5), a case of an unconditional policy effected by a debtor on his life in favour of a creditor. Here however the policy was void *ab initio;* there never was any valid existing contract which could be declared indisputable and the consent of the appellants to the insurance was fraudulently obtained upon warranties subsequently proved to be false. The case of *Wheelton* v. *Hardisty* (6), is easily distinguished. Here the falsity of the warranties goes to the very essence of the undertaking, and makes the insurance void from the beginning. 3 Bedarride, Dol et Fraude, § 1287; Ruben de Couder, Dict. de Droit vo. "Assurance sur la Vie," nos. 295, 305, 369, *et seq.*; Crawley on Life Insurance, p. 119; Bliss, (2 ed.) § 36; Porter, (2 ed.) 146, 197; 24 Laurent, no. 254.

(1) 94 U. S. R. 457.
(2) 120 Ill. 121.
(3) 1 Moo. & R. 481.
(4) 1 F. & F. 116; 2 H. & N. 42.
(5) 17 Can. S. C. R. 394.
(6) 8 E. & B. 232; 5 Jur. N.S. 14.

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

*Fitzpatrick* Q.C. and *Lafleur* for the respondent. The jury have found that there was no fraud or material misrepresentation or concealment, and these findings on matters of fact were adopted by the Court of Queen's Bench and ought not to be disturbed in a second appellate court. *Demers* v. *Montreal Steam Laundry Co.* (1). There is an important distinction between false declarations innocently made and those fraudulently made; *Wheelton* v. *Hardisty* (2); *Wood* v. *Dwarris* (3). The answers of the insured were given in good faith and they must consequently be favourably interpreted (4), and the clause providing that the policy shall be indisputable after a lapse of one year must be given its fullest effect. The Court of Review was unanimous in considering this clause as decisive, and the jury found that whatever errors may have been made, the answers in the application were given in good faith without intent to deceive. The Court of Queen's Bench unanimously adopted the same view. The respondent's relations to the insured were merely of a benevolent character and could of course give him no interest of an insurable nature in the life, but the insured could insure his own life (5), and this is what he did for the benefit he might receive in obtaining the tontine endowment or other advantages at the end of the fifteen years, the term of the policy, incidentally making his benefactor a beneficiary in case he died before that time. There is nothing illegal in this. The jury found no fraud, and the verdict should not be disturbed on this point either; *Metropolitan Railway Co.* v. *Wright* (6); 2 Graham & Waterman, New Trials, (2 ed.) 1283-7 and 1290 *et seq.* There was evidence to support the findings of the jury.

(1) 27 Can. S. C. R. 537.
(2) 8 E. & B. 232; 5 Jur. N.S. 14.
(3) 11 Ex. 493; 25 L. J. Ex. 129.
(4) Art. 2588 C. C.
(5) Art. 2474 C. C.
(6) 11 App. Cas. 152.

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Taschereau J.

The company is also estopped from pleading its own turpitude, even if the contract be held to be a wagering policy and voidable on that account, for they accepted the premiums and hold them still and ought not to be allowed to benefit by their own fault. The jury have found that the company was fully aware of the relations existing between the insured and the respondent, and that with this knowledge they issued the policy. The observations of Henry J., at page 45, in *Vézina* v. *New York Life Insurance Co.* (1) are in point, so also those of Ritchie C.J., at page 289, in *The North American Life Assurance Co.* v. *Craigen* (2). The true principles are laid down in *The Phœnix Insurance Co.* v. *McGhee* (3).

TASCHEREAU J.—This appeal must be allowed and the action dismissed. I have had communication of my brother Gwynne's opinion, and I could not add anything to it. I concur in every word of it. The clause by which the company stipulated that this policy would not be disputed after one year does not help the respondent's case. "*Pactis privatorum juri publico non derogatur*" (4). Private interests must give way before public interests The stipulation itself is contrary to law and public order. The company, appellant's, position in this case is certainly not a deserving one, but a defence like theirs to an action of this nature is allowed not for the sake of the defendant, but of the law itself. There can be no waiver of such an objection. *Coppell* v. *Hall* (5); 2 Solon, Nullité, no. 345. "La partie qui a contracté une obligation en fraude de la loi est recevable à en demander la nullité." Dalloz, '46, 2, 195; S. V. '65,

(1) 6 Can. S. C. R. 30.
(2) 13 Can. S. C. R. 278.
(3) 18 Can. S. C. R. 61.
(4) Broom's Maxims (6 ed.) 651.
(5) 7 Wall. 542.

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Gwynne J.

1, 77; '67, 2, 86; '70, 1, 357; *Barlow* v. *Kennedy* (1); Bédarride, Dol et Fraude, nos. 1294, 1295. But the action will be dismissed without costs. The appeal will be allowed with costs.

GWYNNE J.—This is an action upon a policy of insurance issued by the defendants upon the life of one Antoine Pettigrew, deceased. The plaintiff in his declaration alleges that the defendants by a policy of insurance by them issued upon the 12th day of May, 1894, upon the life of Antoine Pettigrew, promised the plaintiff to pay him the sum of $2,000 upon his furnishing proof of the death of the said Pettigrew. It then avers the death of Pettigrew upon the 9th of October, 1895. It then avers fulfilment of all conditions of the policy and that the plaintiff "en sa qualité de bénéficiaire du montant de la dite police d'assurance" has in accordance with the regulations of the company and the conditions of the policy made application for the payment of the said sum of two thousand dollars. To this declaration the defendants pleaded eighteen pleas with three of which only, the 11th, 14th, and 16th, we propose to deal, the rest contain various statements which are alleged to have been falsely and fraudulently made in the application for the insurance. The three pleas with which we are dealing taken together set up but one defence, which if established is in law a complete bar to the action, and in substance is, that the plaintiff never has had any insurable interest in the life of the said Antoine Pettigrew, and that the plaintiff was the person really assured; that the contract of insurance is one really by the plaintiff for his own profit upon the life of the said Antoine Pettigrew; and that the said policy of insurance is simply a wagering policy obtained with a view of making an

(1) 17 L. C. Jur. 253.

illegal speculation. Upon issue being joined on these pleas, a long list containing twenty questions, each containing several subdivisions, was directed by the court in accordance with the practice prevailing in the province of Quebec, to be submitted to the jury.

At the trial, upon the policy sued upon being produced and its execution admitted, and upon its being admitted that Pettigrew died on the 9th of October, 1895, as alleged in the declaration, the defendants entered upon the defence and commenced by calling the plaintiff himself upon whose examination it appeared beyond controversy that he had no insurable interest in the life of Pettigrew. His account of the steps taken in the initiation and procuration of the policy was as follows: He said that the defendant's agent Michaud first spoke to him *about taking a policy on the life of Pettigrew;* that Michaud at first asked plaintiff to take a policy on his own life which plaintiff refused to do; that shortly afterwards on a subsequent day, Michaud told witness that he had seen Pettigrew, and that he had said that he had no money; that Michaud then asked the plaintiff if he would pay for a policy on the life of Pettigrew to which the plaintiff replied that he would if the policy should be made payable to himself; that he preferred paying premiums for another to paying premiums on his own life; that this was a way to manage well, "que c'était un moyen d'économiser." He again repeated that it was the defendant's agent Michaud who made to him the proposition that he should insure Pettigrew. He further said that he was present when at his own house the application for the policy was prepared by Michaud and signed by Pettigrew with a [×] cross, the plaintiff himself having written Pettigrew's name to it. It was, he said, Michaud who inserted therein the words describing the plaintiff as Pettigrew's "pro-

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Gwynne J.

tector" if he ever should be in want. It was then that he said that he would provide for Pettigrew if ever he should be in want "*pourvu*" to use the plaintiff's own language, "*pourvu que la police serait donnée en mon nom.*"

He further said that Michaud and the plaintiff's wife, in her maiden name, by Michaud's direction, signed as witnesses; that Michaud took away the application and some few days afterwards brought to plaintiff a policy on Pettigrew's life and made payable to Pettigrew and his representatives which the plaintiff refused to receive because it was not made payable to himself. He had, he said, *exacted* that if the company should wish to issue a policy *payable to himself directly* he would pay the premiums, but that otherwise he would not take it. Thereupon the policy was returned to the company by Michaud and another policy in place of the first, (the one now sued upon) was sent to Michaud who delivered it to the plaintiff, who accepted it and paid the premiums upon it. Here it is to be observed that Michaud when returning the first policy to the company gave the company to understand that it was Pettigrew who refused to take the policy in the shape in which it was, whereas it appears that Pettigrew had no knowledge whatever of the proceeding. Michaud in his letter dated the 16th May, 1894, to the defendant's agent at Montreal says :—

J'ai reçu les trois dernières polices envoyées dont je vous en retourne une pour correction, celle de M. A. Pettigrew au lieu d'être payable à ses exécuteurs, administrateurs, &c. *il vent léguer* dans sa police pour le montant de la dite police à M. *Joseph Napoleon Anctil* et *il vous demande* s'il vous plaît d'en faire faire la correction *et aussi j'espère* que la compagnie voudra bien faire ce changement ; dans son application c'était M. Anctil qui était *l'héritier bénéficière.*

Michaud having been called as a witness by the plaintiff declared himself to be *l'instigateur* of the

policy sued upon. He gave a somewhat different account from that given by the plaintiff as to the circumstances attending its initiation. He agreed with the plaintiff that he had first asked the plaintiff to insure his own life which the plaintiff declined, but he says that Pettigrew was present at this conversation between him and the plaintiff and that he took an interest in it and joined in it, and he then relates a long conversation which he says then took place between him and Pettigrew in relation to life insurance and the insurance of Pettigrew's own life. It is singular, to say the least, (although what he says took place between him and the dead man is not very material upon the point in issue) that all that Michaud says took place between him and Pettigrew in the plaintiff's presence should have so taken place, and that the plaintiff in his evidence should not have said a word upon the subject. Michaud however says that he had another conversation a few days afterwards with Pettigrew, in consequence of which *he returned* to the plaintiff and asked him "*if he would not himself* take Pettigrew?" and that plaintiff then asked, *what it would cost to insure him?* That Michaud told him the price, whereupon the plaintiff said:

Submit it to him. See him and if he wishes *perhaps I will take the risk, but upon one condition, that the policy shall be made payable to myself.*

This is plainly the occasion upon which Michaud in his cross-examination tells how he overcame plaintiff's objection to taking the risk which Michaud was pressing him to incur. There he said that Anctil at first refused saying that he thought it would cost too much, whereupon Michaud told him how much it would cost and that the plaintiff in reply said:

Voyez-vous, le père peut vivre encore dix à quinze ans, et s'il vivait dix ans, et encore quand bien même qu'il vivrait rien que sept ans, je perdrais de l'argent, ça c'est un coup de dés, on ne sait pas.

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Gwynne J.

It thus appears that the plaintiff knew very well that what Michaud proposed to him was that he should enter into a gambling speculation, which in the plaintiff's opinion was attended with considerable risk of loss rather than with hope of profit. Michaud then tells how he overcame the plaintiff's scruples. He says that he told him that there is a condition in the defendant's policies which provides that after three years, when a person has paid three years if he wishes to give up the policy the company is obliged to give "*une police acceptée*" and that he, Michaud, thought that one would lose nothing, "*avec une police acceptée.*" He says that to this information and opinion given by Michaud, the plaintiff replied by asking, "*c'est inclus dans la police çela?*" to which Michaud replied by showing plaintiff one of the company's policies which he says he had with him, and he adds that the plaintiff took cognizance of it and after examining it said "*Faites l'examiner et s'il consent je le ferai assurer.*" Thus it appears that the plaintiff was satisfied that if poor Pettigrew should unfortunately live for three years he, the plaintiff, would be safe enough if the company should enter into a policy with himself directly in his own name upon Pettigrew's life with such a condition in it. Michaud then says that up to this time not a word had been said about the plaintiff giving anything to Pettigrew for his support, and he proceeds to say that after the above conversation with the plaintiff he went to Pettigrew and told him that he, Michaud, had found a person to pay the premiums, and that it was the plaintiff, and that he said to Pettigrew "*Je pense qu'il payera les primes; entendez-vous avec lui.*" This, he says, took place on the 5th or 6th of May. Now it does not appear that Pettigrew ever had any interview with the plaintiff in relation to the policy

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Gwynne J.

or made any arrangement with him in respect thereof. Nothing appears to have passed between them save that when the application was being prepared by Michaud in the plaintiff's house for Pettigrew to sign, the plaintiff, apparently to give colour to the statement put into the application by Michaud as Pettigrew's answer to a question required to be answered by the person whose life was proposed to be insured that the plaintiff was Pettigrew's "protector." The plaintiff said that he would provide for Pettigrew if ever he should be in want *provided that*, as the plaintiff says in his own language, "*pourvu que la police serait donnée en mon nom.*" This proviso so frequently insisted upon by the plaintiff appears to be a very explicit expression of the plaintiff's determination to have nothing to do with a policy upon Pettigrew's life unless the company should choose to issue to himself as sole beneficiary a policy to be made in his own name on Pettigrew's life. In fact the proviso attached to the making of the promise and the time when it was made seem rather to indicate that the sole object of the making the promise was to get Pettigrew to sign the application as prepared by Michaud for the purpose of assisting the plaintiff in his project of procuring a policy upon Pettigrew's life to be issued to the plaintiff in his own name.

Pettigrew's presence at the plaintiff's house, where the application was prepared and signed, is thus explained by Michaud. He says that upon the 8th of May, as he was returning to Anctil's house he met Pettigrew on the street and asked him if he would come into Anctil's, saying to him, "*on va terminer cela.*" He adds;

Alors je suis entré.' J'avais une plume et du papier sur moi et j'ai demandé à monsieur Anctil s'il voulait me permettre d'écrire; il a dit: Ecrivez tout ce que vous vondrez. Je lui ai dit que je voulais

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Gwynne J.

assurer le père Pettigrew. Je lui ai dit. *L'acceptez-vous s'il passe.* Je lui ai dit il peut être refusé par l'examinateur de la compagnie aussi. Et M. Anctil a dit: *C'est votre affaire, si la compagnie accepte payable à moi, alors je paierai les primes.*

Then as to the policy as first issued, he said that the plaintiff refused to accept it when he took it to him, because it was made payable to Pettigrew's representatives and not to himself, and that he told Michaud that he might return it to the company to do as they liked with it for that he would not accept it. Thereupon Michaud (no doubt in his admitted character of "*instigateur*" of the policy), wrote to the company's agent at Montreal (their head office being in Toronto), the disingenuous and untrue letter of the 16th May, 1894; and he admits that he never spoke to Pettigrew upon this matter, and that this transaction of the return of the first policy by the plaintiff's direction and the substitution therefor of the one now sued upon took place without the knowledge or consent of Pettigrew. Now if Pettigrew was ever intended to have any interest in the policy which Michaud was thus promoting; if as Michaud alleges in his letter to the company's Montreal agent of the 16th May, 1894, Pettigrew's object in signing the application, which he did sign in manner aforementioned, was that he might *bequeath* a policy to be issued upon the application to the plaintiff whom he intended to make his "*heretier beneficiare*," the policy as first sent to Michaud was framed in the precise shape which would have enabled Pettigrew to fulfil such intention. He could have transferred the policy had it been delivered to him in its original shape in his lifetime to the plaintiff, or he could have bequeathed it to him by will, but that, as we have seen, was not what the plaintiff had intended. *He had exacted* that the policy should be entered into by the company directly with

himself in his own name, and for this reason he refused it and directed Michaud to return it to the company to do what they liked with it for that if they did not choose to enter into a policy with himself in his own name he would have nothing to do with it. When then Michaud brought to him the policy now sued upon in substitution for the one he had refused, he accepted it as being in precise conformity with the terms he had exacted. It is thus established by the terms of the policy itself which is sued upon and by the evidence of the plaintiff himself and of his witness Michaud that Pettigrew never had and that it never was intended by the plaintiff that he should have any possession of the policy, any interest in it or control over it, and that the plaintiff is the sole person who ever was or that the plaintiff ever intended should be the holder thereof, or who should have any interest therein otherwise than by title derived from himself. Such being the undisputed facts appearing in evidence, and it appearing also that the plaintiff had no insurable interest in Pettigrew's life, the law pronounces the policy to be null and void, and under the circumstances appearing in evidence no verdict whether general or special which should be rendered by a jury in favour of the plaintiff in respect of the issue under consideration could ever be sustained in law. The plaintiff's evidence and the terms of the policy itself, left in point of fact nothing for a jury to entertain as regards the issue under consideration, and the questions assigned before the trial to be submitted to the jury on the trial became in truth inappropriate having regard to the undisputed facts which appeared in evidence.

There were two arguments pressed upon us to which it is only necessary to allude briefly. First, that assuming the policy to be a wagering policy

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Gwynne J.

as entered into by the defendant with the plaintiff who had no insurable interest in Pettigrew's life, still that as the policy was initiated and investigated by the company's agent who knew all the circumstances attending its initiation and promotion the defendant's should be held to be *in pari delicto* and estopped from urging this defence; but as it is the law which, upon grounds of public policy, pronounces the policy to be void under the circumstances the doctrine of estoppel has no application. It certainly seems strange that the suspicions of the company's agent at Montreal should not have been awakened when he saw on the application the statement in answer to a question submitted to the person whose life was proposed to be insured that the only relationship existing between the plaintiff and Pettigrew was that the former was the latter's "protector." Michaud's letter of the 16th May, 1894, seems to have been written in terms calculated if not intended to mislead, and perhaps it did mislead the Montreal agent, and so the defendants can not be said to be *in pari delicto*, but in no case can they be held to be bound to the plaintiff by a contract entered into under circumstances which the law upon grounds of public policy pronounces to be null and void, and for the same reason, to a policy so made null and void the clause in the policy that it shall be indisputable after the expiration of one year can have no application. Secondly, it was argued that by the tontine provisions of the policy Pettigrew, if he should live for fifteen years and the policy should be kept in force so long, would derive substantial benefit from the policy, but this argument ignores the following facts, namely: that without the plaintiff's consent that policy could not continue in force for fifteen years: that the plaintiff took special care that the policy should be entered

into with himself directly in his own name: that before consenting to accept it he satisfied himself that he could at the expiration of three years terminate it advantageously, under the condition in the policy in that behalf, if Pettigrew should so long live: that by the express terms of the tontine provisions it is the *lawful holder* of the policy who alone becomes entitled to the benefit of those provisions; and lastly, that the plaintiff himself with whom the policy was entered into, or his personal representative in case of his death, or some person claiming lawful title under him, could alone be such *lawful holder* if the policy should be in force at the expiration of fifteen years.

It being then impossible that upon the facts in evidence judgment could ever be recovered by the plaintiff upon the issue under consideration, it remains now to be considered how that issue, in presence of the incontrovertable facts established in evidence, should be dealt with. It would be unfortunate if for any technical reason a new trial should be ordered of an issue the trial of which has already cost so much, and which if tried again must, as the evidence shows, eventuate in judgment for the defendants. The trial having taken place upon an assignment of facts answered by the jury, both plaintiff and defendants moved for judgment before the Court of Review, each claiming to be entitled thereto, and the defendants moved also in the alternative for a new trial. The Court of Review rejected plaintiff's motion for judgment and ordered a new trial. From this judgment the plaintiff, insisting still that he was entitled to judgment in his favour, appealed to the Court of Queen's Bench at Quebec. By this appeal the case was again, we think, at large before the Court of Queen's Bench which court should have pronounced the judgment which should have been pronounced by

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Gwynne J.

the Court of Review on the original motions. That court reversed the judgment of the Court of Review and granted the plaintiff's motion for judgment. From that judgment the defendants now appeal to this court, and we are bound to give the judgment which, we are of opinion, should have been given by the Court of Queen's Bench and by the Court of Review upon the original motions for judgment in that court; and for the reasons already given we are of opinion that judgment cannot be rendered in favour of the plaintiff.

Then as to the defendants' motion for judgment there are only three questions of the jury the answers to which appear to require consideration; the answers of the jury to the other questions relating to the issue under consideration are in perfect accord with the evidence as given by the plaintiff and relied upon by the defendants. As to these latter questions the jury in substance say:—

1. That the policy sued upon was issued by the defendants and that the plaintiff is the Joseph Napoleon Anctil mentioned in the policy:—2. That the said policy was issued upon an application signed by Pettigrew with his mark:—3. That the plaintiff wrote the name of Pettigrew to the application:—4. That Pettigrew's name was written by the plaintiff with the consent of Pettigrew:—5. That Pettigrew at the time of setting his name to the application was a poor man not having any means whatever:—6. That plaintiff paid all the premiums which were paid:—7. That before the issuing to the plaintiff of the policy sued upon the defendants had upon the said application issued a policy payable to Pettigrew or his representatives, and that the plaintiff refused to accept that policy and in substitution for it had exacted the policy sued upon.

All these answers are in perfect accord with the contention of the defendants and with the evidence as given by the plaintiff himself and on his behalf by Michaud in support of defendants' contention. The only questions, the answers to which require any consideration, are the 6th, 8th and 9th in the assignment of facts prepared before the trial for submission to the jury. The first of these is a question submitted to the jury immediately after and in close context with questions relating to the signing of the application which elicited the answers of the jury to the effect that the application was signed by Pettigrew with his × mark, his name having been subscribed thereto by the plaintiff, and that the plaintiff's wife had subscribed as a witness in her maiden name, and that at the time of its having been so signed Pettigrew was a poor man without any means whatever. Then is put the 6th question for the purpose plainly of eliciting the opinion of the jury upon the question whether, from the manner of procuring the signature of Pettigrew to the application it was or was not the plaintiff who was applying for an insurance to himself for his own benefit upon Pettigrew's life; the question is--

Est-il vrai que c'est le demandeur lui-même qui a fait [*ainsi* assurer la vie du dit Antoine Pettigrew?

Was it the plaintiff who "*ainsi*" that is, who *thus*, by this mode of getting Pettigrew's signature to the application who was for his own benefit proposing to insure Pettigrew's life; to which the jury answer:

Non, c'est Antoine Pettigrew lui-même qui s'est fait assurer.

The plain meaning of which answer appears to be that it was Pettigrew himself who was applying for a policy of insurance to be issued to himself upon his own life. We are not concerned at present to inquire whether that answer so relating to the time of the application being signed by Pettigrew could be sup-

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Gwynne J.

ported upon the whole of the evidence, for it has no relation to the policy sued upon, as plainly appears by the answer of the jury to another question wherein they have found as a fact, as already mentioned, that although the defendants prepared a policy intended to be issued to Pettigrew in pursuance of the application and purporting to be entered into with him and his representatives, yet upon its being brought to the plaintiff he refused to accept it and *exacted* the issuing of the policy sued upon, to himself alone, thus in very substance adopting the evidence of the plaintiff himself, who, when Michaud brought to him the first policy (because it was entered into with Pettigrew and his representatives he refused to accept it), adding in his own language,

> J'ai exigé que si la compagnie défenderesse voulait émaner une police payable à moi directement que je paierais les primes autrement que je n'en voulais pas.

The jury have thus substantially found as a fact that (whatever may have been Pettigrew's intention in signing the application) that intention was never carried into effect but was frustrated by the plaintiff insisting that a policy should be issued upon Pettigrew's application entered into with the plaintiff himself alone in his own name for his own benefit, which was accordingly done as appeared by the policy sued upon, and such policy must in law be held to be null and void unless the plaintiff had an insurable interest in Pettigrew's life. The answers of the jury to questions 8 and 9 relate to the insurable interest which the plaintiff had, if he had any, on Pettigrew's life. The 8th inquires whether there was any family relationship existing between Pettigrew and the plaintiff, and if yea, what relationship? To which the jury, answer: "Yes; a remote affinity." The 9th question was plainly put upon the assumption that

the policy sued upon was entered into with the plaintiff himself for his own benefit, upon Pettigrew's life. It is: "Had the plaintiff an interest *other than* that of affinity to insure for his own benefit the life of Pettigrew as he has done?" to which the jury answer, "Yes; as protector." As to these answers it is sufficient to say that they do not establish that the plaintiff had an insurable interest in the life of Pettigrew, and the evidence plainly showed that he had not.

Upon the whole therefore we are of opinion that as by the terms of the policy it plainly appears that it was entered into with the plaintiff in his own name for his own benefit, and by the plaintiff's own evidence that it was never intended by him that it should be otherwise, and as it appears that the answers of the jury to all the questions submitted to them bearing upon the issue under consideration are in perfect accord with such terms of the policy and such evidence of the plaintiff himself, and as it appears by the evidence and the finding of the jury upon the questions submitted to them that the plaintiff had no insurable interest in the life of Pettigrew the law pronounces the policy to be null and void, and the appeal must be allowed with costs in this court and the Court of Queen's Bench and judgment entered in the Superior Court for the defendants.

SEDGEWICK J.—I regretfully find myself obliged to differ from the conclusions arrived at by the majority of the court in this case. My opinion as to the soundness of the judgment appealed from is so strong that I feel it to be my duty to give expression to it, but under the circumstances, very shortly.

The insurance company has set up two defences, namely, (1), misrepresentation in the application for the policy, and (2), its wagering character.

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Sedgewick J.

The instrument sued on contains this clause:

> After this policy has been in force one full year it will be indisputable on any ground whatever, provided the premiums have been promptly paid, and the age of the insured admitted.

The death occurred after the year had expired.

This provision has an important bearing upon both branches of the defence, affording, as I think, in the first branch, a conclusive answer to it.

It is of recent origin, having in principle been first accepted by a company in England less than twenty years ago, the period of attack however being there limited to three years, the leading companies of Canada and the United States subsequently adopting it. In several cases the prescriptive limit has since been reduced to two years. The defendant company, more public spirited, enterprising and benevolent than its competitors has made it one. There can be no difference of opinion as to what was intended by it and as to what it really means. It was intended to preclude an insurance company upon the trial of an action against it by the holder of a policy from setting up after the death of the assured any defence except non-payment of premium, age being admitted. The defence of innocent, though inaccurate representation, or of wilful misrepresentation or of any species of fraud on the part of the assured was alike included, the object being to make a policy after a prescribed lapse of time, the premiums being paid, an equivalent of money; a promise to pay absolutely and at all events.

There have been no decisions, so far as I know, in England or Canada, except the one appealed from, dealing with this clause, and we are at liberty to consider it untrammelled by authority. Thinking as I do that it means what it says—and it being admitted that it means what it says—let me discuss for a moment

the only answer that is set up in respect to it. That answer is that any contract stipulating whether directly or indirectly that the question of fraud shall not be raised, is against public policy and therefore void. Take a policy like the present where this particular clause has not been inserted. The statements made in the application for the policy form the basis of it. Any deviation from the most exact and scrupulous accuracy in answering the questions contained in the application or in the medical certificate voids the policy, no matter how long and to what amount the premiums have been paid. A representation though innocently made, if untrue, is as fatal as if wilfully made, and it has often happened that policies after having been many years in force have been defeated upon the company showing after the death of the assured that some harmless or innocent mistake had been made. Absolute accuracy of statement is a prerequisite to the indefeasibility of an insurance policy, otherwise it cannot avail in the holder's hands. A security of this kind is therefore of a most precarious nature. The fact that such defences had often succeeded, the possibility that such defences might still be raised, no matter the length of time during which the assured had paid his premiums, was not calculated to advance either the interests of the insurers or the insured, and insurance companies began to feel the necessity of removing this manifest hindrance to the development of their business. The plan adopted was to declare that policies *three* years old should be incontestable for any cause whatever. The idea was that this was not taking a great risk, inasmuch as no man was likely in advance to contemplate and purpose suicide at the expiration of so long a period as three years, nor was he likely to live for that length of time if he had made serious mis-statements regarding his health

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Sedgewick J.

which had also escaped the scrutiny of the company's medical officers. From their point of view the risk was indefinite, while the gain by making policies incontestable was very clear indeed. Policies for very large amounts were being taken out both in the United States and Canada, and the complaint was made that in the hands of a third party they constituted no certain security, as in the event of the death of the assured the claim might be contested on any ground, good or bad, evidence being forthcoming to prove it. By making them incontestable after three years, they became an absolute security at least to the extent of their surrender value, and in the event of the continuous payment of premiums for its full amount, provided the company was financially sound. It was doubtless under the influence of these considerations that the plan of inserting in life policies this kind of stipulation was generally adopted. Then as to the way the assured would view it: He doubtless would be required to pay an increased premium in consideration of what was in fact an increased risk, and the inducements operating upon his mind justifying such increased payment would be the incontestability of the policy after the prescribed time, and its consequent largely increased value, whether to himself in his lifetime, as a negotiable security for money, or in the event of his death to his representatives, by reason of its payment without dispute. It does not appear to me that any principle of public policy is violated by the making of such a contract. I may enter into any contract of insurance I like with an insurance company providing for the payment of a sum of money at my death. I may say: "I will make no representations as to my age or as to the state of my health. I do not propose to give you any information as to my personal habits, or as to the character of my life as a

risk, or as to whether in my view I shall live or die within a certain date. Find that out for yourself. All I propose to do is to pay you so much money while I live in consideration of your paying my estate so much money when I die." If a company chooses to enter into a contract upon those terms there is nothing to prevent them from doing so. They can make any bargain they please. I may know that my life will not be a long one; I may not as a business man upon the terms I propose be willing to insure myself against my own death, but I am not under any obligation (legally, at all events), to make disclosure of any fact. They may or may not take the risk, and if they do take it they must abide by it. *Uberrima fides* not being required in this species of insurance no defence of fraud or misrepresentation would be available, for the reason that there was none.

Then may I not say to an insurance company: "I will pay you annually during my life such a sum of money in consideration of your paying upon my death another sum of money? In my application I have answered certain questions you have put to me. These answers may be true, or they may be untrue, but I want you to fix a time beyond which you will not go in making the inquiry. You may make it one year, or three years, or any period you like, the shorter you make it, the more I will pay you; but whatever the limit is I want a certain definite time fixed so that after that I may know that my life is in fact and truth *assured*." The company asks: "Why this unusual request?" My answer is: "When you are called upon to pay this policy many years may have intervened. I will be dead, and my executors may have to sue you. I cannot give evidence; I cannot then prove the accuracy of the statements I have now made, but you may then bring witnesses against me to show

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Sedgewick J.

that either in some material or immaterial fact I have made a mistake, or even a misstatement, and you may be able in my absence to convince the jury or the court that your allegation, though false, is true. I want to be assured that such a thing is impossible. I will not take the risk of fallible memory or of incorrect or even perjured testimony which may be produced against me when I am gone. You will be as anxious then to escape liability as you are now to secure my premiums, and I want you *now* to take these risks." And the insurance company assenting, issues the policy upon these terms. How can a contract of that kind possibly be against public policy? The company has the period specified, one, two or three years, as the case may be, within which to make inquiries as to fraud or any matter of defence, and may bring their action within that period to set the policy aside. In the event of death within that period the policy may be found void. The ordinary law during the prescribed period as to the absolute accuracy of the application and of the statements made therein has full effect. But after that period it is just as if no formal application had been made at all—no representations true or false had been made—but as if the policy had been issued without them. After the lapse of the term of prescription they are all swept out of the bargain. The policy is a *tabula rasa* as far as they are concerned, the contracting parties understanding that thereupon it has become indisputable. Can there be anything against public policy in such an arrangement? Nay, rather is it not much more against public policy to allow a company that has entered into such a contract, that has year after year taken the premiums of the assured and has allowed him to act upon the faith of it, he borrowing, and third parties lending money upon the faith of its being

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Sedgewick J.

what the company has in express terms said it was, "indisputable," after his death to repudiate it altogether by resurrecting these stipulations which had fulfilled their office and become extinct—it may be half a century before—and one, two or three years after the issue of the policy? If public policy permits this, it becomes an aider and abettor in the most flagrant dishonesty.

Public policy much less requires it when we consider that from 1886 to the present time, as public statistics show, the sum total of life insurance in Canada has risen from one hundred and seventy-one millions to three hundred and twenty-seven millions, such rapid increase being no doubt largely brought about by the introduction of this very stipulation, and that upon the strength of it hundreds of millions of money, on this continent at least, have been loaned and borrowed. To hold it void would be by one blow to inflict a fatal wound upon the value of these securities imperilling at the same time the whole insurance interests of the continent.

An additional consideration leads me to the same conclusion. Suppose this policy did not contain the indisputability clause and that there had been as a matter of fact misrepresentation on the part of the assured. Let us suppose that one, two, or three years after the issue of the policy the idea forced itself upon the assured that his representatives could not recover, and he went to the insurance company and informed it of his fraud and suggested the payment of an increased premium if the stipulation in regard to it were eliminated altogether, and in consideration of the increased premium the company agreed to keep the policy alive; could it, under these circumstances set up the original fraud as a defence? The present is substantially a similar case. The company says:

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Sedgewick J.

"Upon the faith of your statements being true, and for the money you now pay us, we will insure you for one year. If within the year you die and your statements are untrue, we pay nothing, but if you live beyond the year we will insure you until you die for the annual premium, whether your statements are true or not." Is such an agreement contrary to public policy? I do not believe that in the Province of Quebec freedom of contract is handicapped by any such doctrine or that life insurance companies, or even individuals, labour under any such obnoxious disability, or that the value and security of an insurance policy whether to the assured or to a money lender is less in Quebec than in the other Provinces of Canada. Another consideration influences me. According to the Code (article 993) fraud is a cause of nullity only when the party against whom it is practised would not have contracted had there been no fraud. That is elementary and natural justice. But this policy was issued .and an increased premium exacted upon the assumption that there was or might be fraud on the part of the applicant. There was a time limit within which it was stipulated that advantage might be taken of the fraud, but it was also stipulated that if death occurred beyond that limit—fraud or no fraud—the company would be liable. Besides, I am not sure that had there been no misrepresentation—had the applicant stated that he recently had had for the first time, an attack of appoplexy, brought on by his intemperate habits, this company would have refused the risk. That is a question upon which there is absolutely no evidence. Successful competition, the immediate possession of premium money, and the new business, these and other considerations relating to the chances of death within the time limit, might one or all have influenced the com-

pany, had accurate answers been made, and for all I know, and as far as the evidence goes, the policy might nevertheless have issued. It has not conclusively been proved that the alleged "artifices" came within the principle of "*dans locum contractui.*"

I have not expressed any opinion as to whether or not the finding of the jury upon the question of misrepresentation was so unreasonable that justice required that it should be set aside. Of course there was uncontradicted evidence that an untrue statement had been made, but I think there is sufficient evidence to support the finding that it was not wilfully untrue. Then as to the question of this being a wager policy. With all possible respect for my brother Gwynne's carefully prepared judgment, I differ from him absolutely in his treatment of this point. There is no difference of opinion as to what a wager policy is, or as to the fact that courts of justice will not enforce it. Divergence of view, however, occurs as to the application of facts to the admitted law. I think the evidence here conclusively proves that Pettigrew insured his own life for his own benefit, obtaining from Anctil money to pay the premium, and Anctil advancing it, induced to do so by the fact that he, being made the beneficiary, would be comparatively secure, as he was assured that in the event of three annual payments a paid-up policy would be issued. *Primâ facie*, upon the documentary evidence, Pettigrew insured his own life. It is not the case of a man having no interest in the life of another insuring that life for his own benefit. If Anctil had been the original mover in this matter, if he had gone to the insurance agent and had instituted the negotiations which eventually led to the execution of the contract, that would have been important in showing that Pettigrew was a mere tool or instrument for the purpose

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Sedgewick J.

of carrying out his design. But the application was made by Pettigrew after the company's agent had asked him to insure, and he had come to Anctil and had his promise—based upon what consideration is immaterial—that he would see that the premium was paid. The security which Anctil took for the repayment of the insurance moneys was the provision that in case of death the policy should be paid to him, an ordinary and common thing in case of life insurance. There is nothing to prevent one from insuring his life, making the policy payable in the event of death to an absolute stranger, as is common in many places making it payable to a university or a public charitable institution. The fact that Anctil was named the beneficiary is in itself of no consequence in determining the character of the policy. It is not in my view arguable that the contract was in the present case, as a matter of law, between Anctil and the company. The contracting parties were Pettigrew and the company, Anctil being, in the event of death, the beneficiary. The contention that Anctil alone was interested in the policy is absolutely refuted by the provisions of it. It is true that in the event of death the money was payable to Anctil, but in the event of the assured living until the 5th of May, 1909, then the tontine provisions of the policy took effect, and he, Pettigrew, then being the legal holder of the policy, as he was at the time of his death, would be entitled to the cash, or the paid up insurance, or the annuity or other benefits provided for thereby.

In Pettigrew's application for insurance (made a part of the policy) he says that in the event of death the policy is to be paid to Anctil, but he is equally explicit in his statement that the payment is to be made to himself at the expiration of the tontine period. The finding of the jury upon this point was

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Sedgewick J.

in my view justified by the evidence, and even if I thought the weight of evidence was the other way, under the circumstances, we should not disturb it. But I am also of opinion that this defence is not such a defence as, having in view the indisputability clause, this company can set up. It is one of the grounds which insurance companies frequently raise as a defence, but it is equally a ground which the company has precluded itself from setting up under the clause in question. If the policy was subject to this vice, it was a vice into which they were bound to inquire within the prescribed period. Not having made that inquiry then they are precluded now from making it, and all the more so since it is undisputed that the company's agent was perfectly familiar with all the facts relating to this branch of the case and communicated these facts to the head office of the company before the policy issued. I admit that a court of justice will not enforce a wagering policy, no matter what agreement may be come to between the parties. Courts will not enforce immoral or illegal contracts, and if such appears to be the character of the transaction from evidence properly adduced in the course of a trial then they ought to refuse to give effect to it, leaving the parties *in statu quo*. In the present case upon proper principles of pleading the plea in relation to wager should have been struck out, as well as the plea in respect of misrepresentation, and all the evidence on both points was irrelevant. Had the evidence been excluded the court would have had no material in the present case upon which they could find upon the question of wager, the documentary evidence all being the other way, and therefore could not on its own motion dismiss the action upon that ground. Circumstances might arise at a trial justifying a court in making a special inquiry as to the real

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

Sedgewick J.

character of a suspicious contract; but I do not think that in a case like the present, the conduct of the insurance company being as it was, the court should be too astute in finding reasons to support a suggestion that possibly the instrument sued on was a wagering policy.

In Quebec under a practice unknown in other parts of Canada, one not a party to but beneficially interested in a contract may enforce it, our English doctrine of privity not prevailing. It is by virtue of this that Anctil is plaintiff in the present action. I do not however understand that it necessarily follows that he becomes entitled to the amount of the judgment irrespective of the claim of the legal representatives of Pettigrew and they may still be entitled to call him to account, allowing him to retain thereout his advances and reasonable interest.

In dealing with this case I may perhaps have gone beyond the record in discussing the "indisputability" clause, but I have referred generally to its object and history as courts have frequently done in discussing stipulations crystalized by usage into definite shape, the "sue and labour" clause in marine policies, for example, or the "restraint upon anticipation" clause in marriage settlements.

One other observation I may make. I have assumed in this discussion that there was a policy—an actual contract both in law and in fact—an agreement or *consensus* of thought between the parties, of which the instrument in question was but the written expression and evidence, and it is only to such a case that this opinion applies.

In my view the judgment of the court appealed from should be sustained.

KING and GIROUARD JJ. concurred with GWYNNE J.

*Appeal allowed with costs.*

Solicitors for the appellant: *McGibbon, Casgrain, Ryan & Mitchell.*

Solicitors for the respondent: *Lemieux & Lane.*

1897

THE MANUFACTURERS LIFE INSURANCE COMPANY v. ANCTIL.

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WILLIAM F. POWELL (DEFENDANT)...APPELLANT;

AND

THOMAS J WATTERS (PLAINTIFF)...RESPONDENT.

1897

*Oct. 12.

Dec. 9.

ON APPEAL FROM THE SUPERIOR COURT OF LOWER CANADA, SITTING IN REVIEW AT MONTREAL.

*Title to lands—Deed, form of—Signature by a cross*—19 *V. c.* 15 *s.* 4 (*Can.*) *—Registry laws—Litigious rights — Acquiescence — Evidence — Commencement of proof—Warrantor impeaching title—Arts.* 1025, 1027, 1472, 1480, 1487, 1582, 1583, 2134, 2137 *C. C.*

Where the registered owner of lands was present but took no part in a deed subsequently executed by the representative of his vendor granting the same lands to a third person, the mere fact of his having been present raises no presumption of acquiescence or ratification thereof.

The conveyance by an heir at law of real estate which had been already granted by his father during his lifetime is an absolute nullity and cannot avail for any purposes whatever against the father's grantee who is in possession of the lands and whose title is registered.

Writings under private seal which have been signed by the parties but are ineffective on account of defects in form, may nevertheless avail as a commencement of proof in writing to be supplemented by secondary evidence.

The grantees of the warrantors of a title cannot be permitted to plead technical objections thereto in a suit with the person to whom the warranty was given.

Where there is no litigation pending or dispute of title to lands raised except by a defendant who has usurped possesssion and holds by force, he cannot when sued set up against the plaintiff a defence based upon a purchase of litigious rights.

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1897

POWELL v. WATTERS.

APPEAL from the judgment of the Superior Court of Lower Canada sitting in Review at Montreal (1), which affirmed the judgment of the Superior Court, District of Ottawa, maintaining the plaintiff's action with costs.

The plaintiff claimed title and possession of certain mining rights and also 40 tons of mica, excavated by the defendant and lying at the pit's mouth. The defendant alleged that plaintiff was a purchaser in bad faith of litigious rights; that defendant owned by good title and by prescriptive possession; that the deeds on which plaintiff relied were absolute nullities, and that the defendant held in good faith, and, if evicted, was entitled to retain the mica extracted, as representing fruits and revenues, on paying a rate per ton. A last plea made the usual claim for improvements made under mistake of title.

The defence of litigious rights was accompanied by a tender and deposit of $1,000, the amount paid by plaintiff, and prayed that defendant might be subrogated in all his rights. This plea was dismissed and by the final judgment the trial court declared plaintiff owner of the mining rights and entitled to possession of the mica, on paying the cost of output.

Both parties claimed title through the late Maurice Foley, the Crown patentee. Plaintiff relied on the following chain of title:—1. Original indenture under private seals before one witness, executed 14th November, 1872, at Hull, Province of Quebec, and registered on the 16th of the same month, whereby Maurice Foley leased to T. P. French the mining rights in question for 99 years. The consideration was a yearly payment of one shilling and a royalty of six per cent on the output. The signatures of the parties were attacked

(1) Q. R. 12 S. C. 350.

that of Maurice Foley being made with a (×) cross:— 2. An indenture under private seals before one witness, executed 25th November, 1873 (registered 31st December, 1873), at Ottawa, in Ontario, whereby Maurice Foley leased the same mining rights for ninety-nine years on somewhat modified terms to T. P. French. The original of this document was lost, but the signatures were also attacked, that of Maurice Foley appearing to have been made with a (×) cross:—3. Maurice Foley died on the 16th of April, 1874, Michael Foley being his sole heir; T. P. French died on the 18th November, 1890, and his son and daughter succeeded to his title:—4. An original indenture, under private seals, in presence of two witnesses, executed October 28th, 1892, at Toronto and Ottawa, registered 28th September, 1893, whereby the heirs French sold all their rights to plaintiff.

The defendant relied upon, 1—An indenture of sale under private seals before one witness, from Michael Foley as sole representative of his father, conveying the same mineral rights to Pierce Mansfield, dated 9th January, 1875, registered 1st February, 1875, the original also said to be lost; and 2—An indenture, under private seals, dated 26th September, 1892, at Ottawa, whereby Pierce Mansfield sold said rights to defendant, signed and sealed in the presence of two witnesses, and registered in due course.

The farm on which the mines exist always remained the property and residence of the Foley family, who only parted with the minerals, but neither Maurice nor his son Michael ever prospected for minerals subsequent to the purchase by T. P. French. French worked a baryta mine in 1874, 1875, and 1877, and claimed the mineral rights from 1872 until his death in 1892, and this active exercise of title was continued by his heirs. In 1878 there appeared to have

1897

POWELL v. WATTERS.

been a contract made whereby Michael Foley agreed with T. P. French to get out 100 tons of phosphate. The defendant's vendors do not appear to have exercised continuous or even isolated acts of ownership, but there was some proof of an indefinite character that T. P. French was present at the passing of the deed by Michael Foley to Mansfield, although it does not appear that he assented to the deed. On the other hand, at a later date French appeared to have warned Mansfield not to buy from Michael Foley, as the mines were not his to sell. Defendant however took possession of the mines and got out the mica which was seized on the institution of the plaintiff's action.

The $1,000 deposited with the plea as to purchase of litigious rights was seized while in court for costs due the plaintiff's attorney (*par distraction des frais*), and a portion paid to him under an order of the court.

*Geoffrion* Q.C. for the appellant. The plaintiff's title rests on two indentures which do not bear the signature of the vendor, but only his alleged cross, and executed in presence of but one witness. These deeds do not constitute a *commencement de preuve par ecrit*, capable of supplement by parol evidence of identification or execution; they are absolute nullities incapable of legal registration which, having nevertheless been registered, were properly ignored by defendant. Arts. 2134, 2137 C. C.; C. S. L. C. c. 37 ss. 56–58; *McKenzie* v. *Jolin* (1); *Neveu* v. *de Bleury* (2); *Querette dit Latulippe* v. *Bernard* (3). Cross-marks are not valid as signatures in deeds of land. The defendant's open and adverse possession was notice of the litigious character of the claim of French's heirs which plaintiff bought at his risk, and the latter at best can demand only restitution of the

(1) 5 L. C. R. 64. (2) 6 L. C. Jur. 151.
(3) 1 Dor. Q. B. 69.

price tendered with defendant's plea. Arts. 1582 & 1583 C. C. *Brady* v. *Stewart* (1). The *vileté de prix*, shows that the plaintiff was speculating on the disputed title, trusting by litigation to secure a valuable mine with an output, in mica alone, of several thousand dollars per year for a few hundred dollars risked to obtain a colourable title. French abandoned his possession to Mansfield and acquiesced in the deed by Michael Foley to him, tacitly ratifying it by his presence at its execution without making objections.

*Lafleur* and *Aylen* for the respondent. There is no law in the province of Quebec requiring a document, otherwise available as a private writing or as a commencement of proof in writing, to disclose the presence of two subscribing witnesses, on pain of nullity. The statute, 19 V. c. 15, s. 4 (Can.) authorizes signatures of illiterate persons by a cross-mark. The *lex rei sitæ* rules, art. 6 C. C. See also *Trudeau* v. *Vincent* (2), and cases there collected in the judgment of Mr. Justice Davidson. The indenture of the 14th of November, 1872, between Maurice Foley and the late T. P. French, followed by registration, and by effective acts of possession and ownership, was a commencement of proof in writing, and is fully supplemented by the evidence. Arts. 1225, 1233 C. C. The seizin of heirs operates by law alone in the province of Quebec (3).

The appellant and his vendors had constructive notice of a prior title on file in the registry office at the time of their purchase, as well as actual notice of French's title. They were in bad faith from the beginning and no indemnity for improvements can be allowed. They were usurpers holding by violence; trespassers against the true owner of the mines. The

(1) 15 Can. S. C. R. 82. (2) Q. R. 1 S. C. 231.
(3) Arts. 606, 607 C. C.

1897

POWELL v. WATTERS.

plea of litigious rights is based on defendant's own bad faith and violence, and there is no longer any deposit under the control of the court available to support the tender. The title was not in question in any pending litigation when plaintiff purchased. The trespasses and usurption by defendant and his vendors cannot form the basis of a plea setting up a purchase of litigious rights. Arts. 1583, 1584 C. C. *Chartrand* v. *City of Sorel* (1). After issue had been joined the appellant asked that the plea of litigious rights should be first heard. His motion was granted, a special trial had and the plea was dismissed on the ground that the title was clear, being only two removes from the Crown grant. The court ordered that the evidence taken at that trial should apply to the whole case. Other witnesses were then examined and the case heard upon the merits, the judgment on the plea of litigious rights approved and the action maintained.

The judgment of the court was delivered by

TASCHEREAU J.—The controversy in this case is upon the title to certain mines and minerals in the Township of Hull. The Superior Court and the Court of Review both held that the plaintiff, present respondent, is the rightful owner. The defendant now appeals.

The respondent's declaration alleges that by deed executed and registered on the 28th day of October, one thousand eight hundred and ninety-two, John McLean French and Anna Montague French sold to him, the said respondent, all the mines and minerals in question of which the said John McLean French and Anna Montague French had inherited from the late Thomas Patrick French, their father, who had acquired them by two deeds, one of the fourteenth

(1) Q. R. 7 S. C. 337.

day of November, 1872, and one of the 25th November, 1873, (registered respectively 16th November, 1872, and 31st December, 1873,) from Maurice Foley, the Crown's grantee. He then alleges possession under these conveyances, and trespass by appellant with usual conclusions *au pétitoire*.

The appellant met this action, first by a plea of litigious rights with tender and deposit, and second by a plea claiming title under a sale to him of 26th September, 1892, registered 4th October, 1892, by one Mansfield, who had purchased on 9th January, 1875, (registered on 1st February, 1875) from Michael Foley, the universal legatee of Maurice Foley, who died in 1874, the same Maurice Foley who had sold to French. These deeds of both parties are all in evidence or admitted.

It is found by the two courts below that up to his death in 1890, from the time of his purchase from Maurice Foley in 1872, or soon thereafter Thomas Patrick French had been in open and undisturbed possession of these mines; that his heirs had continued in possession up to appellant's trespasses in 1892; that neither Michael Foley nor Mansfield were ever in possession as owners, and that the pretended sale by said Michael Foley to said Mansfield in 1875 had never been acted upon. There is ample evidence to support these findings, and we cannot be expected here to reverse the concurrent determination of the two courts below thereupon, though the evidence is not all one way. I see that it is proved by Michael Foley, and not contradicted by Mansfield, that there was no consideration, nothing whatever, paid to him by Mansfield for that sale of 1875. This is strong corroborative evidence that the parties thereto did not themselves consider their dealing as a serious sale, or as a sale at all. Mansfield would then have got these

1897

POWELL v. WATTERS.

Taschereau J.

mines as a gift, an assertion which I could not believe. French's presence at that dealing, whatever name be given to it, and whatever may have been the reasons for it in the parties' mind, is not by itself alone, unexplained though it be, evidence that he assented to it. There is direct, though negative, evidence to the contrary in the very fact that he was not a party to it. He may very well be assumed to have been asked to agree to it and to have refused, since he was, to the knowledge of the parties (presumed in law, if not actually), the registered owner, and he continued to claim ownership as he had always done since 1872, and remained in possession. That is far from an acquiescence, or a ratification which would entail a renunciation to, or a relinquishment of his rights, which, as held in the courts below, it would be unlawful to presume.

Then the sale by Maurice to French, leaving aside the registry laws, was perfectly valid without any writing at all, even as to third parties. Arts. 1025, 1027, 1472 C. C.; Sirey, Tables Dec. [1881-1890] "Vente," nos. 2, 4, 21, 80 to 84; Sirey, Code Ann. sous art. 1582, nos. 9, 60, 98 *et seq.* That being so, how could Michael Foley sell or cede to Mansfield that which he never had? His father, Maurice, cannot have left in his succession, or have bequeathed, what he had parted with in his lifetime. Michael Foley, then, sold what clearly did not belong to him. And such a sale is, in law, not only voidable, but void, radically null, of a nullity of *non esse*. Art. 1487 C. C. This is, no doubt, as to third parties, subject to the registry laws, art. 1480 C. C. But these do not add to Mansfield's title, as the sale to French is registered before his purchase.

If it was the land itself that had been sold by Maurice to French, and the sale registered, could Michael have hypothecated it in 1875 to Mansfield?

Could Mansfield, if it had been done, have brought an hypothecary action against French? It seems to me impossible to contend that any such action could have been maintained. This is the same question, or very nearly so, in another form, but I think it helps to show how groundless are appellant's pretensions to a title from Mansfield. Another form of testing appellant's rights: If Mansfield had bought this lot himself from Maurice or from Michael, would not the duly registered charge upon it created in favour of French, have remained in full force and effect? Would he not have acquired subject to French's duly registered rights?

Further, as at the time of this pretended sale in 1875 by Michael Foley to Mansfield, French was the registered owner. Article 2089 C.C., as to preference from priority of registration, has full application. Article 2098 C. C. also necessarily implies that when a deed conveying an immovable is registered, this conveyance may be invoked against any third party who has purchased the same from the same vendor. Now here, French and Mansfield derive their titles from the same person, for, in law, Maurice and Michael are one and the same person. Michael is, by the law of the province, the continuation of Maurice's personality, and, as such, the *garant* of French. If French and Michael Foley, or French and Mansfield, had gone to law about this title, it seems to me unquestionable that French's claim would have prevailed. And if so, the respondent, who holds under French, has a good title, and, *a converso*, the appellant has no title, because Mansfield had none. *Girault* v. *Zuntz* (1), Verdier, Transc. Hyp. nos. 306, 307, 308, 323, 326, 364, 365.

(1) 15 La. An. 684.

1897

POWELL v. WATTERS.

Taschereau J.

As to appellant's technical objections to the sales by Maurice Foley to French, they should have been specially pleaded, and it is because they were not, we must assume, that they are not noticed in the judgment of the Superior Court. However, they were noticed in the court appealed from to be dismissed, after an elaborate review by Davidson J., for the court, of the questions raised thereby. We do not think it necessary to add anything to it. It would require a very strong case indeed, one stronger than the appellant has been able to make, to justify us in upsetting a well settled jurisprudence, and one upon which it is obvious the validity of a large number of titles must depend. If not by themselves complete, these private writings certainly amount, by the law of the Province, to a *commencement de preuve par écrit*, as held by the Court of Review, and that is sufficient, upon the further evidence adduced, to uphold the sale to French. His vendor's legal representative admits the sale, and the registration with the possession completes the evidence.

If it had been necessary to pass upon the second of French's purchases from Maurice Foley, that of 25th November, 1873, of which the original writing is lost, I would probably have found more legality in the proof of it by the copy from the Registry Office, than the Court of Review seems to have. Arts. 1218, 1233 C. C. nos. 6, 7; Sirey, Code Ann. art. 1325, nos. 52, 54, 60, 77. However, both courts have rested the respondent's title upon the sale of the 14th November, 1872, and that being sufficient to dispose of the controversy between the parties, it is unnecessary for us to go further than the courts below have done.

Another ground perhaps upon which these objections to the sales by Maurice Foley to French might be disposed of, is that they are not open to the appel-

lant, because he holds under Michael Foley through Mansfield, and Michael Foley is, as representative of Maurice, French's *garant*, and respondent's *arrière garant*. Michael could not, any more than Maurice could have done in his lifetime, be admitted to invoke irregularities of a title of which he is the *garant*. "*Quem de evictione tenet actio eumdem agentem repellit exceptio.*" Pothier, Vante, 165 *et seq.* French and the respondent, if attacked by him on that ground, would meet him by the demand of a valid deed, if one was necessary. Can the appellant be in a better position than his vendor? *Non debeo melioris conditionis esse quam actor meus a quo jus ad me transiit.*

When sued *en garantie* by appellant (as he has been), could Michael Foley plead that French's purchase from Maurice of which he, Michael, is the *garant*, is not valid because of the irregularities upon which these objections are based? Or, take up the *fait et cause* of appellant, and plead these irregularities in answer to the respondent's action? Compare Troplong, Hypotheques nos. 524, 527, 530.

As to the plea of litigious rights, it does not seem to me to be a serious one, and it was rightly dismissed three times in the courts below. I am not sure if it comes up at all upon this appeal. To call Judge Gill's judgment rejecting it an interlocutory judgment seems to be a misapplication of that term. Was that not a final judgment on that issue? A final judgment upon the merits of that plea? If the court had maintained the plea, that would clearly have been a final judgment. Why a judgment dismissing it is not as final as to that issue is not evident to me. This is not the ordinary case of an interlocutory judgment. If it was given on a part only of the issues in the case it is due to a singular intervertion of the appellant's pleas. Instead of pleading to the merits of the action first, and his

1897

POWELL v. WATTERS.

Taschereau J.

plea of litigious rights as a subsidiary one to be adjudicated upon only if he did not obtain the dismissal of the action upon his first pleas, he pleaded litigious rights first, and his answers to the merits of the action as subsidiary pleas. Then, upon his special application, by order of the court, the issue on the plea of litigious rights was first tried. No doubt, the respondant cannot complain if his adversary, diffident perhaps of his chances to get the action dismissed, was willing to pay him one thousand dollars without entering on the merits. But I do not see that by applying for a separate trial on this plea, the appellant got the right not to treat the judgment upon it as a final one on that issue, when adverse to him. After that judgment, the case went on to trial on the action, and that the same court could be asked again to pass upon an issue it had already tried and determined would certainly seem an anomaly. And if that could not be done, the merit of that plea is not now before us. If the Superior Court had dismissed the respondent's action upon the merits would, upon an appeal by him, the judgment in his favour upon the plea of a litigious right have been reopened? However, assuming the point to be still open to the appellant, there is nothing in it. He cannot be admitted to controvert a right theretofore uncontroverted, and upon the only ground of his own litigation, which, in law, is without any foundation, defeat the respondent's unquestionable rights. There was no controversy, no litigation spoken of, before the appellant's purchase from Mansfield. French's rights were neither uncertain and disputed, nor disputable, and they did not become uncertain, or disputed, nor disputable in law till the appellant disputed them in this case. It was he who bought for the purpose of litigation, as held by the Superior Court. His own purchase shows this by the fact that Mansfield, his

1897

POWELL v. WATTERS.

Taschereau J.

vendor, specially stipulated no warranty, and that he would not even be obliged to refund the price if appellant did not get the property.

According to appellant's theory, any trespasser might, by his sole act of trespass, hinder the sale of a property by one who has been in open and undisturbed possession as owner for ten, twenty, or more years. Then by Art. 1583, C. C. it is by the debtor that a right must be disputed or disputable to give it the litigious character necessary to oblige its assignee to surrender it. Is there any such thing in this case as a right disputed by the debtor? Has the law as to litigious rights any application, even if under the Quebec Code it applies to anything else than sales of debts and rights of action? Huc, Transmission des créances, nos. 615, 618.

I would hold this plea to be untenable Further, the deposit of $1,000 made with it is not now in court. The appellant, in his factum, says that it has been paid to the respondent himself for costs to which the appellant had been condemned. But that is an error, though I do not see that it would make any difference; it has been paid over to the third party, the *procureur distrayant*. 3 Baudry-Lacantinerie, Droit Civil, no. 650. However, this is without importance in this case. We are of opinion that the appeal must fail on the merits of both issues.

The appeal is dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *W. R. Kenney.*

Solicitor for the respondent: *Henry Aylen.*

1897

*Oct. 12, 13, 14.

*Dec. 9.

THE GLENGOIL STEAMSHIP CO., AND ROBERT GRAY (DEFENDANTS) ..... APPELLANTS;

AND

WILLIAM PILKINGTON AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

THE GLENGOIL STEAMSHIP CO., AND ROBERT GRAY (DEFENDANTS) ..... APPELLANTS;

AND

WILLIAM FERGUSON AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

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

*Maritime law—Affreightment—Carriers—Charterparty—Privity of contract—Negligence—Stowage—Fragile goods—Bill of lading—Condition—Notice—Arts.* 1674, 1675, 1676 *C. C.—Contract against liability for fault of servants—Arts.* 2383 (8); 2390, 2409; 2413, 2424, 2427 *C. C.*

The chartering of a ship with its company for a particular voyage by a transportation company does not relieve the owners and master from liability upon contracts of affreightment during such voyage where the exclusive control and navigation of the ship are left with the master, mariners and other servants of the owners and the contract had been made with them only.

The shipper's knowledge of the manner in which his goods are being stowed under a contract of affreightment does not alone excuse shipowners from liability for damages caused through improper or insufficient stowage.

A condition in a bill of lading, providing that the shipowners shall not be liable for negligence on the part of the master or mariners, or their other servants or agents is not contrary to public policy nor prohibited by law in the Province of Quebec.

*PRESENT: —Taschereau, Gwynne, Sedgewick, King and Girouard JJ

1897

THE GLENGOIL STEAMSHIP COMPANY v. PILKINGTON.

THE GLENGOIL STEAMSHIP COMPANY v. FERGUSON.

Where a bill of lading provided that glass was carried only on condition that the ship and railway companies were not to be liable for any breakage that might occur, whether from negligence, rough handling or any other cause whatever, and that the owners were to be "exempt from the perils of the seas, and not answerable for damages and losses by collisions, stranding and all other accidents of navigation, even though the damage or loss from these may be attributable to some wrongful act, fault, neglect or error in judgment of the pilot, master, mariners or other servants of the shipowners; nor for breakage or any other damage arising from the nature of the goods shipped," such provisions applied only to loss or damage resulting from acts done during the carriage of the goods and did not cover damages caused by neglect or improper stowage prior to the commencement of the voyage.

APPEALS (consolidated) from two judgments of the Court of Queen's Bench for Lower Canada (1), affirming the decisions of the Superior Court, District of Montreal (2), maintaining the actions respectively with costs.

The facts and questions at issue in both cases are identical and are stated in the judgment now reported. The cases were consolidated after joinder of the issues in the trial court and were heard together in both courts below and on the appeals to the Supreme Court of Canada.

*Atwater* Q.C. and *Duclos* for the appellant. The ship was chartered for the voyage in question by the Columba Steamship Company. The charter party is produced and it is proved that the ship was being operated for the benefit of the Columba line, and not for the Glengoil Steamship Company, who though owners of the vessel, had parted with her possession and control for this voyage. The Columba Company were, for the purposes of the voyage, *pro hac vice* owners, and the captain was subject to their orders and control. The Glengoil Steamship Company did

(1) Q. R. 6 Q. B. 294, note. (2) Q. R. 6 Q. B. 95.

1897

THE GLENGOIL STEAMSHIP COMPANY v. PILKINGTON.

THE GLENGOIL STEAMSHIP COMPANY v. FERGUSON.

not contract with the respondents, nor were they the carriers. The bills of lading were issued by the Columba Steamship Company for the carriage of goods ostensibly by their ship, and were signed by their own agents at Antwerp. Even presuming they had signed as agents for the captain, the captain himself, for the purpose of this voyage, was agent of the Columba line. The Columba line secured the freight, contracted for the carriage of the goods, received the consideration for this carriage, issued its own bills of lading. Arts. 2391, 2408 C. C.; *Frazer* v. *Marsh* (1); *Colvin* v. *Newberry* (2); *Marquand* v *Banner* (3); *Baumwoll Manufactur von Scheibler* v. *Furness* (4).

The conditions in the bill of lading constitute an express contract and do not fall within art. 1676 C. C. which applies merely to notices. The conditions are reasonable and can be validly stipulated; *Mongenais* v. *Allan* (5); *Moore* v. *Harris* (6); *Trainor* v. *The Black Diamond Steamship Co.* (7); *Ohrloff* v. *Briscall* (8); *Shaw* v. *North Pennsylvania Railroad Co.* (9); *Pollard* v. *Vinton* (10); see remarks by Lord Usher, M. R., at page 479 in *Leduc* v. *Ward* (11). I tis a self-evident fact that glass is an extremely difficult cargo to handle, and one which carriers will only accept under express and special conditions. We contend that the stowage was sufficient but that the cases in which the glass had been packed by the shippers were too slight, being made of thin soft wood, and no precautions were taken to keep it from moving within these cases. The stowage was done by competent stevedores at Antwerp, and was as

(1) 13 East 238.
(2) 1 C. & F. 283.
(3) 6 E. & B. 232.
(4) [1893] A. C. 8.
(5) Q. R. 1 Q. B. 181.
(6) 1 App. Cas. 318; 2 Q. L. R. 147.
(7) 16 Can. S. C. R. 156.
(8) L. R. 1 P. C. 231.
(9) 11 Otto 557.
(10) 15 Otto 7.
(11) L. R. 20 Q. B. D. 475.

well done as it could be under the circumstances and having regard to the nature of the goods. Soem question was raised as to the propriety of putting sand at the bottom, and the breakage was attributed to the sand sinking, and thus allowing the cases of glass to fall beneath the bottom of the combings of the hatch; but according to the evidence of the Port Warden of Montreal, who made the examination of the cargo as soon as the hatches were taken off, and gave a certificate of the breakage, the sand had not shifted, and sand is a first-class foundation. The shippers were aware of the method of stowage adopted and were satisfied with it.

Even if the loss or damage were caused by negligence or fault of any persons for whom the appellants are responsible, there is a valid contract exempting them from liability and the respondents are estopped from complaining of improper stowage. There was no improper stowage nor any fault nor negligence, and the damage was due to the perils of the sea, and there is no liability. Art. 1072 C. C. *Packard* v. *The Canadian Pacific Railway Co.* (1). It is true that the Quebec courts have held against the validity of contracts for exemption from liability for negligence, but in this case the law of the flag rules, and as the "Glengoil" is a British ship the rules of the English law must prevail.

*Macmaster* Q.C. for the respondents (*Farquhar Maclennan* with him). As to the liability of the ship, notwithstanding the charter party, we refer to *Baumwoll Manufactur von Scheibler* v. *Furness* (2); *Manchester Trust* v. *Furness* (3); *Hayn* v. *Culliford* (4); *Sandenan* v. *Scurr* (5); *Leary* v. *United States* (6). This charter-party did not give the charterers "exclusive control

(1) M. L. R. 5 S. C. 64.
(2) [1893] A. C. S.
(3) [1895] 2 Q. B. D. 282, 539.
(4) 3 C. P. D. 410; 4 C. P. D. 182.
(5) L. R. 2 Q. B. 86.
(6) 14 Wall. 607.

1897

THE GLENGOIL STEAMSHIP COMPANY v. PILKINGTON.

THE GLENGOIL STEAMSHIP COMPANY v. FERGUSON.

and navigation " of the ship. Art. 2391 C. C. It was a contract to render a particular service for a fixed amount in money, the owners retaining the control and possession of the ship, and we had no notice of charter-party.

The action arose in the Province of Quebec where the delivery of the goods was contracted for. Arts. 1674, 1675, 2383 (8) 2390; 2409, 2413 C. C. declare the law and there is no proof of any foreign law applicable to the case. The master is obliged to stow and care for the cargo, arts. 1672, 1675, 2424 & 2427 C. C., and to deliver the goods, art. 2428 C. C. The owners are responsible for the acts of the master, arts. 2389 & 2390; *Steel* v. *State Line Steamship Co.* (1). The Dominion Act (2), founded upon 37 Vict. ch. 25, does not interfere with the provisions ot the Civil Code. The mere notice by conditions indorsed on the bill of lading does not bind the shippers; art. 1676 C. C. Carriers cannot stipulate against responsibility for faults of themselves or their employees. *Chemin de fer d'Orléans* v. *Barbezat* (3); *Chemin de fer de l'Ouest* v. *Savaglio* (4), and references in note. No one can free himself from responsibility for his own fault; see Sirey & Gilbert, Code de Commerce, art. 98, nos. 79–84. Such a contract is forbidden by law, and *contra bonos mores*, arts. 989, 990, 1062, 1064 C. C. No fortuitous event occurred in this case, the fault of the defendants alone caused the damages, arts. 1200-1202 C. C. A condition of non-warranty does no more than to shift the burden of proof. *Chemin de fer Paris-Lyon, etc.* v. *Abegy* (5); see also authorities cited in Dalloz, Table Dec. 1877-1887, vo. " Commissionnaire," nos. 79-85, and Sirey, Table Dec. 1881-1890, vo. " Chemin de fer." (6); *Chemin de fer de l'Est, etc.* v. *Chuchu, etc.* (7);

(1) 3 App. Cas. 72.
(2) R. S. C. c. 82.
(3) S. V. 1860, 1, 899.
(4) S. V. 1859, 1, 316.
(5) S. V. 1876, 1, 80.
(6) Nos. 190 *et seq.*
(7) Dal. 1890, 1, 209.

*Compagnie Anonyme de Navigation* v. *Akoun* (1); *Vatin* v. *Blanchard-Duchesne* (2).

The jurisprudence of the Province of Quebec is uniform and unbroken that the carrier cannot contract himself out of this liability, and it is quite in line with the French jurisprudence. *Samuel* v. *Edmonstone* (3); *Huston* v. *Grand Trunk Railway Co.* (4); *Allan* v. *Woodward* (5); *Watson* v. *Montreal Telegraph Co* (6); *Richelieu & Ontario Navigation Co.* v. *Fortier* (7); *Great North-Western Telegraph Co.* v *Laurence* (8); *Mongenais* v. *Allan* (9); *Gauthier* v. *Canadian Pacific Railway Co.* (10). Even supposing that there could be such exemption from liability, that exemption would have to be made in the most express terms. The general exemption in favour of the "ship" is altogether too indefinite in this bill of lading. The "ship" does not mean the owners, and certainly it does not mean the master and employees of the vessel. The law, in the United States; (*Liverpool and Great Western Steamship Co.* v. *Phœnix Insurance Co.* (11); *New York Central Railroad Co.* v. *Lockwood* (12);) in France and in the Province of Quebec, is that the clause exempting the carrier from liability for his faults or those of his employees, is contrary to public order and cannot be invoked as an exemption from liability where fault is proved.

The cases of *Peek* v. *The North Staffordshire Railway Co.* (13); *Doolan* v. *The Midland Railway Co* (14); *Robertson* v. *The Grand Trunk Railway Co.* (15); *The Grand Trunk Railway Co.* v. *Vogel* (16); and *In Re*

(1) Dal. 1892, 1, 456.
(2) Dal. 1895, 1, 40.
(3) 1 L. C. Jur. 89.
(4) 3 L. C. Jur. 269.
(5) 22 L. C. Jur. 315.
(6) 5 Legal News 87.
(7) M. L. R. 5 Q. B. 224.
(8) Q. R. 1 Q. B. 1.
(9) Q. R. 1 Q. B. 181.
(10) Q. R. 3 Q. B. 136.
(11) 129 U. S. R. 397.
(12) 17 Wall. 357.
(13) 10 H. L. Cas. 473.
(14) 2 App. Cas. 792.
(15) 24 Can. S. C. R. 611.
(16) 11 Can. S. C. R. 612.

1897

THE GLENGOIL STEAMSHIP COMPANY v. PILKINGTON.

THE GLENGOIL STEAMSHIP COMPANY v. FERGUSON.

*Missouri Steamship Co.* (1), were decided under different circumstances and laws from those prevailing in the Province of Quebec, which govern the present case—*lex loci contractûs* not being pleaded or proved.

The cases in which the glass was shipped were sound and sufficient and were the ordinary cases for shipping glass. The captain failed to carefully arrange and stow the glass, and did not attend to its stowage, but left it to his mate who knew nothing about the stowage of glass, and who never carried a cargo of glass before. The glass on arrival was found to have sunk down from eighteen inches to over three feet, which sinking, in the absence of sufficient bracing, allowed the glass to fall down and get broken The surveyors all condemned the stowage. The respondents in both cases submit that even if the burden of proof of negligence should be upon them, it is clear that there was gross neglect of duty on the part of the master and crew in respect of the stowing and arranging of the cargo, and that the injury can only be attributed to that cause.

The judgment of the court, in both cases, was delivered by :

TASCHEREAU J.—The plaintiffs, present respondents, allege that the appellants are respectively owners and master of the steamship "Glengoil;" that on 14th May, 1893, appellants received at Antwerp, in Belgium, in good order and condition, for carriage to Montreal, certain cases of plate glass, the property of the respondents ; that the appellants took the glass on board the steamer, and acting through their duly authorized agents, issued bills of lading therefor to the respondents' order; that the master, Gray, and the crew and men under him were guilty of fault, negligence and want of

(1) 42 Ch. D. 321.

1897

THE GLENGOIL STEAMSHIP COMPANY v. PILKINGTON.

THE GLENGOIL STEAMSHIP COMPANY v. FERGUSON.

Taschereau J.

care in arranging and stowing the glass, and did not safely, properly or sufficiently stow it; that owing to the improper and insufficient stowage, and to the fault of the appellants the glass was damaged during the voyage to the extent of $3,667.01 *; and that the respondents had a privilege upon the steamer for this sum and were entitled to a conservatory attachment on the vessel to secure it.

The appellants severed in their defence, but each pleaded four similar pleas:

First—A general denial;

Secondly—That there was no privity of contract between the parties, inasmuch as the steamer had been chartered for the voyage in question to the "Columba Line," and the contract for the carriage of the goods was with the "Columba Line;"

Thirdly—That by the terms of the bills of lading, it was provided that the glass was carried only on condition that the ship was not liable for breakage whether from negligence, rough handling or any other cause whatever; and, further, that it was a condition of the bill of lading that the owners were exempt from perils of the sea and from damage arising from the nature of the goods, or accidents of navigation even when caused by the fault of the master or other servants of the owners;

Fourthly—That the glass was properly stowed and the stowage was approved by the respondents, shippers and representatives in Antwerp; that the damage was due to the insufficiency of the cases or packages containing the glass, and to accidents of navigation caused by tempestuous weather during the voyage.

[*REPORTER'S NOTE.—The claim for damages in the Pilkington case was $3,667.01 and in the Ferguson case $3,830.]

1897

THE GLENGOIL STEAMSHIP COMPANY v. PILKINGTON.

THE GLENGOIL STEAMSHIP COMPANY v. FERGUSON.

Taschereau J.

The trial judge found as a matter of fact that the damage suffered by the respondents was due to negligent and insufficient stowage of the glass, as alleged in the statement of claim. The Court of Appeal has concurred in that finding. There is evidence to support it, and in accordance with a well settled jurisprudence the appellants cannot expect us to reverse it. There is nothing in the case to take it out of the general rule as to appeals from conflicting evidence.

As to the appellants' plea of no privity of contract, on the ground that the ship had been chartered by the "Columba Line," we disposed of it at the hearing. The courts below rightly held that the appellant company had the exclusive control and navigation of the ship during this particular voyage (1), and that the respondents had contracted with them, and with them only. *Sandeman* v. *Scurr* (2); *Manchester Trust* v. *Furness* (3).

As to appellants' contention that the stowage had been approved of by the respondents' agents, it is not supported by the evidence, and the judgment appealed from rightly rejected it. In law, the mere fact that the shipper knew how the goods were being stowed does not alone excuse the shipowner from negligence. *Hutchinson* v. *Guion* (4).

The judgment appealed from also rejected the third of the appellants' pleas, based upon the stipulation in the bill of lading that the glass was carried only on the condition that the ship was not liable for breakage whether from negligence, rough handling or any other cause whatever, and on condition that the owners were exempt from the perils of the sea and from damage arising from the nature of the goods, or accidents of navigation, even when caused by the fault or negli-

(1) Art. 2391 C. C.
(2) L. R. 2 Q. B. 86.
(3) [1895] 2 Q. B. D. 282, 539.
(4) 28 L. J. (C. P.) 63.

gence of the pilot or master, or other servants of the owner. As to this part of the judgment we think that there is error in the reason given by the court.

This special plea is grounded on the stipulations of the bill of lading that:—

> Glass is carried only on condition that the ship and railway companies are not liable for any breakage that may occur, whether from negligence, rough handling or any other cause whatever.

and that:—

> Owners to be exempt from the perils of the seas * * * * and not answerable for damage and losses by collisions, stranding and all other accidents of navigation, even though the damage or loss from these may be attributable to some wrongful act, fault, neglect or error in judgment of the pilot, master, mariners or other servants of the ship owner; * * * * nor for breakage or any other damage arising from the nature of the goods shipped * * * *.

The *considerant* of the Court of Appeal, overruling this plea is that:—

> Considering that the appellants could not limit their responsibility in this matter by notices of conditions known to the shippers, nor stipulate by contract immunity from their own fault or that of persons for whom they are responsible, such an agreement being prohibited by law. Art. 1676 C. C.

The learned judge who, for the court, gave the reasons for the judgment, holds that the stipulation in question is illegal, because it is immoral and contrary to public interest. Such, he says, is the uniform jurisprudence in the Province of Quebec. Assuming that to be so, though, in some of the cases cited at bar, the distinction between notices and express contracts would appear to have been lost sight of, for us to blindly follow that jurisprudence here, though more pleasant and far less onerous, would be to forget our duties. We have to scrutinize and review it, mindful always, I need not say, of the high consideration it is entitled to. It strikes one as an astounding proposition, to say the least, that what is undoubtedly licit in England,

1897

THE GLENGOIL STEAMSHIP COMPANY v. PILKINGTON.

THE GLENGOIL STEAMSHIP COMPANY v. FERGUSON.

Taschereau J.

under the British flag, which covers over two-thirds of the maritime carrying trade of the world, should be immoral and against public order in the Province of Quebec, and that what is sanctioned by law in six of the Provinces of this Dominion, should be prohibited in the seventh because of its immorality. Compare, *In re Missouri Steamship Co* (1); and *Trainor* v. *The Black Diamond Steamship Co.* (2). As well said by a learned writer in France in an elaborate review of the question:—

> La liberté laissée aux parties contractantes, en ce qui touche la responsabilité des armateurs, n'a pas empêché le commerce Anglais d'envahir le monde entier et d'être pour nôtre pays un trop juste sujet d'envie. (3)

Is a condition in a bill of lading, stipulating that the owners will not be responsible for the negligent acts of the master, illegal and void? The Court of Appeal answers in the affirmative, on the ground, as appears from their formal judgment, that such a stipulation is immoral and illegal because, being prohibited by article 1676 of the Civil Code, it is unlawful under article 990, which enacts that the consideration of a contract is unlawful when it is prohibited by law, or contrary to good morals or public order. We have come to the opposite conclusion. Far from prohibiting such a contract, this article 1676 implies that it is a perfectly licit one. It certainly does not take away the right to expressly agree to a limitation of this liability. On the contrary it impliedly admits it, for, if it did not exist, this enactment as to notices would altogether be a superfluous one. It merely enacts that there will be no implied contract from a notice limiting the carrier's liability even when that notice is known to the shipper, so that,

(1) 42 Ch. D. 321. (2) 16 Can. S. C. R. 156.
(3) Rev. Critique, [1869], 199.

1897

THE GLENGOIL STEAMSHIP COMPANY v. PILKINGTON.

THE GLENGOIL STEAMSHIP COMPANY v. FERGUSON.

Taschereau J.

without an express contract, the full liability of the carrier must be given effect to, notwithstanding such a notice and knowledge thereof by the shipper. It is not given as a new law, and nothing in the report of the codifiers gives room for the contention that an express contract of this nature was intended to be prohibited by this enactment The jurisprudence in France, though perhaps formerly not uniform, now sanctions the validity of such a contract. However, as we have come to the conclusion that the appeal fails upon another ground, I will not here dwell more at length upon this question, nor on the issue with Gray, the captain, upon the more difficult question, under the law of the Province of Quebec, of the stipulation by him of non-liability for his own negligence, though both were extensively and ably argued before us. I merely refer to the following, as containing almost all that can be said or quoted on this subject. Dalloz, 1877, 1, 449; 1877, 2, 68; Sirey, 1876, 1, 357 and note; Sirey, 1879, 1, 422, (note 1-2,) and 423; Dalloz, 1884, 1, 121 and note; Sirey, 1887, 2, 136; Sirey, 1888, 1, 465, and note by Lyon-Caen; Dalloz, 1894, 1, 441 and note; Pandectes Françaises, 1896, 1, 388. An elaborate commentary on the question by Sarrut, is to be found in Dalloz, 1890, 1, 209. I refer also to Dalloz, Repertoire (Supplement), v. "Droit Maritime" no. 314, and to Sirey, Code de Commerce, nos. 79 *et seq.* under article 98 and nos. 23 *et seq.* under article 216; also to Lyon-Caen et Renault, Droit Commerciale, vol. 3, nos. 623 *et seq.*

In Louisiana, it was held by the Supreme Court that

> all contracts may be made, exçept those reprobated by law or public policy, and a contract by which one stipulates for exemption from responsibility for loss occasioned to another from the negligence

1897

THE GLENGOIL STEAMSHIP COMPANY v. PILKINGTON.

THE GLENGOIL STEAMSHIP COMPANY v. FERGUSON.

Taschereau J.

of his agents or servants is not against public policy, or forbidden by law. *Higgins* v. *New Orleans etc. Railroad Co.* (1).

And in Scotland, such a stipulation is also lawful. *Henderson* v. *Stevenson* (2); *Gilroy* v. *Price* (3).

In Italy it was likewise held by the Cour de Cassation at Florence (4), that:

La clause du connaissement par laquelle le proprietaire est dechargé de la responsabilité des fautes du capitaine est valable.

In Germany and in Belgium the law on the subject is the same. Therefore, it may be fairly asked, can there be anything immoral or against public order in a law that rules not only England, but also Scotland, Italy, Belgium and Louisiana, where the laws are derived from the same sources as those of the Province of Quebec?

On this point the appellant would be entitled to a judgment allowing the appeal and dismissing the action, as they are not liable for the neglect of their captain.

As to the issue with Gray, the captain, it involves the question of his right to stipulate that he would not be liable for his own negligence; on that point we do not decide, as the appeal on both issues must be dismissed, as I have intimated, upon a ground common to both, taken by the respondents, which is, that the conditions in question in the bill of lading in this case do not cover or apply to the act of negligence of the captain charged and found, the defective stowage. The stowage of goods forms part of the obligation which the carrier takes upon himself when no agreement to the contrary appears. It is a duty to be discharged by the master and the crew, and one which arises upon the mere receipt of the goods for the pur-

(1) 28 La. An. 133.
(2) L. R. 2 H. L. Sc. 470.
(3) [1893] A. C. 56.
(4) [1888] Jour. Dr. Intern, Privé, 554.

poses of carriage (1). And it is a duty which it would require an express contract to supersede or excuse. Art. 2424 C. C.; Sirey, Code Commerce, under article 222; *Sandeman* v. *Scurr* (2); *Hayn* v. *Culliford* (3); Dalloz, 1890, 1, 197.

Then conditions of this nature limiting the carrier's liability or relieving him from any, are to be construed strictly and must not be extended to any cases but those expressly specified; *Phillips* v. *Clark* (4); *Trainor* v. *The Black Diamond Steamship Co.* (5). Here the condition that glass is to be carried without liability for breakage must be read as assuming that the glass had been properly stowed. It cannot be read as covering a defective stowage. "Carried" means "during carriage," "during navigation," "in the course of the voyage," and does not cover the stowage done, of course, before the carriage begins "*The Accomac*" (6); *Hayn* v. *Culliford* (3); "*The Ferro*" (7); "*The Glenochil*" (8). The damage here, it is true, was caused during the voyage, whilst the goods were being carried, but the captain's negligence which caused this damage was prior to the voyage. The shipper relieved the ship from negligent acts of the captain or crew during the carriage, during the navigation, but on the implied condition that his goods had been properly stowed. It was unnecessary for him to stipulate expressly for a proper stowage; the law does so in such contracts. In *Hay* v. *La Compagnie Havraise* (9) the Cour de Cassation held, in accord with the English cases I have cited, that a condition as to negligence by the captain "*en navigant le*

(1) Caumont, Dict. Dr. Maritime, vo. "Arrimage."
(2) L. R. 2 Q. B. 86.
(3) 3 C. P. D. 410; 4 C. P. D. 182.
(4) 2 C. B. (N. S.) 156.
(5) 16 Can. S. C. R. 156.
(6) 15 P. D. 208.
(7) [1893] P. D. 38.
(8) [1896] P. D. 10.
(9) Dal. '89, 1, 340.

1897

THE GLENGOIL STEAMSHIP COMPANY v. PILKINGTON.

THE GLENGOIL STEAMSHIP COMPANY v. FERGUSON.

Taschereau J.

*navire*" did not extend to a defective stowage of the goods. Now the word "carried" in this bill of lading, means nothing else but "*en navigant le navire.*"

The other conditions as to "wrongful act, fault, neglect or error in judgment, of the pilot, master, mariners or other servants" clearly applies only to damage or loss from accidents of navigation. An accident during navigation, the result of defective stowage, is not an accident of navigation.

All the perils and acts covered by these two conditions in the bill of lading are subsequent to the stowage. *Steel* v *The State Line* (1) For in the words of Ritchie C.J., in *Trainor* v. *The Black Diamond Steamship Co.* (2) :—

> The terms of the bill of lading relate to the carriage of the goods on the voyage, and not to anything before the commencement of the voyage.

I refer also to *Tattersall* v. *The National Steamship Co.* (3).

A question might have arisen in the case as to which law applied to this contract, but as no other law has been pleaded or proved, the law of the Province of Quebec governs the case, or more correctly perhaps, should I say, the law of Belgium on the subject, if that governed, must be assumed to be the same as the Quebec law.

The appeal will be dismissed, but, as the appellant succeeds on the principal point of law argued before us, we give no costs upon this appeal.

*Appeal dismissed without costs.*

Solicitors for the appellants : *Atwater, Duclos & Mackie.*

Solicitors for the respondents : *Macmaster & Maclennan.*

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(1) 3 App. Cas. 72.

(2) 16 Can. S. C. R. 156.

(3) 12 Q. B. D. 297.

ROBERT COWANS, AND OTHER (DEFENDANTS).. ..... } APPELLANTS; 1897

*Oct. 14, 15.

*Dec. 9.

AND

JOHN MARSHALL (PLAINTIFF) .....RESPONDENT.

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

*Negligence—Master and servant—Common fault—Jury trial—Assignment of facts—Arts.* 353 *&* 414 *C. C. P.—Art.* 427 *C. P. Q.—Inconsistent findings—Misdirection—New trial—Pleading.*

In an action to recover damages for injuries alleged to have been caused by negligence, the plaintiff must allege and make affirmative proof of facts sufficient to show the breach of a duty owed him by, and inconsistent with due diligence on the part of, the defendant, and that the injuries were thereby occasioned; and where in such an action the jury have failed to find the defendants guilty of the particular act of negligence charged in the declaration as constituting the cause of the injuries, a verdict for the plaintiff cannot be sustained and a new trial should be granted.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), (1) affirming the judgment of the Superior Court sitting in Review (2) at Montreal, which granted the plaintiff's motion for judgment in his favour for four thousand dollars damages with interest and costs, and rejected the defendants' motion for a new trial.

A statement of the case appears in the judgment now reported.

*Lajoie* for the appellants. The declaration charges the defendant with negligence under three specific heads, and that an explosion was thereby occasioned whereby the plaintiff lost the sight of both his eyes

PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) Q. R. 6 Q. B. 534. (2) Q. R. 10 S. C. 316.

1897

COWANS v. MARSHALL.

for life. The pleas were that the risk was voluntarily undertaken by the plaintiff in the nature of the work for which he had engaged and which he was accustomed to perform in the course of his trade as a mechanic, that he met with the accident through his own imprudence and direct disobedience of orders, and denial of any fault by defendants. The jury rendered a general verdict of negligence and special verdicts of no negligence on the facts in issue, except on the principal fact of the case, whether certain oakum had become wet through the negligence of appellants, to which they did not answer either affirmatively or negatively. See Thompson on Trials, ss. 2670, 2681; *Faulknor* v. *Clifford* (1); *McQuay* v. *Eastwood* (2).

The appellants ask for a new trial on grounds of misdirection by the trial judge in his address to the jury, and that the verdict is contrary to evidence, defective and incomplete. Art. 413 C. C. P.; Co. Litt. 227*a*. The trial judge's charge was in such terms as to lead the jury away from a proper appreciation of the special facts and direct their attention only to the general question of negligence, and his advice to the jury was erroneous as to facts and as to law. The verdict is exorbitant and unjust.

*Trenholme* Q. C. and *Ryan* for the respondent. Two courts and a jury have found the prime fact of this case in the same sense, and this court should decline to re-open questions of fact so settled by both courts below: *Bellechasse Election Case* (3); *Warner* v. *Murray* (4); *Black* v. *Walker* (5); *Allen* v. *Quebec Warehouse Co* (6). In a matter of procedure like this, the judgment of the lower courts are not properly reviewable by this court. *Gladwin* v. *Cummings* (7); *Grant* v. *Ætna Ins. Co.* (8);

(1) 17 Ont. P. R. 363.
(2) 12 O. R. 402.
(3) 5 Can. S. C. R. 91.
(4) 16 Can. S. C. R. 720.
(5) Cass. Dig. 2 ed. 769.
(6) 12 App. Cas. 101.
(7) Cass. Dig. 2 ed. 427.
(8) 15 Moo. P. C. 516.

*Dawson* v. *Union Bank* (1); *The Quebec Bank* v. *Maxham* (2). Appellate courts will not interfere unless the verdict is unreasonable and unsupported by evidence. Art. 501 C. P. Q.; *Metropolitan Railway Co.* v. *Wright* (3); *Paterson* v. *Wallace* (4). This case depends on the question of negligence or no negligence. All other questions are of a minor or subsidiary nature. *Brossard* v. *The Canada Life Insurance Co.* (5); *Cannon* v. *Huot* (6).

The jury, unable to find all the facts in favour of either party, made an application of the French doctrine of "*faute commune*," or comparative negligence. The court should uphold the jury. See remarks by Hall, J. rending the judgment of the court below (7), and cases cited in 28 Am. & Eng. Enc., pp. 386 and 419. The verdict is consistent and sufficient in form. The sub-divisions of the questions were not material to the main issues in this case. In Quebec the courts accept answers which are not affirmative or negative, if the facts to which they refer are merely upon subordinate issues. *Lambkin* v. *The South Eastern Railway Co.* (8); *The Royal Canadian Insurance Co.* v. *Roberge* (9). Negligence is a question of fact and not of law, and should be disposed of by the jury. The assignment of the fourth question went upon that assumption, and appellants acquiesced in that position by going to trial. *Cannon* v. *Huot* (6); *Brossard* v. *The Canada Life Assurance Co.* (5); *Tobin* v. *Murison* (10); *The Canadian Pacific Railway Co.* v. *Robinson* (11).

The issue as to contributory negligence in a jury trial is covered by a general question as to the defend-

(1) Cass. Dig. 2 ed. 429.
(2) 11 L. C. R. 97.
(3) 11 App. Cas. 152.
(4) 1 Macq. H. L. 748.
(5) M. L. R. 3 S. C. 388.
(6) 1 Q. L. R. 139.
(7) Q. R. 6 Q. B. pp. 543-544.
(8) 5 App. Cas. 352.
(9) Q. R 2 Q. B. 117.
(10) 5 Moo. P. C. 110.
(11) 19 Can. S. C. R. 292.

1897

COWANS v. MARSHALL.

ant's negligence, without its being necessary to ask whether the plaintiff also was negligent. *The Grand Trunk Railway Co.* v. *Godbout* (1). Weight should be accorded to a finding of negligence in a case of accident to an employee. *The Canadian Colored Cotton Co.* v. *Talbot* (2). See also *Chicago and Northwestern Railway Co.* v. *Dunleavy* (3) at page 143.

Instructions by the trial judge as to burden of proof are not regarded as of law, but merely as questions of practice. *Painchaud* v. *Bell* (4) at page 381. When the general verdict is for the plaintiff with special findings not inconsistent therewith, the judge may set aside the special findings and allow the general verdict to stand. *Monies* v. *Lynn* (5); *Roche* v. *Ladd* (6); *Billings Slate & Marble Co.* v. *Hanger* (7).

The court should interpret the verdict as a whole, and when ambiguities seem to exist choose that interpretation which is most consistent with the rest of the verdict, and the circumstances of the case. *Sheen* v. *Rickie* (8); *France* v. *White* (9); *Emmons* v. *Elderton* (10); *Kempe* v. *Crews* (11); *Goodhue* v. *Grand Trunk Railway Co.* (12); *Wilson* v. *Grand Trunk Railway Co.* (13); *Schneider* v. *Boissot* (14); *The "Alice"* v. *The "Rossita"* (15).

The judgment of the court was delivered by:

GWYNNE J.—The respondent instituted this action against the appellants for injuries sustained by him when employed as a machinist in the service of the

(1) 6 Q. L. R. 63.
(2) 27 Can. S. C. R. 198.
(3) 129 Ill. 132.
(4) 21 R. L. p. 370.
(5) 119 Mass. 273.
(6) 1 Allen (Mass.) 436.
(7) 62 Vt. 160.
(8) 5 M. & W. 175.
(9) 1 Man. & G. 731.
(10) 4 H. L. Cas. 624.
(11) Ld. Raym. 167.
(12) M. L. R. 3 S. C. 114.
(13) 5 Legal News 88.
(14) S. V. 78, 1, 412.
(15) L. R. 2 P. C. 214.

defendants, caused, as he alleges, by the negligence of the defendants. In such an action it was necessary for the plaintiff to allege in his declaration the act or acts, whether of omission or commission, relied upon by him as the cause of the injury sustained by him, and that such act or acts constituted negligence of the defendants or of their servants for whom they were responsible. Accordingly in his declaration, after certain prefatory allegations to the effect that he had been employed to carry out the junction of the casing of a tank which the defendants were constructing in connection with the Montreal waterworks, and that he proceeded with the work inside the tank by bolting the iron work together, and that when the work was sufficiently advanced to be ready for the lead to be poured into the strip between the tank and the casing he applied to the defendants for two pounds of lead and that they only gave him one pound, which as the plaintiff alleges was insufficient, and that the defendants told the plaintiff to work upon the bolting of the sides of the junction at the outside, he then proceeds to allege the acts relied upon by him as the cause of the injury which happened to him, and the nature of the injury, as follows:

7. In obedience to such orders the plaintiff immediately began work on the outside, and while he was so employed the defendants without in any way warning the plaintiff sent other workmen to finish the pouring of the boiling lead on the unfinished part inside, although they and their managers knew that the plaintiff was working in an exposed position on the outside.

8. The person so sent to pour the lead on the inside began to do so, when some of the boiling lead so poured came into contact with part of the oakum filling which was in a wet condition owing to the negligence of the defendants, their managers and workmen, and also to the fact that the water had penetrated to it from the water gates constructed by the defendants at the head of the said tank, the said water gates being in a defective, improper and dangerous condition due to the unworkmanlike way in which they had been put in by the defendants.

1897

COWANS v. MARSHALL.

Gwynne J.

9. An explosion immediately occurred and the steam and lead therefrom in a moments time rushed through the apperture connecting the casing with the tank and struck the plaintiff's eyes before he could save himself.

10. After suffering excruciating pain and being confined to the hospital and to his house for a long time the plaintiff now finds himself blind in both eyes for life as a result of the said accident.

11. The said accident was in no way due to any act or omission on the part of the plaintiff, but was on the contrary due to the negligence of the defendants, their managers, and representatives.

12. The defendants were in particular negligent and blameable in three important respects, to wit:—

First, in not supplying the plaintiff with two pots of lead so as to finish the inside work, as he himself had requested them to do upon commencing that part of the work.

Secondly, in sending the plaintiff to work in an exposed place and in directing other persons to finish the work without informing him.

Thirdly, in allowing the oakum to be in a wet condition.

The plaintiff claimed fifteen thousand dollars.

The defendants in their pleas in substance denied that the explosion which was the cause of the injuries sustained by the plaintiff was occasioned by any negligence of theirs and averred that the plaintiff sustained the injuries of which he complains by reason of his own negligence and imprudence.

To this defence the plaintiff answered by denying that he sustained the injuries by any negligence of his own, and he re-asserted that, on the contrary, the said accident was wholly owing to the negligence of the defendants.

The trial took place upon questions submitted to the jury upon an assignment of facts under the provisions of arts. 353 and 414 C. C. P.

In consequence of the manner in which these questions were answered by the jury and for alleged misdirection in the charge of the learned judge before whom the case was tried, the defendants moved for a new trial which was refused by the Court of Review. They thereupon appealed to the Court of Queen's

1897

COWANS v. MARSHALL.

Gwynne J.

Bench in Montreal, a majority of which court, the Chief Justice Sir Alexander Lacoste dissenting, dismissed the appeal. Hence the appeal to this court.

Concurring as we do in the dissentient judgment of the Chief Justice, which shows very clearly, as we think, that if the judgment of the majority of the Court of Appeal should prevail the statutory provisions contained in the Code of Civil Procedure of the province in relation to trial by jury would be wholly set aside, it might be quite sufficient for us to express our concurrence in that judgment, but the argument pressed very earnestly upon us by the learned counsel for the respondent calls for some few remarks The argument pressed upon us was that paragraph 11 of the declaration of the plaintiff above set out in full contained an averment of an independent cause of action which rendered all inquiry into the acts of negligence charged in the 8th paragraph and specially designated in the 12th paragraph wholly unnecessary and irrelevant, and that the effect of the plaintiff's answer pleaded to the defendants' pleas was that the plaintiff abandoned the particular acts alleged in the declaration as the acts of negligence complained of and rested wholly on the charge of negligence generally as contained in the 11th paragraph. This argument, if not based upon appears to be sanctioned by, the charge of the learned judge who tried the case to the jury, for he appears by it to have told the jury that the 4th question which is,

was the said injury, loss of sight, pain and suffering caused by the negligence of the defendants, their managers or workmen ?

was the important question, and that if they should answer either affirmatively or negatively then that the 5th, 6th and 7th questions became absolutely unnecessary. However, as the questions were put, he submitted them to the jury, observing however that if he had

1897

COWANS v. MARSHALL.

Gwynne J.

prepared the questions he would have omitted them altogether. Now, from this contention that the 11th paragraph of the declaration contains an independent cause of action and that the plaintiff's answer to the defendants' pleas had the effect claimed, we must dissent wholly. The 11th paragraph, as is very plain from its terms and context, contains simply an allegation that the "said" accident, namely, the accident caused by the explosion mentioned in the 9th paragraph, which explosion was caused by the acts mentioned in the 8th paragraph, was in no way due to any negligence of the plaintiff, but was on the contrary due to the negligence of the defendants, which had already been charged in the 8th paragraph. This 11th paragraph in fact contains nothing more than a redundant repetition of the allegations in previous paragraphs—that the explosion was caused by the acts of negligence already alleged; it did not in any respect render it unnecessary for the plaintiff to prove in order to succeed in his action the particular acts of negligence relied upon by him as those which caused the explosion. Then in the 12th paragraph the plaintiff alleges three particular acts which he avers to be important and which he charges to have been acts of negligence of the defendants, one of which is mentioned in the 8th paragraph namely—"in allowing the oakum to be in a wet condition." Then as to the plaintiff's answer to the defendants' pleas it is simply a denial of the negligence imputed by the defendants' pleas to the plaintiff as the cause of the injuries he had sustained and a repetition of the allegations in the declaration that they were due to the negligence of the defendants. This mode of pleading is, in effect, simply equivalent to a "joinder of issue" pleaded by a plaintiff to a defendant's plea of like nature according to the form of pleading in use in the other provinces of the

Dominion. But the *principles* of pleading in an action of this nature must not be lost sight of and it has not been suggested as regards them, that there is any difference between the jurisprudence of the Province of Quebec and that of the other Provinces of the Dominion and of England, although there is a difference between their forms of pleading and in procedure, and in the effect of what is called contributory negligence.

It is an established principle that a plaintiff can succeed in an action only *secundum allegata et probata*, and that in an action like the present for negligence causing an injury to the plaintiff he must allege and prove facts sufficient to shew a duty owed by the defendant to the plaintiff and a breach of such duty, and that such breach of duty occasioned the injury complained of; affirmative proof of the facts relied upon as constituting the negligence complained of must be given by the plaintiff, and such facts must be inconsistent with due diligence on the part of the defendant, and therefore if the evidence should be equally consistent with the existence or non-existence of negligence the plaintiff cannot succeed. Bullen and Leake on Pleading p. 9 and precedents of declarations *passim*. *Cotton* v. *Wood* (1); *Hammack* v. *White* (2); *Montreal Rolling Mills* v. *Corcoran* (3). In *Wakelin* v. *London and South Western Railway Co.* (4), an action by the representatives of a deceased person alleged to have been killed by the negligence of the defendants, Lord Halsbury, L. C., says at page 44:

> It is incumbent on the plaintiff to establish by proof that her husband's death has been caused by some negligence of the defendants, and negligent act or some negligent omission to which the injury com-

(1) 8 C. B. N. S. 568.
(2) 11 C. B. N. S. 588.
(3) 26 Can. C.S.R. 595.
(4) 12 App. Cas. 41.

1897

COWANS v. MARSHALL.

Gwynne J.

plained of * * is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff, as with the denial of the defendants, the plaintiff fails for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition.

In the same case, at page 47, Lord Watson held that it lay on the plaintiff to prove affirmatively some negligent act or omission on the part of the defendants or their servants which materially contributed to the injury complained of; that the burden of proof lies on the plaintiff does not admit of dispute, and he adds:

*Mere allegation or proof that the company were guilty of negligence is altogether irrelevant, * * * the plaintiff must allege and prove not merely that they were negligent but that their negligence caused or materially contributed to the injury.*

The case of *Montreal Rolling Mills* v. *Corcoran* (1), was decided upon the same principles recently in this court. Now in the case before us the plaintiff in his declaration alleges that the cause of the injury complained of was the explosion mentioned in the 9th paragraph. That this is an undoubted fact is not disputed. He also alleges that this explosion took place from the facts alleged in the 8th paragraph. These allegations and that charged in the 7th paragraph constituted the whole of the negligence complained of in the declaration and to the acts so charged as constituting the negligence complained of the plaintiff's action and his proof therein are confined. See the observations of Lord O'Hagan in *Metropolitan Railway Co.* v. *Jackson* (2), at page 202. It is to these matters that the question No. 5 in the assignment of facts was applied. That question is divided into four parts, as follows:

5th. Were the defendants negligent,
1st, In not furnishing plaintiff with two pots of lead?

(1) 26 Can. S. C. R. 595. (2) 3 App. Cas. 193.

1897

COWANS v. MARSHALL.

Gwynne J.

To which the jury answer that there was no evidence. As to this question it must be admitted that it was on an immaterial point for it could not be held that such neglect if it had been established in evidence is what the law regards an act which was a *cause* of the explosion. However, the jury have by their answer substantially found that this alleged act of omission was not established.

2ndly. In sending the plaintiff to work in an exposed place?

to which the jury answer that the place was "not considered exposed." Thus substantially also finding that the alleged act of negligence was not established.

3rdly. In directing others to finish the work of pouring lead into the joint inside unawares to the plaintiff?

to which the jury answer "No." They thus negative the negligence charged in that respect.

4thly. In allowing the hemp or oakum in filling the joint to be in a wet condition?

to which the jury answer "not wet when put in." Now the evidence showed that the immediate cause of the explosion was the wet condition in which the oakum was when the lead was poured in, and the answer of the jury to this question certainly wholly fails to find that such wet condition was attributable to any act of omission or of commission of the defendants or for which they are responsible, and that they were so responsible was the most material fact in the case for the plaintiff to establish; indeed, in view of the other answers of the jury to the 5th question, the sole point upon which the question of the liability of the defendants rested. The 6th, 7th and 8th questions related to that part of the defence which charged the accident to the plaintiff to be attributable to the plaintiff's own negligence and imprudence, and as to this the jury have by their answers to the questions

1897

COWAN v. MARSHALL.

Gwynne J.

submitted to them found that "to a certain extent" the accident was attributable to the plaintiff's own imprudence and want of care, and for this reason they have deducted from the total sum of $7,500 as the amount of plaintiff's damages the sum of $3,500. The result of all this appears to be that the jury have attributed to the plaintiff himself nearly half of the injury which he has suffered and they have failed to find that the defendants are guilty of the only act of negligence charged against them in the declaration and of which any evidence was offered *as constituting the cause of the explosion* which was the very gist of the matter in issue as affecting the defendants' liability; for these reasons we are of opinion that the judgment for the plaintiff cannot be sustained, and that the defendants' application for a new trial should have been granted. The appeal must therefore be allowed with costs in this court and also in the Court of Queen's Bench, and we order a new trial and without costs, as we are of opinion that the contention of the appellants that the learned judge's observations to the jury in relation to the 4th question and the matters upon which the learned judges directed them that that question turned, is well founded.

As the new Code of Civil Procedure, Art. 427 enables the judge presiding at a trial to add to strike out or amend any of the facts assigned to be submitted to the jury if he considers that by so doing a more perfect trial *of the issues* will be secured, it will no doubt be a subject of special consideration that the questions submitted to the jury shall be so framed as to avoid confusion and contradiction in the answers of the jury and to arrive at the truth of the cause of action which the plaintiff has affirmed and which the defendants have denied, namely, that the defendants are responsible for the explosion which is alleged

by the plaintiff to have caused him the injury of which he complains.

While juries naturally feel deep sympathy with the plaintiff, as indeed every one must do, for the very serious injury he has suffered, the defendants have a right to insist that they shall not be made responsible therefor unless their responsibility shall be established in accordance with the principles of law applicable to the case with which they are charged by the plaintiff in his declaration.

*Appeal allowed with costs. New Trial granted without costs.*

Solicitors for the appellants: *Bisaillon, Brouseau & Lajoie.*

Solicitors for the respondent: *Ryan & Jacobs.*

1897

*Oct. 19. 20, 21.

*Dec. 9.

ROBERT HAGGERT (PLAINTIFF).....APPELLANT;

AND

THE TOWN OF BRAMPTON, RICHARD BLAIN AND JOHN McMURCHY (DEFENDANTS).. ..... } RESPONDENTS.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Mortgage, construction of—Trade fixtures—Chattels—Tools and machinery of a "going concern"— Constructive annexation — Mortgagor and Mortgagee.*

The purposes to which premises have been applied should be regarded in deciding what may have been the object of the annexation of moveable articles in permanent structures with a view to ascertaining whether or not they thereby became fixtures incorporated with the freehold, and where articles have been only slightly affixed but in a manner appropriate to their use and shewing an intention of permanently affixing them with the object of enhancing the value of mortgaged premises or of improving their usefulness for the purposes to which they have been applied, there would be sufficient ground, in a dispute between a mortgagor and his mortgagee, for concluding that both as to the degree and object of the annexation, they became parts of the realty.

APPEAL from the judgment of the Court of Appeal for Ontario affirming with some variations the decision of the Chancery Division of the High Court of Justice which had, with variations, affirmed the judgment of the trial court dismissing the plaintiff's action with costs.

The liquidator of an insolvent manufacturing company claimed certain articles as chattels from mortgagees of the company's lands who had gone into possession and claimed the same articles as fixtures attached to the freehold. In the trial court the learned judge,

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(MacMahon J.), who dismissed the plaintiff's action, held that upon the construction of the mortgage the property had been mortgaged as a "going concern," and that all the articles in the factory premises incident to and necessary for the manufacturing business of the company were covered by the mortgage, and that the plaintiff's claim did not extend to certain other articles to which he would otherwise have been entitled to recover by the judgment. The judges in the Divisional Court, although divided in their opinions, agreed with the principle of construction laid down by the trial judge but granted to the plaintiff the other articles which had been refused him in the trial court. The plaintiff appealed from the Divisional Court judgment in so far as it had allowed the defendants the articles claimed by them as fixtures, but as he only partially succeeded in the Court of Appeal he took the present appeal to the Supreme Court of Canada as to all machinery and other chattels for which judgment had not already been delivered in his favour and which were not permanently affixed in May, 1891, when the company went into liquidation, or, at the latest, which were not so affixed on the 15th of January, 1894, when the respondents, the Town of Brampton, took possession of the mortgaged premises.

*Aylesworth* Q.C. and *Justin* for the appellants. The security is expressly restricted to the freehold "including all machinery annexed to and known in law as part of the freehold." Some of the machinery although slightly attached to the floor for the purpose of steadiness in working could not be operated if permanently fastened down, it being necessary to shift them when reversed. The appellant has made out at least a *prima facie* case that the machinery was not attached at the time possession was taken by the town, and the burden of proof was thus shifted upon the respondents to

1897

HAGGERT v. THE TOWN OF BRAMPTON.

show that the machinery had been attached by some person with the authority of the insolvent company. No such proof was given, and the conclusion is inevitable that it was attached by some person without such authority and as a mere wrongdoer, and therefore that such annexation in no way affected the character of the property as chattels.

In considering the intention of the parties in giving the mortgage, the learned trial judge seems to start with the view, that, because the mortgagors were then carrying on, and intended to continue carrying on the manufacture of engines, threshing machines and agricultural implements in the mortgaged premises, they were mortgaging their factory premises, machinery, tools and business, treated as one "going concern." This is an entirely erroneous idea. The company was mortgaging nothing but its lands and buildings, including therewith, of course, all machinery which in law would be deemed part of the freehold. The grant in the mortgage is of the land only. What this grant carries with it, defendants are entitled to, but the interpretation of the grant cannot be widened. The learned trial judge treats this mortgage as including all the machinery in question because all of it was "necessary to the carrying on of the business and operations of the company;" but that circumstance, even if the evidence established it, cannot afford any indication whether or not the company, when the various pieces of machinery were put into the buildings, intended them to become parts of the buildings, or to still remain chattels.

As to the specific articles claimed upon this appeal, the safe is clearly shown not to have been fastened. The fact that "pigeon holes" were built around it is not material. This was not done with the intention of fastening the safe, but as a matter of convenience. It

is merely in the position of a chattel placed in a room, and subsequently the room or doorways, so changed that the articles will not come out without being taken apart, or the doorway enlarged. The character of the property is not changed. See *Longbottom* v. *Berry* (1), at pages 129 and 139, and *Park* v. *Baker* (2). The lathes, bending machine, Bradley forges, iron wheel clamp, Daniels planer, band sawing machine, platform scales, anvils and other similar machines rested in position by their own weight only; they were not permanently affixed in any way. See *Ex parte Astbury; In re Richards* (3); *Mather* v. *Fraser* (4). The scales in connection with the dynamometer are simply a pair of ordinary weigh scales, and they do not become a fixture from the circumstance that it may have been customary to use them with a fixed machine, when in fact they have never been in any way attached to, or made part of that machine, any more than a chisel becomes a fixture by the circumstance of a workman using it in turning a piece of wood upon a turning machine which is fixed; it may be taken away and used for any other purpose, and is not a part of the machine, though it may be impossible to use the machine itself for any purpose without using the other article as well.

Appellant is entitled to damages for illegal detention of the machinery; *Dreyfus* v. *Peruvian Guano Co.* (5); *Cockburn* v, *Muskoka Mill and Lumber Co.* (6); and the difference between the value of the property at the time of the demand made therefor, or, the time of the commencement of the action, and the value at the time of delivery thereof. *Henderson* v. *Williams* (7);

(1) L. R. 5 Q. B. 123.
(2) 7 Allen (Mass.) 78.
(3) 4 Ch. App. 630.
(4) 2 K & J. 536.
(5) 42 Ch. D. 66; 43 Ch. D. 316.
(6) 13 O. R. 343.
(7) [1895] 1 Q. B. 521.

1897

HAGGERT v. THE TOWN OF BRAMPTON.

*Blakely* v. *Dooley* (1); *Auger* v. *Cook* (2). We also refer to *La Banque d'Hochelaga* v. *The Waterous Engine Works Co.* (3); *Hobson* v. *Gorringe* (4); *Joseph Hall Manufacturing Co.* v. *Haslitt* (5); *Stevens* v. *Barfoot* (6).

The case of *Keefer* v. *Merrill* (7) explains *Crawford* v. *Finlay* (8), and shows it to have no application in this case.

*Blain* and *Cameron* for the respondents. The articles, though loose, belonging to the fastened or fixed machinery, belong to the freehold, and the annexation may be actual or constructive. Constructive annexation arises when the thing is fitted for use in connection with the premises and is more or less necessary to their enjoyment. On this principle not only the machines but even the patterns and tools belonging to the fixed machinery pass with the realty, as they were essential to the profitable user of an agricultural implement factory. Such effect must be given to the language used in the mortgage as to include all things which were annexed to the freehold with their essential parts whether fixed or loose. *Hobson* v. *Gorringe* (4); 8 Am. & Eng. Encyclopœdia of Law, 8, p. 43.

The evidence shows that there is a counter-shaft to each of the machines consisting of a short piece of shafting on which are fitted two or more pulleys. Each counter-shaft runs in cast iron hangers, which are firmly bolted to the joists and beams of the ceilings. Each counter-shaft is connected by belting, both with the line shafting and with the machine below to which the counter-shaft belongs. Power is

(1) 18 O. R. 381.
(2) 39 U. C. Q. B. 537.
(3) 27 Can. S. C. R. 406.
(4) [1897] 1 Ch. 182.
(5) 11 Ont. App. R. 749.
(6) 13 Ont. App. R. 366.
(7) 6 Ont. App. R. 121.
(8) 18 Gr. 51.

conveyed to the line shafting then through the counter-shaft to the machine on the floor. Another function of the counter-shaft is to enable the machine below to run at varying speeds. This is effected by what are called cone pulleys, which are really groups of pulleys of different sizes; the counter-shaft is firmly annexed and is as much a part of the machine as the rudder is of a ship. See judgment of Brett L. J. in *Sheffield, &c, Building Society* v. *Harrison* (1). The machine, its belting and its counter-shaft form one fixed piece of machinery.

The respondents rely on the following authorities: *Longbottom* v. *Berry* (2); *Holland* v. *Hodgson* (3); *The Sheffield &c. Building Society* v. *Harrison* (1); Ewell on fixtures p. 21; *Keefer* v. *Merrill* (4); *Rogers* v. *Ontario Bank* (5); *Sun Life Insurance Co.* v. *Taylor* (6); *Dickson* v. *Hunter* (7); *Crawford* v. *Finlay* (8).

The judgment of the court was delivered by:

KING J.—The question is whether certain things were rightly adjudged to be fixtures in a case between mortgagor and mortgagee. The mortgage recited that the Haggert Bros. Manufacturing Co. had applied to the town of Brampton for a loan of $75,000 upon certain undertakings to carry on all their manufacturing business in the town, during a period of twenty years, and it was agreed that the company should give in security their bond in double the amount and a mortgage for the amount of the loan, and interest "upon all the real estate of them the mortgagors, including all the machinery there was or might thereafter be annexed to the freehold, and which should be

(1) 15 Q. B. D. 358.
(2) L. R. 5 Q. B. 123.
(3) L. R. 7 C. P. 328.
(4) 6 Ont. App. R. 121.
(5) 21 O. R. 416.
(6) 13 Can. L. T. 106.
(7) 29 Gr. 73.
(8) 18 Gr. 51.

1897

HAGGERT v. THE TOWN OF BRAMPTON.

King J.

known in law as part of the freehold." The mortgaged premises were conveyed by description of the several parcels or tracts of land.

The articles in question are pieces of machinery and other articles used on the premises in connection with the manufacturing.

A mortgagor in fee has not the same right as against the mortgagee, nor a grantor as against his grantee, that a person having a limited interest only, as a tenant, has to remove things annexed for the purposes of trade or domestic convenience.

In *Holland* v. *Hodgson* in 1872 (1), it is said:

> There is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz. the degree of annexation, and the object of annexation.

The circumstances indicating the intention are such as are patent for all to see, and not such as rest in mere agreement with the third party. In *Hobson* v. *Gorringe* (2), an assignee of a mortgage was held to be entitled to treat an engine affixed to the building by bolts and screws as part of the land, notwithstanding that it was brought upon the land under a contract with the maker of the engine, by the terms of which contract the engine was, under the circumstances that existed, to continue the property of the seller (as between vendor and vendee).

Articles no further attached to the land than by their own weight may become fixtures if the circumstances are such as to show that they were intended to be part of the land, though of course the onus of shewing that they were so intended lies on those who

(1) L. R. 7 C. P. 328. (2) [1897] 1 Ch. 182.

assert that they have ceased to be chattels. *Holland* v. *Hodgson* (1).

In a number of cases were articles were held to be affixed to the land, the affixing was by means of bolts and screws. In *Holland* v. *Hodgson* (1), already referred to, looms were so held which were attached to stone floors of a mill by means of nails driven through holes in two of the four legs of each loom, in some cases into beams built into the stone, and in other cases into plugs of wood driven into holes drilled in the stone for the purpose.

In *Hellawell* v. *Eastwood* in 1851 (2), spinning machinery fixed by screws to the floor in much the same way were held not to be fixtures, the court considering that they were attached slightly so as to be capable of removal without the least injury to the fabric of the building or to themselves, and the object of the annexation being in their opinion not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels. In recent cases it is questioned whether the principles of law laid down in this case were correctly applied to the facts.

The circumstance that the fastening is merely to steady the machines when in use is now held not to be inconsistent with the inference that the object was to permanently improve the freehold. *Longbottom* v. *Berry* (3).

The court in that case says:

> This fixing was clearly necessary, for they (the machines), could not otherwise be effectually used; as for the same reason the fixing was obviously not occasional but permanent. It is no doubt said in this case (referring to *Mather* v. *Fraser* (4),) that the object of fixing was to ensure steadiness and keep the machines in their places when worked; but the same thing could probably be said of most trade

(1) L. R. 7 C. P. 328.
(2) 6 Ex. 295.
(3) L. R. 5 Q. B. 123.
(4) 2 K. & J. 536.

1897

HAGGERT v. THE TOWN OF BRAMPTON.

King J.

fixtures from a steam engine downwards; and if the effect of this fixing is to cause the whole set of machines to be effectually used in the manufacture of wool and cloth, it seems very difficult to avoid coming to the conclusion that a necessary conveyance is to cause the mill to be put to a more profitable use as a wool mill than it otherwise would be. It is also equally difficult to conceive that a machine which at all times requires to be firmly fixed to the freehold, for the purpose of being worked, could truly be said never to lose its character as a movable chattel.

So also in *Holland* v. *Hodgson* (1), where the looms were attached by nails for the purpose of steadying them and keeping them in a true direction.

In passing upon the object of the annexation, the purposes to which the premises are applied may be regarded; and if the object of setting up the articles is to enhance the value of the premises or improve its usefulness for the purposes for which it is used, and if they are affixed to the freehold even in a slight way, but such as is appropriate to the use of the articles, and showing an intention not of occasional but of permanent affixing, then, both as to the degree of annexation and as to the object of it, it may very well be concluded that the articles are become part of the realty, at least in questions as between mortgagor and mortgagee. See the cases already referred to, and also *Walmsley* v. *Milne* (2), and *Wiltshear* v. *Cotterell* (3).

It was contended that, as to a number of articles, an inference upon the evidence ought to be drawn that the affixing did not take place until after the mortgagee went into possession, but the inference is by no means a necessary one, and the conclusions of fact should not be disturbed upon this account.

Certain articles (as the watchman's clock), are instances of constructive annexation. Certain other articles (as the dynamometer scales) are necessary parts

(1) L. R. 7 C. P. 328.
(2) 7 C. B. N. S. 115.
(3) 1 E. & B. 674.

of fixed machines, neither being practically available for the purpose for which it was used without the other.

As to machines not themselves affixed at all, but connected with fixed countershafting, we do not think the machines became thereby affixed where they were not parts of the one article.

As to the safe, the learned judges of the Court of Appeal were evenly divided, and it is impossible to feel confident on such a question. But considering that the safe was put in a place structurally adapted for it, and was so enclosed in it by a wooden structure subsequently built that it could not be taken out without destroying what was a portion of the realty, and that it was put there not for a temporary purpose but to be permanently there, it would seem reasonable to conclude that it was so affixed as an adjunct to the building, to improve its usefulness as such, considering the purpose to which the building was applied.

Applying the principles enunciated to the several classes of articles in question, those which are considered to remain chattels are as enumerated hereafter, and the rest were affixed to and formed part of the realty. The chattels which were not annexed to the realty, nor became part of the realty, are as follows: In the office, one copying press and table; in the blacksmith's shop, No. 7, anvil; No. 9, four anvils; in the boiler shop, No. 11, two anvils; in the long wood shop, iron clamp for making engine wheels; in the wood finishing shop, the band sawing machine, and saws in connection therewith, also belting; in the outside yard, the platform scale on wheels. Amongst the miscellaneous articles, the fire hose, fire hose reel with all its hose, tools and couplings, including brass nozzles and branches.

1897

HAGGERT v. THE TOWN OF BRAMPTON.

King J.

The variations here indicated should be made in the judgment entered in the court below. The appeal is dismissed without costs.

*Appeal dismissed without costs.*

Solicitor for the appellant: *B. F. Justin.*

Solicitor for the respondents, the Town of Brampton: *J. W. Beynon.*

Solicitor for the respondents, Blain and McMurchy: *T. J. Blain.*

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1897

*Oct. 21, 22.

Dec. 9.

EDWARD WASHINGTON (PLAINTIFF)..APPELLANT;

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Railways—Statute, construction of—51 V. c. 29, s. 262 (D.)—Railway crossings—Packing railway frogs, wing-rails, etc.—Negligence.*

The proviso of the fourth sub-section of section 262 of "The Railway Act" (51 V. c. 29 (D).) does not apply to the fillings referred to in the third sub-section and confers no power upon the Railway Committee of the Privy Council to dispense with the filling in of the spaces behind and in front of railway frogs or crossings and the fixed rails of switches during the winter months.

Judgment of the Court of Appeal for Ontario (24 Ont. App. R. 183) reversed.

APPEAL from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of Mr. Justice Street in the High Court of Justice and dismissing the plaintiff's action with costs.

This action was tried before Mr. Justice Street and a jury at Hamilton on the 11th of May, 1896. The

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 24 Ont. App. R. 183.

1897

WASHINGTON v. THE GRAND TRUNK RAILWAY COMPANY.

jury answered the questions submitted favourably to the plaintiff and assessed damages at $2,500. The learned trial judge reserved judgment on the findings of the jury, and on the motion of the defendants' counsel for a non-suit until the 29th day of May, 1897, when he directed judgment to be entered for the plaintiff for $2,500 and costs. On an appeal by the defendants the Court of Appeal for Ontario set aside the judgment and verdict and dismissed the action with costs.

The plaintiff was a yardman in the employ of the defendants and on the morning of the 16th January, 1896, was engaged in coupling cars forming part of a freight train in defendants' yard at Hamilton. While coming out from between two cars which he had just coupled his foot caught in a frog or between a wing-rail and frog-rail and he was thrown down, a car passing over and severing his right arm. The grounds of negligence alleged so far as material to be stated, are:—That the defendants had neglected to pack the space between the rails in the railway frog over which the cars were passing and in which plaintiff's foot was caught, as required by the Workmen's Compensation for Injuries Act (1), and the Railway Act (2), thus permitting a defective condition or arrangement of the ways, works, machinery, plant or premises connected with or intended for or used in the defendants' business. The defendants denied negligence and pleaded that the Railway Committee of the Privy Council, in pursuance of the powers conferred by section 262 of The Railway Act, by an order made in November, 1889, allowed them to omit the packing or filling of frogs and of the spaces between wing-rails and frogs and between guard-rails and fixed rails from

(1) 49 V. c. 28 s. 4 (Ont.); 55 V. c. 30 s. 5 (Ont.)

(2) 51 Vict. ch. 29 s. 262 (D.)

1897

WASHINGTON v. THE GRAND TRUNK RAILWAY COMPANY.

the month of December to the month of April in each year and directed that such order should be permanent, and that the order was in force at the time that the accident happened between the months of December and April when the packing was lawfully left out of the frogs, etc. The plaintiff contended that the Railway Committee had no power to dispense with the filling of the frogs, etc., during the winter months.

At the trial the following questions were left to the jury:—1. Was the plaintiff's foot caught in the frog or between the wing-rail and the frog-rail? 2. Were the defendants guilty of any negligence which led to the accident? 3. If so, in what did such negligence consist? The jury answered that the plaintiff's foot was caught in the frog; that defendants were guilty of negligence in not having the frog packed or protected; and they assessed the damages at $2,500, for which sum judgment was entered. A verdict entered for appellant was affirmed by the Divisional Court but set aside by the Court of Appeal.

*Staunton* for the appellant. The respondents are required to have their frogs filled with packing all the year round by section 262 of the Railway Act. The Railway Committee had no authority to dispense with the packing required by sub-section three in the spaces behind and in front of frogs or crossings, and between the fixed rails of switches where such spaces are less than five inches in width. The application of the proviso of the fourth subsection is limited to the filling specially mentioned in that clause, namely, in the spaces between any wing-rail and any railway frog, and between any guard-rail and the track-rail along the side of it at their splayed ends. These words must be read in their ordinary sense as written. *Grey* v. *Pearson* (1); *Thelluson* v. *Rendlesham* (2), at

(1) 6 H. L. Cas. 61; 26 L. J. Ch. 473. (2) 7 H. L. Cas. 429.

page 519; *Lowther* v. *Bentinck* (1), at page 169; *Leader* v. *Duffey* (2) at page 301; *Re Hamlet* (3), at page 435. Beale, Legal Interpretation, p. 236; Abbott's Railway Law of Canada, p. 394.

*McCarthy* Q.C. for the respondents. The sub-sections of the statute must be read together as paragraphs relating to a common subject. Maxwell (3 ed.) pp. 59, 74; Hardcastle (2 ed.) 238. Even sub-heads have been doubted to create distinctions. *Union Steamship Co.* v. *Melbourne Harbour Trust Commissioners* (4); *Hammersmith Railway Co.* v. *Brand* (5); *Eastern Counties, etc., Railway Co.* v. *Marriage* (6).

The respondents have neglected no duty under the Dominion Railway Act, and there is no right of action against them here under that Act. The order of the Railway Committee in any event affords a good defence. *Rex.* v. *Newark upon Trent* (7); *Cohen* v. *The South Eastern Railway Co.* (8), at page 260; *United States* v. *Babbit* (9). *Ex parte Partington* (10).

The judgment of the court was delivered by:

SEDGEWICK J—The only question involved in this appeal is as to whether the proviso at the end of sub-section 4 of section 262 of the Railway Act (Canada), 51 Vict. ch. 29, applies not only to the sub-section in which it is placed but to sub-section 3 as well. If the proviso is confined to sub-section 4 alone then the appeal must be allowed and the trial judgment restored, otherwise the appeal fails.

The whole section above referred to is as follows:

(1) L. R. 19 Eq. 166.
(2) 13 App. Cas. 294.
(3) 39 Ch. D. 426.
(4) 9 App. Cas. 365.
(5) L. R. 4 H. L. 171.
(6) 9 H. L. Cas. 32.
(7) 3 B. & C., 59, 71.
(8) 2 Ex. D. 253.
(9) 1 Black, U. S. R. 55.
(10) 6 Q. B. 649.

1897

WASHINGTON v. THE GRAND TRUNK RAILWAY COMPANY.

Sedgewick J.

262. This section shall apply to every railway and railway company within the legislative authority or jurisdiction of the Parliament of Canada.

2. In this section the expression "packing" means a packing of wood or metal, or some other equally substantial and solid material, of not less than two inches in thickness, and which, where by this section any space is required to be filled in, shall extend to within one and a half inches of the crown of the rails in use on any such railway, shall be neatly fitted so as to come against the web of such rails, and shall be well and solidly fastened to the ties on which such rails are laid.

3. The spaces behind and in front of every railway frog or crossing, and between the fixed rails of every switch where such spaces are less than five inches in width, shall be filled with packing up to the underside of the head of the rail.

4. The spaces between any wing-rail and any railway frog, and between any guard-rail and the track-rail alongside of it, shall be filled with packing at their splayed ends so that the whole splay shall be so filled where the width of the space between the rails is less than five inches, such packing not to reach higher than to the underside of the head of the rail: Provided however that the Railway Committee may allow such filling to be left out from the month of December to the month of April in each year, both months included.

5. The oil cups or other appliances used for oiling the valves of every locomotive in use upon any railway shall be such that no employee shall be required to go outside the cab of the locomotive, while the same is in motion, for the purpose of oiling such valves.

There can be no question but that in Canadian legislation the numbers of sections and sub-sections are constituent parts of an Act. It often happens that one section of an Act refers to another section by its number, and it would in that case be absurd to say that the numbering formed no part of the Act. It must necessarily be deemed a part of the Act, otherwise no effect can be given to a provision of that kind. Notwithstanding the general rule that the title of an Act forms no part of it, we were compelled in a case in this court to hold that owing to the form which the enactment took in that particular case, even its title was part of it. *O'Connor* v. *Nova Scotia Telephone*

1897

WASHINGTON v. THE GRAND TRUNK RAILWAY COMPANY.

Sedgewick J.

*Co.* (1). A Bill passing through the legislature is invariably divided into sections. These sections are before Parliament during every stage of legislation and must be taken to have a legislative effect.

The question then is, does the "filling" mentioned in the proviso extend to the "filling" referred to in sub-section three as well as in sub-section four?

There can be no doubt that according to the grammatical construction of sub-section four the proviso is confined to that sub-section alone. It is in fact admitted that *primâ facie* the proviso is so limited, but it was agreed that the legislature must necessarily have intended that it should take a wider scope and include all kinds of filling prescribed by the whole section. Now, it is an elementary principle that the grammatical or ordinary sense of words used in a statute are to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the statute, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that inconsistency and absurdity, but no further. *Grey* v. *Pearson* (2). In order therefore to extend the proviso beyond its *primâ facie* limits, giving its words a secondary and extended meaning in order to give effect to the presumed intention of the legislature, clear and conclusive reasons must be shown to compel us to put such a construction upon it.

Reading the whole section any one would naturally suppose that the legislature intended to distinguish between that class of filling mentioned in sub-section three, and the class mentioned in sub-section four, and that the first filling was to be a permanent fixture, and that the second might, under certain circumstances,

(1) 22 Can. S. C. R. 276. (2) 6 H. L. Cas. 61.

1897

WASHINGTON v. THE GRAND TRUNK RAILWAY COMPANY.

Sedgewick J.

be dispensed with during the winter months. There was no evidence on this point before us; it was only suggested why such a distinction should be made. I am no expert, but I can readily understand why the spaces behind and in front of a "frog" should at all times be kept filled, in consequence of its permanently dangerous character, while the intervening spaces between a guard-rail and the track-rail alongside of it may not be so dangerous, and that it may be convenient during the winter time for the purpose of more easily keeping the track free from ice and snow to permit such spaces to be open during the winter months. It is not clear to me why a distinction should be made in the case of the spaces between the fixed rails and a switch and the spaces referred to in sub-section four, but that is no reason why I should assume there is no distinction. Whatever the reason may be, if the enactment, as a matter of fact, makes it we must give effect to it. No reason has been presented which forces us to depart from the ordinary meaning of the terms employed, or to extend the proviso beyond its grammatical meaning. Clearly in a case like the present the burden of sustaining the claim for a wider construction is upon him who claims it. The burden in the present case has not been sustained.

With great deference we have to dissent from the view taken by the Court of Appeal. The error in their judgment seems to have been in the assumption that the Legislature intended to give a wider meaning to the proviso and that the whole argument was to show that there was no insuperable obstacle by reason of the words themselves to prevent that wider meaning from being given to it. In our view, in dealing with a case like the present we must begin with the words themselves giving them their grammatical,

1897

WASHINGTON v. THE GRAND TRUNK RAILWAY COMPANY.

primary, and ordinary meaning. If it is, however, made clear that they are susceptible of a broader scope and of taking in a wider range that must be proved by circumstances and considerations imperatively forcing that conclusion upon us. These circumstances have not been shown to exist. The appeal must therefore be allowed and the original judgment restored. The appellant is entitled to costs in all the courts.

Sedgewick J.

*Appeal allowed with costs.**

Solicitors for the appellant: *Staunton & O'Heir.*

Solicitor for the respondents: *John Bell.*

*Leave to appeal from this judgment to the Judicial Committee of the Privy Council has been granted.

1897

*Oct. 22, 23, 25.

*Dec. 9.

F. A. HOGABOOM, GEORGE A. CASE AND CHARLES MILLAR, (EXECUTORS AND TRUSTEES OF THE HOGABOOM ESTATE) ..... } APPELLANTS;

AND

THE RECEIVER-GENERAL OF CANADA (APPLICANT AND PETITIONER) AND GEORGE S. HOLMESTED (LIQUIDATOR)..... } RESPONDENTS.

*IN THE MATTER OF*

THE CENTRAL BANK OF CANADA AND OF THE WINDING-UP ACT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Winding-up Act—Moneys paid out of court—Order made by inadvertence —Jurisdiction to compel repayment—R. S. C. c. 129, ss. 40, 41, 94 —Locus standi of Receiver General—55 & 56 V. c. 28, s. 2—Statute, construction of.*

The liquidators of an insolvent bank passed their final accounts and paid a balance, remaining in their hands, into court. It appeared that by orders issued either through error or by inadvertence the balance so deposited had been paid out to a person who was not entitled to receive the money, and the Receiver General for Canada, as trustee of the residue, intervened and applied for an order to have the money repaid in order to be disposed of under the provisions of the Winding-up Act.

*Held*, affirming the decision of the Court of Appeal for Ontario, that the Receiver-General was entitled so to intervene although the three years from the date of the deposit mentioned in the Winding-up Act had not expired.

*Held, also*, that even if he was not so entitled to intervene the provincial courts had jurisdiction to compel repayment into court of the moneys improperly paid out.

APPEAL from the judgment of the Court of Appeal for Ontario (1), which allowed the appeal of the Receiver-

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 24 Ont. App. R. 470.

1897

HOGABOOM v. THE RECEIVER-GENERAL. OF CANADA.

*In re* THE CENTRAL BANK OF CANADA.

General from the order of Street J., refusing an application to compel repayment by the executors of the Hogaboom estate of moneys which had been paid to them out of court, under two orders made by Armour C.J., and rescinding and setting aside the two last mentioned orders with costs.

The liquidators of the Central Bank of Canada had paid the money in question into court as part of the balance remaining in their hands at the time of the passing of their final accounts on their discharge, after having paid to the creditors of the bank, out of the assets realized, ninety-nine and two-thirds cents on the dollar of their claims. Prior to this deposit being made, the liquidators, having exhausted every other effort to realize the assets of the bank, had, in 1891, offered the then unrealized assets for sale by tender as per schedule made up to the 22nd July of that year. The tenders were not opened until September, when Hogaboom's tender for $44,500 was accepted, but as some of the assets included in the schedule had been realized in the interval, a deduction was made in respect of those sums, computed at $2,500, and it was agreed that he should be entitled to all other moneys realized from the assets described in the schedule, and in a book containing a list of the unrealized assets, until they were actually transferred to and vested in him. This transfer was effected by an order of the Master in Ordinary, on 3rd October, 1891, containing language which his executors contend is wide enough to include other assets beyond those referred to in the schedule and list. The clause in question is in the following words :— "And every real and personal and heritable and movable property, effects and choses in action of the said bank, if any, of what nature and kind soever and wherever situated and existing to which the said bank was or appeared to be entitled or which was in the

1897

HOGABOOM v. THE RECEIVER-GENERAL OF CANADA.

*In re* THE CENTRAL BANK OF CANADA.

custody or under the control of the said liquidators and as the same existed on the 22nd July, 1891," save and except one or two claims especially mentioned. An application was made to the Chancellor on the 23rd day of October and an order made by him in the same terms.

Upon the 8th June, 1892, the Master-in-Ordinary had made an order upon the application of the liquidators for a final dividend, payable upon the 2nd July following, which recited that $2,197.50, which had been reserved for dividends upon notes of the bank outstanding and in circulation, and upon which no claims had been made during the time limited by the Act, should now form part of the funds applicable to a final dividend of 6⅓ per cent. which was as much, in view of outstanding matters, as in the opinion of the liquidators could be safely paid out of the assets without incurring risk. The liquidators were also required to deposit in the Canadian Bank of Commerce a schedule setting forth the names and addresses (so far as known) of the payees and the several amounts payable to them in respect of said dividend, and all dividends previously declared but unclaimed, and to make special deposit of the gross amount of the said dividends to be held by the bank subject to the provisions of Section 94 of the Winding-up Act, and the order then provided that by the 2nd July, 1892, the liquidators should deliver into the custody of the Master all the books of the bank, and all claim papers, and file their final accounts as liquidators and pay into court to the credit of the matter any balance remaining in their hands, including the amount reserved to pay dividends.

On the 14th October, 1892, the Master reported that at the date of the report there had come into the liquidators' hands since a previous report $118,171.92. That after deducting various sums amounting to $110,758.01,

there remained in their hands $7,413.91, which was deposited in the Canadian Bank of Commerce, and which deposit was exclusive of $801.45 for outstanding cheques credited and allowed to the liquidators in their final account; that against the sum of $7,413.91 there were dividend cheques unclaimed amounting to $2,588.04, leaving in the bank $4,825.87 to be paid into court in pursuance of the order of the 8th June, 1892. The liquidators were then discharged, and the respondent Holmested, Accountant of the Supreme Court of Judicature, appointed liquidator without salary, and he has, from the sum so paid into court, paid by order of the court various small sums, but there remained in court on the 3rd January, 1895, $3,635.13, which was claimed, after Hogaboom's death, by his executors as part of the assets which vested in him under his purchase in 1891.

On 4th January, 1895, Armour C. J. made an order for payment out to the trustees of the Hogaboom Estate of the sum of $2,994.88, part of the moneys in court at the credit of the liquidation proceedings, and on the 16th May, 1896, he made a further order for payment out of $606.36, the balance to the credit of the same account. The Receiver-General and Finance Minister for Canada then applied to Street J. for leave to appeal from the orders of Armour C. J., and for a substantive order for the repayment of the moneys, and his applications were dismissed. He then applied to Meredith J. and obtained leave to appeal on both branches of his application to the Court of Appeal (1). The Court of Appeal on the 30th June, 1897, allowed the appeal and reversed the orders of Armour C. J. It is from the judgment of the Court of Appeal that this appeal is taken.

(1) 17 Ont. P. R. 370.

1897

HOGABOOM v. THE RECEIVER-GENERAL OF CANADA.

*In re* THE CENTRAL BANK OF CANADA.

*S. H. Blake* Q.C. and *W. R. Smythe* for the appellants. The transfer order of 3rd October, 1891, entitled Hogaboom's Estate to the money, as it was part of the unrealized assets and the order confirming the sale vested all the bank's property in Hogaboom and covered such a residue as that in question. There are no special circumstances to justify interference with the orders made by Armour C. J. See *Marsh* v. *Joseph* (1); *Slater* v. *Slater* (2); *Dangar's Trusts* (3); *Re Ward* (4); *Todd* v. *Studholme* (5); *Re Spencer* (6); *Brydges* v. *Branfill* (7). Summary jurisdiction is not exercised except against solicitors and then only when their negligence has permitted a successful crime. This case is not within the class in which a summary jurisdiction is exercised. *In re Opera, Limited* (8); *In re Thorpe; Vipont* v. *Radcliffe* (9). The court has no right to interfere in this case *ex mero motu.*

The Receiver-General has no *locus standi* to complain or interfere on the ground that he should have had notice of the application to Chief Justice Armour or that the orders were *ex parte* in respect to him. Compare secs. 40 and 41 of the Winding-up Act, and 55 & 56 Vict. ch. 28, sec. 2, which did not come into force until a month after the order of 8th June, 1892. The deposit of the money in court under the latter statute cannot be substituted for the provision requiring the deposit in a bank. There had been no escheat or forfeiture to the crown and he consequently had no beneficial interest in the moneys. The liquidation was still going on with Mr. Holmested as liquidator; he got notice and the rule respecting *ex parte* applications cannot be invoked. The order of Meredith J. (8)

(1) 13 Times L. R. 136.
(2) 58 L. T. 149.
(3) 41 Ch. D. 178.
(4) 31 Beav. 1.
(5) 3 K. & J. 324.
(6) 18 W. R. 240.
(7) 12 Sim. 369.
(8) [1891] 2 Ch. 154.
(9) [1891] 2 Ch. 360.
(8) 17 Ont. P. R. 370.

giving leave to appeal from the orders of Armour C. J., after such leave had been refused by Street J. was made without jurisdiction, and therefore no effective appeal came before the Court of Appeal for Ontario. See *Re Sarnia Oil Co.* (1); *Ex parte Stevenson* (2), at page 609 per Esher L.J.; *Kay* v. *Briggs* (3); *Ryan* v. *Canada Southern Railway Co.* (4); "*The Amstel*" (5). See also remarks by Ferguson J. refusing appeal from the same order (6) and cases there cited.

*Newcombe* Q.C., *Deputy Minister of Justice*, and *F. E. Hodgins* for the Receiver-General and Finance Minister of Canada, respondent. The vesting orders and minutes of settlement are confined in their effects to the unrealized assets actually sold and purchased on the tender. *Joint Committee of River Ribble* v. *Croston Urban District Council* (7). There is inherent jurisdiction in the court to compel repayment into court of funds which may have been erroneously and inadvertently ordered to be paid out to an improper person. See *Ex parte James* (8), at page 614; *Ex parte Simmonds* (9); *In re Brown* (10); *In re The Opera Limited* (11); *Brydges* v. *Branfill* (12) at p. 388. This should more particularly be done where all parties have not had an opportunity of laying facts before the court. *Flett* v. *Way* (13); *Re Dangar's Trusts* (14), at page 184; *Marsh* v. *Joseph* (15); *In re Spencer* (16). It is trust money and ear-marked and can be followed. *Bailey* v. *Jellett* (17). The court should not permit itself to be used as a means of effecting a fraud; *White* v. *Tommey* (18) at page 334. The interest

(1) 15 Ont. P. R. 347.
(2) [1892] 1 Q. B. 394.
(3) 22 Q. B. D. 343.
(4) 10 Ont. P. R. 535.
(5) 2 P. D. 186.
(6) 17 Ont. P. R. 395.
(7) [1897] 1 Q. B. 251.
(8) 9 Ch. App. 609.
(9) 16 Q. B. D. 308.
(10) 32 Ch. D. 597.
(11) 39 W. R. 398.
(12) 12 Sim. 369.
(13) 14 Ont. P. R. 123.
(14) 41 Ch. D. 178.
(15) 74 L. T. 412; 75 L. T. 558.
(16) 18 W. R. 240.
(17) 9 Ont. App. R. 187.
(18) 4 H. L. Cas. 313.

1897

HOGABOOM v. THE RECEIVER-GENERAL OF CANADA.

*In re* THE CENTRAL BANK OF CANADA.

in the payment over of the money at the end of three years from the discharge of the liquidators entitled the Receiver-General to take such conservatory measures; *Peacock* v. *Colling* (1) *Howard* v. *Shrewsbury* (2); and also to special notice of the appellants' application. The notice to the Crown must be special; *Perry* v. *Eames* (3); *Wheaton* v. *Maple* (4); *Re Parker* (5); *Re Bonelli's Electric Telegraph Co.* (6). The official liquidator not being allowed to act, the Receiver-General was the proper person to intervene; *In re Arthur Average Association* (7), at page 529 per Jessel M.R. See also *Duggan* v. *Duggan* (8); *Whitmore* v. *Turquand* (9); *Walker* v. *Budden* (10); *Allum* v. *Dickinson* (11); *Watson* v, *Cave* (12); *Jacques* v. *Harrison* (13).

In cases to restrain waste, it is held that trustees, to preserve contingent remainders, could support a bill for the benefit of the contingent remainders. *Perrott* v. *Perrott* (14), at page 95; *Davies* v. *Leo* (15); *Birch-Wolfe* v. *Birch* (16). The parties affected by proceedings have a sufficient interest to enable them to apply to set them aside. *Jacques* v. *Harrison* (13). A trustee may not sufficiently represent his *certuis qui trustent* particularly if the destruction of trust estate is being accomplished. *Miller* v. *Ostrander* (17); *Baker* v. *Trainor* (18); *Eccles* v. *Lowery* (19); *Francis* v. *Harrison* (20)

Even if the provisions of section forty had not been strictly complied with it is clear that these are moneys

(1) 53 L. T. 620.
(2) L. R. 3 Eq. 218.
(3) [1891] 1 Ch. 658.
(4) [1893] 3 Ch. 48.
(5) 14 Q. B. D. 405.
(6) L. R. 18 Eq. 656.
(7) 3 Ch. R. 522.
(8) 17 Can. S. C. R. 343.
(9) 1 J. & H. 296.
(10) 5 Q. B. D. 267.
(11) 9 Q. B. D. 632.
(12) 17 Ch. D. 19.
(13) 12 Q. B. D. 136, 165.
(14) 3 Atkyns, 94.
(15) 6 Ves. 784.
(16) L. R. 9 Eq. 683.
(17) 12 Gr. 346.
(18) 15 Gr. 252.
(19) 23 Gr. 167.
(20) 43 Ch. D. 183.

paid in by the liquidators and therefore available for creditors. If so the court should insist on their restoration, as in that case the Receiver-General is entitled to any part of it remaining unclaimed for three years, and entitled to have it put in such a position as to allow of the declaration of the dividend. The vesting orders on which such reliance was placed vest the unrealized assets on Hogaboom, "subject to the equity and conditions attaching thereto." The Receiver-General's right is at least an equity or condition.

*McCarthy* Q.C. for the respondent Holmested cited *Joint Committee of River Ribble* v. *Croston Urban District Council* (1), and authorities mentioned in Holmested & Langton, Ont. Jud. Act, under sec. 782 (2).

The judgment of the court was delivered by

GWYNNE J.—I retain the opinion which I held during the argument that this appeal should not have been entertained. It simply calls in question the jurisdiction of the High Court of Justice for Ontario to rescind certain orders made by a judge of one of the divisions of the court, whereby monies paid into court in the matter of the Winding-up of the Central Bank in favour of the scheduled creditors, were paid out of court to parties not entitled to such trust funds. The parties who had so received such trust funds out of court have in obedience to the order now appealed from repaid the monies back into court where they now remain subject to the trust purposes for which they were originally paid into court, and this court could not order that money to be repaid to the appellants without committing the error with which the Court of Appeal in Ontario have adjudicated that the

(1) [1897] 1 Q. B. 251. (2) Ed. 1890, p. 656.

1897

HOGABOOM v. THE RECEIVER-GENERAL OF CANADA.

*In re* THE CENTRAL BANK OF CANADA.

Gwynne J.

orders under which the monies were paid out of court were affected ; and so this court would become advisedly instrumental in causing a repetition of the breach of trust which had originally been committed inadvertently or in error. The only foundation upon which the argument for the appellants has been rested was that the Receiver-General, by a petition in whose name Her Majesty's Attorney-General, the Minister of Justice for the Dominion, informed the court of the breach of trust which had been committed and prayed the court to rescind the orders by which the breach of trust had been effected, and to order the Hogaboom estate to refund into court the monies erroneously paid out to it, had no *locus standi* in court, and secondly that the orders complained of were not appealed against within the terms of the seventy-fourth section of the Winding-up Act, nor had the proceedings to set aside the orders been taken in the form prescribed by the rules of practice established under the Ontario Judicature Act to regulate the practice of the court in the conduct of litigious proceedings *inter partes*. It would be useless to attempt to add anything to the judgment of the learned Chief Justice of Ontario for the purpose of establishing, as he has done most incontrovertibly, that the court had held the monies so paid out to the Hogaboom estate, subject to a certain trust purpose in which that estate had no right or shadow of right whatever, and we need only say that we entirely concur with the learned Chief Justice in his amazement that any one could have supposed that Hogaboom or his estate ever had any such claim, and in the conclusion reached by him that, by the payment of the money out of court to that estate, a great miscarriage of justice had taken place which it was incumbent upon the court as soon as apprised of the error to correct. In the argument

before the Court of Appeal for Ontario the appellants, impressed no doubt with a conviction of the impossibility of maintaining any right to withdraw any part of the fund upon a motion made in the manner in which they did, or upon the material supplied by them in their motion for the orders, set up a claim to retain the monies so received by them, in virtue of a cause of action which they claimed to have against the liquidators of the estate in liquidation, upon an allegation that the said liquidators had not delivered to Hogaboom or his estate the whole of the unrealised assets of the estate which Hogaboom in his lifetime had purchased from them and paid them for. Mr. Justice Maclennan in his exhaustive judgment has dealt with this contention in a much fuller manner than we think was at all necessary for the determination of the matter with which alone the court were dealing, for if the estate of Hogaboom had any such claim, before they could obtain satisfaction of it they must needs establish their claim by a judgment pronounced upon it in their favour, and in order to obtain such a judgment, it was necessary for them to proceed against the liquidators charged with having committed the wrong complained of, either in an ordinary action, or at least, it may be, by proceedings instituted against them under the winding-up order, as nearly as may be in the same manner as an ordinary action, suit or proceeding within the jurisdiction of the court (1). Mr. Justice Maclennan has pointed out in his judgment that in January, 1892, Hogaboom made an application to the court to commit the liquidators for non-delivery to him of certain mortgages, bills, notes and other securities which he claimed to be entitled to by virtue of his purchase of the unrealised assets of the bank, and

(1) 52 Vict. ch. 32, s. 21.

1897

HOGABOOM v. THE RECEIVER-GENERAL OF CANADA.

*In Re* THE CENTRAL BANK OF CANADA.

Gynwne J.

which he had not received. This contestation was carried on by Hogaboom into the Court of Appeal for Ontario; in that contestation, if there were other assets which Hogaboom claimed to be entitled to, then was the time to present his claim, when it could have been disposed of in the presence of the persons from whom he had purchased the unrealised assets of the bank, as they stood on the 22nd July, 1891, and who were the parties responsible if the claim was well founded.

The learned judge has also shewn that after much litigation that claim was finally disposed of by an agreement concluded between Hogaboom and the liquidators upon the 3rd March, 1893, after the liquidators had been discharged from their office, and after a final close of their dealings with the estate in liquidation and after the payment into court in trust for the creditors of the estate under the provisions of 55 & 56 Vict. ch. 28, of the monies which have been paid out of court to the appellants, in the manner complained of, and by an order made by the court upon the application of Hogaboom in the matter upon the 19th June, 1893, whereby that settlement was approved and confirmed and so finally adjudicated upon. By that settlement Hogaboom released and discharged the liquidators from all claims whatsoever and accepted the sum of fifty dollars in full of all claims against the liquidators and the bank in respect of the assets purchased by him and not handed over. In the Court of Appeal for Ontario, and before us, it was argued that this settlement is not open to the construction put upon it by the respondents' counsel, or rather that it is open to a different construction. We are not here concerned at present with an inquiry whether this be so or not, for if the estate of Hogaboom had, and has still, any claim for assets of the

estate in liquidation purchased by Hogaboom, and not handed over to him, that claim must needs be determined and adjudicated upon in a proceeding duly instituted asserting the demand. When that proceeding shall be, if it ever shall be, instituted, will arise some important questions which must be decided in favour of the appellants before they can obtain a judgment in their favour, namely: 1st. Whether the liquidators who are charged with having committed the wrong of which the appellants complain, must not be the parties against whom the proceedings must be instituted: 2ndly. Whether the estate of Hogaboom is or is not barred and estopped by the settlement made upon the proceedings instituted in January, 1892: 3rdly. If not so estopped, whether there is any foundation for the claim to any, and if any, to what amount: And 4thly. Whether such amount, if any there should be found to be, can now, after the final discharge of the liquidators and the payment by them into court in trust for the creditors who had proved in the liquidation, of the monies remaining in their hands the property of the estate in liquidation, can be charged against such monies.

In the argument before us it was expressly admitted upon behalf of the appellants, indeed it could not be contended to the contrary, that the claim which the appellants assert in argument here has never yet been established in proof, but their learned counsel contended that as the appellants obtained the orders which the Court of Appeal for Ontario have pronounced to have issued upon insufficient material inadvertently and in error it must be assumed that the claim had been established, that in fact it must be so assumed contrary to the manifestly apparent facts. The statement of this contention carries in itself its own refutation. But all these matters are irrelevant

1897

HOGABOOM v. THE RECEIVER-GENERAL OF CANADA.

*In re* THE CENTRAL BANK OF CANADA.

Gwynne J.

upon the present appeal, as indeed also is the following to which, nevertheless, I must add a few words because of the contention of the appellants' counsel that inasmuch as the order of the 8th June, 1892, was made before the passing of 55 & 56 Vict. ch. 28, which took place on the 9th July, 1892, the appointment of Mr. Holmested as liquidator for the special purposes named in the order of the 21st November, 1892, had the effect of continuing the estate in liquidation notwithstanding the passing of the final account of the liquidators on the 14th October, 1892, and the order of that date, and notwithstanding anything contained in 55 & 56 Vict. ch. 28. Mr. Justice Maclennan in his judgment points out that unless the liquidators were discharged under the Act they have never been discharged; that the court had no power except under the authority of that Act to discharge them, nor to appoint a liquidator in their place; and he concludes that the naming of Mr. Holmested, the financial officer of the court, as a "liquidator" for the purpose of distributing the balance paid into court by the liquidators, who in passing their final accounts had been discharged, did not make Mr. Holmested a *liquidator* in the sense in which a statutory liquidator representing the creditors of an estate in liquidation is regarded. The naming of Mr. Holmested "liquidator" for the special purpose named in the order had no more effect than if the purpose for which he was so named had been entrusted to him as an officer of the court, without adding to him the appellation of liquidator; and Mr. Justice Maclennan says that the order of the 8th June was made in anticipation of the passing of the Act. He might indeed have added as an historical fact known to the court, that the Act was framed for the purpose of enabling the liquidation of the Central Bank to be closed; that it was framed by

the present Chief Justice, Sir William Meredith, then solicitor of the liquidators in the liquidation matter; that it was revised by the learned Chancellor, and so revised was introduced into Parliament and passed, and that the Master in Ordinary, before whom the proceedings in liquidation were conducted, had urged the Minister of Justice to expedite its passing. Mr. Justice Maclennan's judgment on this point was well founded, but apart from this, the order of the 8th June was provisional only, it authorized accounts to be taken, but gave no effect as yet to their being taken—they were not taken until after the passing of the Act, and the order did not obtain effect until the 14th October, when the accounts having been finally taken, and the amount to be paid in court having been ascertained and paid into court, the order of the 14th October, 1892, finally discharging the liquidators was made, and that order then constituted the finality given to the liquidation by the statute and the money paid into court became by the statute money in court upon the trust purposes named in the statute. But to advert to the only matters which are material on the present appeal, which affect merely the regularity of the proceedings adopted for the purpose of obtaining a rescission of the orders complained of, I desire to say that in my judgment the jurisdiction of the court to rescind orders which like those in the present case have been issued as is clearly demonstrated inadvertently and through error, and which constituted a breach of trust committed by the court itself, is not fettered in any respect either by the rules of practice established by the Judicature Act for regulating proceedings in litigious matters *inter partes*, or by the 74th section of the Winding-up Act, or in fact by any rule other than that compliance with which natural justice requires, namely, that the party to be affected by the order should have notice of

1897

HOGABOOM v. THE RECEIVER-GENERAL OF CANADA.

Gwynne J.

*In re* THE CENTRAL BANK OF CANADA.

the application for it so as to enable him to answer such application I am of opinion that the error in the issuing of the orders which the court below has rescinded, is so conclusively apparent, that the application to the Divisional Court should have been granted as soon as it was made. As to the objection that the Receiver General had no *locus standi in curiâ*, while I concur in Mr. Justice Maclennan's judgment that under the statute he had, I must repeat that in my judgment it is quite immaterial whether he had or not. Her Majesty's Attorney General gave the court information of the error and breach of trust through, it is true, the form of a petition signed by the Receiver General, but that was sufficient information to call the court into action whether the person signing the petition had or had not an interest in the fund. The court, indeed, upon being informed of the error and breach of trust as it was by its own financial officer, might have ordered the issue of a rule *nisi* or any other mode of calling upon the appellants to show cause why the orders should not be rescinded. And finally, I am of opinion, that in a matter of this peculiar character, alleged irregularity in the procedure adopted in the court below, is not a matter to be entertained in this court upon appeal.

The appeal, therefore, must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellants : *Charles Millar & Co.*

Solicitors for the respondent, the Receiver General : *F. E. Hodgins.*

Solicitor for the respondent, George S. Holmested : *John Hoskin.*

BURNS & LEWIS (ON BEHALF OF THEMSELVES AND ALL OTHER CREDITORS OF ELIZA BARNET CHEYNE (PLAINTIFFS)..... } APPELLANTS;

1897

*Oct. 25, 26, 27.

*Dec. 9

AND

JAMES D. WILSON AND THE W. E. SANFORD MANUFACTURING COMPANY, LIMITED, (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Debtor and creditor—Insolvency—Fraudulent preferences—Chattel mortgage — Advances of money — Solicitor's knowledge of circumstances — R. S. O.* (1887.) *c.* 124—54 *V. c.* 20 (*Ont.*)—58 *V. c.* 23 (*Ont.*)

In order to give a preference to a particular creditor, a debtor who was in insolvent circumstances, executed a chattel mortgage upon his stock in trade in favour of a money-lender by whom a loan was advanced. The money, which was in the hands of the mortgagee's solicitor, who also acted for the preferred creditor throughout the transaction, was at once paid over to the creditor who, at the same time, delivered to the solicitor, to be held by him as an escrow and dealt with as circumstances might require, a bond indemnifying the mortgagee against any loss under the chattel mortgage. The mortgagee had previously been consulted by the solicitor as to the loan, but was not informed that the transaction was being made in this manner to avoid the appearance of violating the acts respecting assignments and preferences and to bring the case within the ruling in *Gibbons* v. *Wilson* (17 Ont. App. R. 1).

*Held*, that all the circumstances, necessarily known to his solicitor in the transaction of the business, must be assumed to have been known to the mortgagee and the whole affair considered as one transaction contrived to evade the consequences of illegally preferring a particular creditor over others and that, under the circumstances, the advance made was not a *bonâ fide* payment of money within the meaning of the statutory exceptions.

1897

LEWIS v. WILSON.

Girouard J.

APPEAL from the judgment of the Court of Appeal for Ontario, affirming the judgment of the Honourable the Chancellor, by which the plaintiffs' action was dismissed with costs.

A statement of the case appears in the judgment now reported.

*Gibbons* Q.C. for the appellants. The person who lent the money to the insolvent was acting as an instrument of a particular creditor, the respondent company, which through him obtained an illegal preference over other creditors. He was not a *bonâ fide* lender, and the transaction does not come within *Gibbons* v. *Wilson* (1); he was a trustee for the company to assist in a scheme to cover up the illegal transaction; *Clarkson* v. *McMaster* (2); *Molson's Bank* v. *Halter* (3). It was a transfer to the company, who got the proceeds and should be made to account for them for distribution amongst creditors.

This is a clear case for setting aside, as a preference, the transfer to the Sanford Company of the proceeds of the chattel mortgage. Wilson gave his cheque to the solicitors of the Sanford company, who had taken an order providing for the handing over of the same to the company. No money passed. If, in relation to the transfer of moneys, the solicitor is to be taken as representing The Sanford Company then there was a delivery to them of the cheque of a third party, Wilson, clearly a security transferred within the sixty days and subject to attack. If he is to be taken as representing Wilson, then the cheque given to the Sanford Company was the cheque of a third party and not cash or money and was the proper subject of attack as a pre-

(1) 17 O. R. 290, 17 Ont. App. R. 1.

(2) 25 Can. S. C. R. 96.

(3) 18 Can. S. C. R. 88.

ference. *Davidson* v. *Fraser* (1). Creditors, whose debts were maturing due, had a right to participate in the assets as they were, and the giving of the chattel mortgage would prevent them enforcing any portion of their claims. It was just as much a transaction with intent to defeat, delay and hinder as an absolute disposal of the stock. *Gottwalls* v. *Mulholland* (2); *Merchants Bank* v. *Clarke* (3); *Mulcahy* v. *Archibald* (4).

*Ritchie* Q.C. for the respondent, Wilson. Wilson had no knowledge that the money was intended for his co-respondents and did not know that they were creditors of the debtor. He did not know what the money was wanted for and had no right to ask. Had he known of the intention to pay a creditor in full, even if such payment would not leave sufficient to pay the other creditors in full, he had still a perfect right to make the advance and take the security, because the statute expressly favours payments in money. He had no knowledge whatever that the money was wanted to pay creditors, that his co-respondents were creditors, or that the debtor was insolvent, and the learned chanceller has found all these facts in his favour. *Gibbons* v. *Wilson* (5). The debtor did not give the security to get under the cover and protection of the mortgage, and the learned chancellor refused to impute to this respondent knowledge of any understanding between his co-respondents and the debtor by which the latter was to get the support and assistance of the company. This respondent had no knowledge until the trial of this action that his co-respondents had executed and delivered in "escrow" a bond or guaranty, and this respondent had no communication of any kind with the person to whom it was

(1) 23 Ont. App. R. 439.
(2) 3 (U. C.,) E. & A. 194.
(3) 18 Gr. 594.
(4) 33 Can. L. J. 545.
(5) 17 Ont. App. R. 1.

1897

BURNS & LEWIS v. WILSON.

delivered. He actually made a present *bonâ fide* advance of money and is entitled to hold the security he took.

*John J. Scott* for the respondents, the W. E. Sanford Manufacturing Company. The chancellor's finding upon the facts are favourable to these respondents and against the appellants and should not be disturbed. The security was for a present actual *bonâ fide* advance of money and within the protection of the third section of the "Act respecting Assignments and Preferences by Insolvent Persons." These respondents were not aware of any fraudulent intention, if any such existed, on the part of the mortgagor, to whom the money was actually paid, and the payment cannot be disturbed. The indemnity bond was left with the solicitor and delivered only as "an escrow."

The judgment of the court was delivered by—

SEDGEWICK J.—In the spring of the year 1895 one Eliza Barnet Cheyne commenced the clothing business in Toronto, and by the first of the month of November in that year had become indebted to the W. E. Sanford Company of Hamilton in the sum of about $4,700, and had also become indebted to the firm of Burns & Lewis, of London, and to other merchants in an amount exceeding $3,000. This indebtedness was to a considerable extent overdue at the time that the mortgage, which is now in controversy, was given. About the end of October the Sanford Company, hearing that Miss Cheyne was about to be proceeded against by some of her creditors, sent an agent to her and suggested that she should make an assignment for the general benefit of her creditors, the object being to have the assets divided ratably among the creditors. She refused to execute such an assignment, but it was agreed that her father, who all through appears

1897

BURNS & LEWIS v. WILSON.

Sedgewick J.

to have been her business manager, and who alone on her side gave evidence in the case, should go to Hamilton for the purpose of entering into some arrangement looking to the liquidation of the Sanford Company indebtedness. He accordingly came to Hamilton and met there the principal officers of the company. These gentlemen retained the services of a firm of solicitors (Scott, Lees & Hobson) in the matter, which firm were, and had been for years previously, the solicitors of Mr. James D. Wilson, a retired merchant and money lender of Hamilton, who had frequently before advanced money to various parties, and upon such securities as were recommended to him by his solicitors. At the meeting between Cheyne and the company it was apparent that Miss Cheyne could not pay her debts as they become due and that it was an absolute necessity, if her business was to continue, that she must get by some means or other a very considerable extension of time. It was present also to the minds of the parties that she could not give an assignment of her property to the Sanford Company by way of security or by way of preference, because that would be in violation of the statute respecting assignments and preferences; but it was known that under a recent decision of the Ontario Court of Appeal in the case of *Gibbons* v. *Wilson* (1) it was held in effect that it was not contrary to law that a debtor in insolvent circumstances might legally give a mortgage upon the security of his property to a third party and with the proceeds pay a single creditor in full to the detriment of his other creditors, and that too, even although the lender of the money were aware of the fact that such was his purpose and object in obtaining the loan when giving the security. It was then also ascertained that Mr. Wilson would

(1) 17 Ont. App. R. 1.

1897

BURNS & LEWIS v. WILSON.

Sedgewick J.

be willing to advance whatever money the solicitors wanted upon the securities mentioned by them. It was further understood that in the event of Miss Cheyne giving a chattel mortgage to a third party he would advance her money sufficient to pay the Sanford debt. That security would enable her to hold her other creditors at bay so far as her assets exigible in execution were concerned until the moneys due under the security were paid. It was thereupon agreed that Miss Cheyne should give a chattel mortgage to Mr. Wilson upon her stock in trade, he advancing the amount of the Sanford debt, $4,775, and that the mortgage should be payable with interest at eight per cent per annum by weekly instalments of $100 each, the final instalment to be paid on the 11th of November, 1899. It was agreed further that the money received from Wilson should be handed over to the Sanford Company, thereby wiping out their indebtedness; further, that the Sanford Company should execute an instrument of indemnity guaranteeing to Wilson the amouut of his loan, the solicitor to hold this security and to deal with it as the necessities of the case might require. There was in addition some kind of an indefinite understanding that the Sanford Company should continue to supply Miss Cheyne with goods to enable her to carry on her business (this promise on the part of the company forming to a very considerable extent the inducement under the influence of which Miss Cheyne became a party to the transactions), and that she should at once give to the Sanford Company a second chattel mortgage upon her stock, including subsequently acquired property, in consideration of the sum of $916, the amount of the value of the goods which they were then to advance, the money secured under such instrument to be paid forthwith. Previous to this final

arrangement Mr. Scott, the partner of the solicitor, Mr. Lees, had a personal interview with Mr. Wilson and had in effect informed him that he wanted this money upon the security of a chattel mortgage covering the stock and goods owned by one Miss Cheyne in Toronto. Mr. Scott, who was aware of all the circumstances, had not given Mr. Wilson any further information upon the subject than I have stated, Mr. Wilson having the fullest confidence that so far as he was concerned, Mr. Scott's assurance that he would be fully protected was all that was necessary. He had never known or heard of Miss Cheyne before. In fact he did not know whether she was single or married, but as already stated he knew from his experience that he might place the most implicit reliance upon the advice of his solicitor, Mr. Scott. In pursuance then of this arrangement, Miss Cheyne executed the chattel mortgage in favour of Wilson, and Wilson gave the money to the solicitors ; the solicitors gave the money to the company, the company gave the bond of indemnity in favour of Wilson to the solicitors, and within a week the Sanford Company sent goods to the extent of $916 to Miss Cheyne, and on the 5th of November she gave the chattel mortgage above referred to, to the company payable forthwith. Two weeks afterwards the Sanford Company, without Wilson's knowledge, took possession of the whole of the property covered by the mortgages, advertised the same for sale, and realized a sum not quite sufficient to pay off the two mortgages, leaving nothing whatever for the appellants, Messrs. Burns & Lewis, nor for any of her other creditors. An action was commenced on the 15th of November, 1895, a fortnight after the date of the mortgage, to set it aside, the defendants being Miss Cheyne, Mr. Wilson and the company. Upon the trial the learned Chancellor for Ontario de-

1897

BURNS & LEWIS v. WILSON.

Sedgewick J.

cided, although with very great doubt, that the transaction was valid, and his finding was sustained by the Court of Appeal upon the authority of *Gibbons* v. *Wilson* (1), and it is from that judgment that this appeal is taken.

The law upon the subject is contained in the Act Respecting Assignments and Preferences of Insolvent Persons, (Revised Statutes of Ontario, ch, 124) and the Amending Acts, 54 Vict. ch. 20 and 58 Vict. ch. 23. Section 2 of the principal Act (R. S. O. Chap. 124) was repealed by the Act of 1891, a new section of that Act being substituted therefor, and it enacts, among other things:

First—

That every assignment of property 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, hinder, delay, or prejudice his creditors, or any one or more of them, shall as against his creditor or creditors injured, delayed or prejudiced, be utterly void.

Secondly—

That every such transfer to or *for* a creditor with intent to give such creditor an unjust preference over his other creditors or over any one or more of them, shall, as against the creditor or creditors injured, delayed, prejudiced or postponed, be utterly void.

And further that a transaction of that kind shall be presumed to be made with intent and to be an unjust preference if made within sixty days previous to the time when any action is taken to impeach it. These provisions are, however, subject to section 3 of the principal Act, which enacts, among other things, that nothing in the preceding section, to which I have referred, should apply to any *bonâ fide* assignment of property which is made by way of security for any present actual *bonâ fide* advance of money.

(1) 17 Ont. App. R. 1.

1897

BURNS & LEWIS v. WILSON.

Sedgewick J.

The Act of 1895 above referred to only affects this case in so far as it adds to the existing rights of the attacking creditors. In order to arrive at a conclusion as to whether this case comes within the statute the case must be looked at from three points of view, viz.: First, from the view of the debtor; secondly, from the view of the creditor; and thirdly, from the view of the lender. I do not think there can be any question here, but that Miss Cheyne, as a matter of fact, was a person in insolvent circumstances and unable to pay her debts in full at the time she executed the instrument impeached. There is a question, however, as to the intent with which she did it. Did she do it with the intent to delay her creditors, or with the intent to give a preference to the company, or only with the intent of enabling her to carry on her business? While this latter intent no doubt did exist there can be no question but that such intent was to be carried out by so protecting her property that her other creditors could not by any means avail themselves of it for the payment of their claims. In other words, her desire to carry on her business was to be attained by setting her other creditors at defiance through the medium of this chattel mortgage which for four years at least was to remain in existence against them. There was therefore clearly an intent on her part to hinder, delay, and prejudice her creditors.

Now, from the point of view of the company: It was admitted at the argument, and it is unquestionably correct, that they could not have taken this mortgage in their own names. Had they done so it would at once have come within the statute and been void as an unjust preference.

The principal question in controversy is as to Wilson. Was this mortgage, so far as he was concerned, by way of security for a "present actual *bonâ fide* advance of money?"

1897

BURNS & LEWIS v. WILSON.

Sedgewick J.

Now I admit that an insolvent debtor may sell or mortgage his property for money and then pay that money to one of his creditors, even though in doing so, he should give a preference to that creditor over all of the other creditors, and further that such a transaction cannot be successfully attacked under the statute, even though the lender knows of the debtor's intent to effect such preference, and we have so held in *Campbell* v. *Patterson* (1). The payment of money to a person in exchange for property of that person does not *per se* affect in any way the quantum of his assets available for his creditors generally, and there is no principle of law which compels any man bargaining for or taking security upon goods to make any inquiry either before or afterwards as to what disposition it is intended to make of the money or property transferred. He is none the less debarred from completing the transaction even although aware of its purpose. Is Mr. Wilson in that position here? He endeavours to shield himself by setting up his ignorance. It was at first contended at the argument before us that Mr. Scott was not his solicitor, and even if it were held that he was, the solicitor's knowledge was not his knowledge. The first contention was abandoned, but the other was pressed. So far as this point is concerned we are of opinion that his solicitor's knowledge necessarily acquired in connection with these same transactions was his knowledge, and that he must be held to have known what his solicitor knew. It was in our view the same as if the solicitor had Mr. Wilson's money in his hands for the purpose of investing it in such a way as the solicitor might think expedient, he having a power of attorney to carry on the business in the same way and to the full extent that his principal

(1) 21 Can. S. C. R. 645. ; *Sub nomine. Campbell* v. *Roche*, 18 Ont. App. R. 646.

1897

BURNS & LEWIS v. WILSON.

Sedgewick J.

might have done. Under such circumstances, the defence of ignorance on the part of the principal would be of no avail as against the knowledge of the attorney. Now, in our view all of these transactions must be viewed as one transaction. Each of its constituent facts had relation to every other in connection with it, and all must stand or fall together. The defendant company were rightly desirous of payment or security for their debt. They called in the aid of a solicitor to advise as to how this desire might be accomplished. The solicitor had, in substance, in his possession funds of his principal with full powers of investing them. Both he and the company knew that the debtor could not give a security direct to the company. That would undoubtedly be a violation of the statute, but the solicitor suggests: "In your interest I can get over the statute. I have read *Gibbons* v. *Wilson* (1); I will take my client's money and pay you and get Miss Cheyne to give a chattel mortgage to me, you at the same time giving me a bond of indemnity that I will eventually get back my money." It was a happy suggestion, is immediately adopted, and the transaction was completed upon these lines. I may have drawn too strong inferences from the admitted facts, but it is clear that substantially the transaction was just as I have stated. I do not think that under these circumstances the money, even although it was Wilson's money, was given in good faith to Miss Cheyne. The whole intent and object of the scheme, so far as the company was concerned, and so far as its solicitor (he being Wilson's solicitor as well) was concerned, was to secure the payment in full of the Sanford claim, the necessary consequence of which was, and was known to be, that all the other creditors would be, at all events, hindered and delayed in their remedies, if not, as matters subsequently

(1) 17 Ont. App.R. 1.

1897

BURNS & LEWIS v. WILSON.

Sedgewick J.

turned out, defeated altogether. The money was not money paid to Miss Cheyne at all. The chattel mortgage was a mere instrument taken by the company to secure the object they had in view. Wilson himself was a like instrument used by them to aid in the same purpose, nothing more than a mere portion of the machine devised by the solicitor to work out his ingenious plan. It was not upon the security of the Toronto goods that the solicitor paid the company, but it was because he knew, whether by verbal promise or by reason of the written indemnity of the company, they would protect him and Wilson from all loss in the matter, and under these circumstances it seems to me an impossible task to show that there was a *bonâ fide* payment of money by Wilson to Miss Cheyne. On the contrary it was a *malâ fide* payment to the company for the purpose of avoiding the statute under the guise of a colourable or fictitious payment to Miss Cheyne.

It is satisfactory to know that all the money due to Wilson has been realized from the sale of the proceeds, the same having been paid over to him since the commencement of this action, by the company.

We are of opinion that this appeal should be allowed. The result will be that the money received by the company from Wilson, instead of being devoted exclusively to the company's benefit, will now be divided *pro ratâ* among themselves and their fellow creditors.

There will be judgment for the appellants, and they will have judgment in the court below as asked in their statement of claim, with costs.

*Appeal allowed with costs.*

Solicitors for the appellants: *Gibbons, Mulkern & Harper.*

Solicitor for the respondent, Wilson: *T. B. Martin.*

Solicitors for the respondents, The W. E. Sanford Manufacturing Company: *Scott, Lees & Hobson.*

CATHERINE FRANCES SMALL (PLAINTIFF) ..... } APPELLANT;

AND

MARY CALLENDAR THOMPSON (DEFENDANT) ..... } RESPONDENT.

1897

*Oct. 27, 28.

*Dec. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Mortgage—Married women—Implied covenant—Disclaimer.*

Where a deed of lands to a married woman, but which she did not sign, contained a recital that as part of the consideration the grantee should assume and pay off a mortgage debt thereon and a covenant to the same effect with the vendor his executors, administrators and assigns, and she took possession of the lands and enjoyed the same and the benefits thereunder without disclaiming or taking steps to free herself from the burthen of the title, it must be considered that in assenting to take under the deed she bound herself to the performance of the obligations therein stated to have been undertaken upon her behalf and an assignee of the covenant could enforce it against her separate estate.

APPEAL from the judgment of the Court of Appeal for Ontario reversing the judgment of Armour C.J. in the High Court of Justice which ordered and adjudged that the plaintiff should recover $4,891.96 out of the separate property of the defendant Mary Calendar Thompson, with costs.

The action was brought against the respondent, a married woman, and Robert Cameron Sinclair, for the purpose of enforcing against her and her separate estate a covenant contained in a deed of lands by him to her made under the following circumstances. The plaintiff had conveyed the lands to Sinclair by deed, whereby the said Sinclair assumed a

PRESENT —Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1897

SMALL v. THOMPSON.

mortgage thereon and covenanted with the plaintiff that he would pay the same. Sinclair afterwards conveyed the lands to the respondent by a deed made in consideration of the assumption by her of the said mortgage and a sum of money (the receipt whereof was by him acknowledged), and in the said deed there was contained a covenant with the vendor therein and his assigns by the said respondent that she would assume and pay off the said above mentioned mortgage when it fell due and to indemnify him and his assigns from all payments on account thereof. The respondent did not sign the deed which contained her covenant in favour of Sinclair, but she took possession and enjoyed the lands thereunder until the mortgagees took possession in default. The plaintiff obtained from Sinclair, before action, an assignment of all his rights against the defendant under the covenant in question. Subsequently Sinclair executed a release of the covenant by an instrument in writing which declared that there had been no intention at the time of the conveyance that the defendant should assume any personal liability to pay the mortgage although according o the deed she appeared to be liable therefor. The plaintiff appeals from the judgment of the Court of Appeal reversing the decision of the trial judge and directing judgment to be entered for the defendant Thompson. The issues raised on the appeal are set out in the judgment of His Lordship Mr. Justice King.

*Armour* Q.C. for the appellant. The defendant was clearly liable on the documents, and parol evidence is inadmissible to contradict them, and inadmissible and insufficient to reform the deed, and the Court of Appeal was wrong in giving effect to such evidence. The defendant must now, retaining, as she does, the land, pay the balance of the consideration for which it

was purchased. *Cherry* v. *Heming* (1); *Willson* v. *Leonard* (2); *Webb* v. *Spicer* (3); *Rex* v. *Houghton-le-Spring* (4). The conditions on which the deed was delivered are binding on the grantee as an essential part of the contract and germane thereto; *Mackenzie* v. *Coulson* (5), per James V. C. at page 375. She knew of the obligations charged upon her title; *Eaton* v. *Bennett* (6), and there was no error as to the agreement; *McNeill* v. *Haines* (7) per Ferguson J. at page 485. See also *Hart* v. *Hart* (8). There has been no disclaimer either by deed or matter of record although she took possession as grantee and for years received the rents, issues and profits. *Fraser* v. *Fairbanks* (9) per Gwynne J. at page 87, and per Sedgewick J. at page 89; *Smith* v. *Cooke* (10); *Blair* v. *Assets Company* (11) at page 418; also *re Dunham* (12); and *re Defoe* (13). This is not a case of dealing between husband and wife and *McMichael* v. *Wilkie* (14) cannot apply. See also *Williams* v. *Balfour* (15).

*Aylesworth Q.C.* for the respondent.—The uncontradicted testimony shows that respondent's purchase of the property was upon the express condition and stipulation that she was not to assume or become liable for the mortgage thereon, but that Sinclair alone was to be liable for the mortgage without any right of indemnity, and that, by inadvertence and mistake, the alleged convenant sued on was inserted in the deed. The parol evidence was admissible to prove these facts; and, therefore, neither Sinclair nor any assignee from him could maintain an action on the supposed covenant.

(1) 4 Ex. 631.
(2) 3 Beav. 373.
(3) 13 Q. B. 886.
(4) 2 B. & Ald. 375.
(5) L. R. 8 Eq. 368.
(6) 34 Beav. 196.
(7) 17 O. R. 479.
(8) 18 Ch. D. 670.
(9) 23 Can. S. C. R. 79.
(10) [1891] A. C. 297.
(11) [1896] A. C. 409.
(12) 29 Gr. 268.
(13) 2 O. R. 623.
(14) 18 Ont. App. R. 464.
(15) 18 Can. S. C. R. 472.

1897

SMALL v. THOMPSON.

Story's Eq. Juris. sects. 153 and 155. *Price* v. *Ley* (1); *Wake* v. *Harrop* (2); *Fraser* v. *Fairbanks* (3); *British Canadian Loan Co.* v. *Tear* (4); *Beatty* v. *Fitzsimmons* (5); *Corby* v. *Grey* (6).

The appellant, as assignee of the alleged covenant, stands in no better position that the assignor Sinclair, for the covenant is merely a chose in action, and the assignee takes it subject to the equities existing between the parties. *Patterson* v. *McLean* (7); *Davis* v. *Hawke* (8); *In re Natal Investment Co.* (9). The respondent is not bound by the deed from Sinclair to her, or by the covenant therein, as she did not execute the deed nor assent to it, and was never at any time in receipt of the rents and profits of the property conveyed by the deed. See Shep. Touchstone, 177; Com. Dig. tit. "Fait" A2; Co. Litt 231*a*; 2 Roll Rep. 63. See also *Webb* v. *Spicer* (10); *Rex* v. *Houghton-le-Spring* (11); *Burnett* v. *Lynch* (12); a party to a deed, who does not execute it, assent to it or take the benefit of it, is not bound by the deed or the covenant contained in it. Even though she had accepted the benefit of this deed, she would not be liable to the appellant in an action of covenant, for such an action cannot be maintained on a deed conveying land, executed by the grantor, and purporting to contain a covenant by the grantee to pay a mortgage on the property, but which deed has not been executed by the grantee. *Credit Foncier Franco-Canadien* v. *Lawrie* (13), and cases therein cited. The land in question was conveyed to the wife as the husband's nominee by deed

(1) 4 Giff. 235.
(2) 6 H. & N. 768.
(3) 23 Can. S. C. R. 79.
(4) 23 O. R. 664.
(5) 23 O. R. 245.
(6) 15 O. R. 1.
(7) 21 O. R. 221.
(8) 4 Gr. 394.
(9) 3 Ch. App. 355.
(10) 13 Q. B. 886.
(11) 2 B. & Ald. 375.
(12) 5 B. & C. 589.
(13) 27 O. R. 498.

absolute in form, but for the purpose of security only, and consequently she is not liable to indemnify the vendor. *Walker* v. *Dickson* (1); *Gordon* v. *Warren* (2); *Fraser* v. *Fairbanks* (3). Sinclair acted as agent for the purchase of the property, and the respondent is not bound to pay off the mortgage or idemnify him, as this equitable obligation arises only between vendor and purchaser, and not between an agent and his principal. Even if she was under any implied obligation to Sinclair, such obligation was not one which could be assigned, and therefore, nothing passed to the plaintiff. *Campbell* v. *Robinson* (4); *Oliver* v. *McLaughlin* (5). See the language of the Lord Chancellor in *Jones* v. *Kearney* (6), at p. 155. See also *Campbell* v. *Morrison* (7).

The respondent being a married woman, the obligation to pay off the mortgage is not enforceable against her, as such obligation cannot be said to be a contract made by her in respect of her separate property; *McMichael* v. *Wilkie* (8); especially as the liability, if any, arises wholly by implication of law and in the absence of contract, It can no more operate now than before the "Married Women's Property Act, 1884 (9)." We refer also to *Wright* v. *Chard* (10), A plaintiff who seeks to charge the separate estate of a married woman must make out at least some contract or engagement with him on her part. *Jones* v. *Harris* (11); *Johnson* v. *Gallagher* at page 514 (12); *Aguilar* v. *Aguilar* (13); *Ambrose* v. *Fraser* (14).

The judgment of the court was delivered by:

(1) 20 Ont. App. R. 96.
(2) 24 Ont. App. 44.
(3) 23 Can. S. C. R. 79.
(4) 27 Gr. 634.
(5) 24 O. R. 41.
(6) 1 Dr. & War. 134.
(7) 24 Ont. App. R. 224.
(8) 18 Ont. App. R. 464.
(9) R. S. O. [1887] ch. 132.
(10) 4 Drew. 673.
(11) 9 Ves. 486.
(12) 3 DeG. F. & J. 494.
(13) 5 Madd. 414.
(14) 14 O. R. 551.

1897

SMALL v. THOMPSON.

King J.

KING J.—Sinclair entered into a written contract to purchase, and expressly agreed to indemnify his vendor, Mrs. Small, against personal liability for the mortgage debt charged on the property and which formed part of the purchase money, but was suffered to be retained by the purchaser to protect him against the mortgage charge. It is claimed that he purchased for and on account of Thompson, the husband of the female defendant. In such case the principal on taking over the property would ordinarily be bound to the agent to assume any obligations for the purchase money which the agent had entered into with the consent of the principal.

But it is claimed that Sinclair, in consideration of $50 agreed with his principal to take upon himself the obligation to the vendor to assume payment of the mortgage debt without recourse against his principal.

Both Sinclair and Thompson swear to this, but the learned Chief Justice who tried the case did not give credit to their statements. First, as to Sinclair. Against his statement there is to be placed the clear statements of the deed to the contrary effect. And the deed was written by him, copied, he says, from the deed given to him by Mrs. Small. But is it not well nigh incredible that a person should make an express bargain to assume the responsibility for the mortgage debt himself, and then, having made such an agreement for a purpose which he swears was well known to him, viz., that his transferee should be free from all liability in respect of it, should immediately afterwards, in the course of carrying out the transfer, state in plain English what was palpably inconsistent with such agreement, viz., that Mrs. Thompson was to assume responsibility for the mortgage debt and to indemnify Sinclair against liability therefor?

The explanation put forward, that the deed was copied by him from the original deed to him, is no explanation at all. In view of this and of Sinclair's assignment to Mrs. Small of his claim for indemnity against Mrs. Thompson, and then of his still later attempt to release the same to Mrs. Thompson, it is little wonder that the learned Chief Justice preferred to give effect to the terms of the deed as against Sinclair's attempt to cut it down.

Then as to Thompson: There is the fact that he had the deed from 1890 to 1895 in his possession. He says that he never read it, but kept it in his safe all the time. But it seems to me (as it probably seemed to the learned Chief Justice) that one who contrives a plan of hiring a man of straw to place between the vendor and himself, so that in certain events he may not have to pay what they all suppose is the fair value of the property, and who then trusts so implicitly to the man of straw as to take a transfer from him without looking at it, ought not to be surprised if there is found some difficulty in acting upon his view of the transaction.

The action is, however, against Mrs. Thompson, who is sought to be made liable in respect of her separate estate, and this can only be done upon a contract by her. That she had separate estate is manifest upon the evidence. The question then is: Did she contract?

It is contended for the plaintiff that she was the real principal for whom Sinclair was acting, and that this was unknown to Mrs. Small at the time of the agreement. I think, however, the proper conclusion upon the evidence is that the consideration was paid by Thompson out of his own moneys.

Then as to making out the deed to Mrs. Thompson. His account of it is that he did this in order to keep the property free from execution in a suit that he anti-

1897

SMALL v. THOMPSON.

King J.

cipated relative to the Princess Theatre. But Mrs. Thompson speaks of this theatre as being her separate property. As it appears that Thompson fell himself under a pre-nuptial obligation to transfer to his wife all property that he should become entitled to, and in pursuance of this did in fact transfer to her a number of properties, the more reasonable view is that in this case he was acting in the like manner, and so the transfer was in the nature of an advancement by Thompson to his wife. But in either case, and equally, the question is: Was there in fact a contract by her?

The indenture contained what purports to be an express covenant that she shall pay the amount of the mortgage debt and idemnify Sinclair against liability therefor.

It is also stated in the recital as part of the consideration that the grantee is to assume the obligation to pay the mortgage debt. Mrs. Thompson did not execute the deed, and the question is whether she has taken the benefit of it and adopted it. Upon execution of a deed the estate is divested out of the grantor and put in the party to whom the conveyance is made, although made in his absence and without his knowledge, until some disagreement to take the estate appears (1). While, *primâ facie*, every estate is supposed to be beneficial to the party to whom it is given, the party himself is the best judge of whether it is so or not, and he cannot be forced to take an estate against his will; accordingly he may renounce or refuse the gift. *Townson* v. *Tickell* (2). "He is supposed to assent until he does some act to show his dissent," per Holroyd J.

Mrs. Thompson appears not to have known of the deed until action brought. However, there came a time when she did know of it; and so far (as appears

(1) 4 Cruise Dig. 9.

(2) 3 B. & Ald. 31.

1897

SMALL v. THOMPSON.

King J.

to me), she has done no act since and down to the present time, to free herself from the burden of the title. She does indeed seek to free herself from obligations, whether express or implied, contained in the deed, contending that she did not execute it, and that she never authorized Sinclair or her husband to enter into any contract for the purchase, or to bind her in any way to pay the amount of the original consideration, or to accept the deed; and she claims that she cannot be held liable in respect of her separate estate upon any implied agreement to indemnify or save Sinclair harmless from payment of the mortgage. A person may indeed set up inconsistent defences in his pleading, but while some of the defences here imply an intention to hold to the transfer, there is, so far as I observe, nowhere a sufficiently distinct, or in fact any, disclaimer of all benefit and advantage under the deed, and no act or disclaimer proved in evidence. On the contrary, by pleading Sinclair's release of her covenant she adopts the conveyance of the property to her. This being so, and the deed upon the face of it showing a clear expression of intention that the grantee is to assume the obligation of the grantor to pay the mortgage debt as part of the original consideration, it would seem that Mrs. Thompson, in assenting to take under the deed, binds herself to the undertakings expressed in it on her part to be performed and fulfilled. She has therefore contracted in a way that binds her separate estate. Unfortunately owing to the speculative values placed upon the property at the time of purchase, the amount of the mortgage debt exceeds the present value of the property. Were it not so, this suit would not have reached this stage.

Another objection to plaintiff's claim is that it was not competent for Sinclair to assign, or for plaintiff to take an assignment of a liability of the nature of that

1897

SMALL v. THOMPSON.

King J.

alleged. This point comes specially up in an appea argued next after this, (1) and is decided adversely to the objection here taken.

Upon the whole case therefore, the appeal is to be allowed with costs.

*Appeal allowed with costs.*

Solicitors for the appellant: *Henderson & Small.*

Solicitors for the respondent: *Canniff & Canniff.*

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1897

*Oct. 28.

*Dec. 9.

JOHN MALONEY (DEFENDANT).....APPELLANT;

AND

ELIZABETH PRUDENCE CAMPBELL (PLAINTIFF) ..... ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Action, right of—Conveyance subject to mortgage—Obligation to indemnify —Assignment of—Principal and surety—Implied contract.*

The obligation of a purchaser of mortgaged lands to indemnify his grantor against the personal covenant for payment may be assigned even before the institution of an action for the recovery of the mortgage debt and, if assigned to a person entitled to recover the debt, it gives the assignee a direct right of action against the person liable to pay the same.

APPEAL from the judgment of the Court of Appeal for Ontario (2) affirming the decision of the Common Pleas Division of the High Court of Justice which maintained the plaintiff's action with costs.

A sufficient statement of the case appears in the judgment of the court delivered by His Lordship Mr. Justice King.

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*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) *Maloney* v. *Campbell*, 28 Can. S. C. R. 228.

(2) *Campbell* v. *Morrison*, 24 Ont. App. R. 224.

*C. H. Ritchie* Q.C. (*Boland* with him) for the appellant. The appellant did not execute the deed conveying the mortgaged property to him; *Credit Foncier* v. *Lawrie* (1), but he had a right to protect the property as he did by payments of interest on the mortgage during the time he considered he had a right to deal with it; *Re Errington* (2). There was an understanding collateral to the agreement that he should not be liable for the mortgage; *British Canadian Loan Co.* v. *Tear* (3); *Beatty* v. *Fitzsimmons* (4). An implied obligation cannot be assigned so as to give a right of action; see *Fraser* v. *Fairbanks* (5) at page 87 per Sedgewick J. No right of action could arise against the appellant until the mortgagor was damnified; *Jacoby* v. *Whitmore* (6); *Campbell* v. *Robinson* (7); *Eddowes* v. *Argentine Loan and Mercantile Co.* (8); *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (9). A purely personal right of this kind cannot be assigned; *Canham* v. *Rust* (10); *Milnes* v. *Branch* (11); *Haywood* v. *Brunswick Permanent Benefit Building Society* (12); *In re Law Courts Chambers Co.* (13); *Aldous* v. *Hicks* (14).

This is not a case of a covenant to the covenantee *or his assigns*, and as such is distinguishable from *Werderman* v. *Société Générale d'Electricité* (15). A mere possibility is not asssignable. *Robinson* v. *Macdonell* (16), at page 236. A mere naked right to be indemnified is not assignable. *Smith* v. *Teer* (17); as to the effect of the assignment of the implied covenant, see *Sutherland* v.

(1) 27 O. R. 498.
(2) [1894] 1 Q. B. 11.
(3) 23 O. R. 664.
(4) 23 O. R. 245.
(5) 23 Can. S. C. R. 79.
(6) 49 L. T. 335.
(7) 27 Gr. 634.
(8) 63 L. T. 364.
(9) 22 Ch. D. 561.
(10) 8 Taunt 227.
(11) 5 M. & S. 411.
(12) 8 Q. B. D. 403.
(13) 61 L. T. 669.
(14) 21 O. R. 95.
(15) 19 Ch. D. 246.
(16) 5 M. & S. 228.
(17) 21 U. C. Q. B. 412.

1897

MALONEY v. CAMPBELL.

*Webster* (1), at page 227. The appellant refers to *Walker* v. *Dickson* (2); *Canada Landed and National Investment Co.* v. *Shaver* (3); *Williams* v. *Balfour* (4), per Strong J. at pp. 479–481, refering to *Campbell* v. *Robinson* (5).

*McPherson* and *Clark* for the respondent. The cases of *Eddowes* v. *Argentine Loan and Mercantile Co.* (6); and *Hughes-Hallet* v. *The Indian Mammoth Gold Mines Co.* (7) are clearly distinguishable when read in the light of *Hobbs* v. *Wayet* (8); *Irving* v. *Boyd* (9); *British Canadian Loan Co.* v. *Tear* (10); *Davidson* v. *Gurd* (11), and *Ball* v. *Tennant* (12). The right of action is complete against the purchaser of the equity of redemption who must be treated as a surety See *Wooldridge* v. *Norris* (13); *Cruse* v. *Paine* (14); *Leith* v. *Freeland* (15); *Boyd* v. *Robinson* (16); *Smith* v. *Pears* (17) at p. 86; *Brig* v. *Dame*, and *Mathers* v. *Helliwell* (18). The appellant was bound to indemnify the mortgagor, *Waring* v. *Ward* (19). He was liable both under the agreement and as purchaser of the equity of redemption, *Thompson* v. *Wilkes* (20); *Boyd* v. *Johnston* (21); *Fraser* v. *Fairbanks* (22); *Canavan* v. *Meek* (23). The right amounted to a chose in action and is assignable. See R. S. O. (1887) c. 122, s. 7; *Walker* v. *Dixon* (2). The amount of the mortgage debt having been withheld as part of the consideration gave plaintiff a right of action; *Re Cozier*, *Parker* v. *Glover* (24);

(1) 21 Ont. App. R. 228.
(2) 20 Ont. App. R. 96.
(3) 22 Ont. App. R. 377.
(4) 18 Can. S. C. R. 472.
(5) 27 Gr. 634.
(6) 63 L. T. 364.
(7) 22 Ch. D. 561.
(8) 36 Ch. D. 256.
(9) 15 Gr. 157.
(10) 23 O. R. 664.
(11) 15 Ont. P. R. 31.
(12) 25 O. R. 50; 21 Ont. App. R. 602.
(13) L. R. 6 Eq. 410.
(14) L. R. 6 Eq. 641.
(15) 24 U. C. Q. B. 132.
(16) 20 O. R. 404.
(17) 24 Ont. App. R. 82.
(18) 10 Gr. 172.
(19) 7 Ves. 332.
(20) 5 Gr. 594.
(21) 19 O. R. 598.
(22) 23 Can. S. C. R. 79.
(23) 2 O. R. 636.
(24) 24 Gr. 537.

*Canavan* v. *Meek* (1), per Haggarty C.J. at pages 745–746. See also *Wolmershausen* v. *Gullick* (2).

The judgment of the court was delivered by:

KING J.—Upon an agreement for exchange of properties, Morrison conveyed certain premises in Toronto to Maloney subject to a mortgage for $2,500 given by Morrison to Campbell, the assumption of which mortgage was expressed in the deed from Morrison to Maloney to be in part consideration of the conveyance.

Subsequently Morrison assigned to Campbell all liability or obligation of Maloney to him in respect of the mortgage debt. And in the present suit for foreclosure Campbell seeks as well a personal judgment against Maloney as against Morrison for the amount due on the mortgage. This was allowed by Robertson J., and affirmed by the Court of Appeal for Ontario, per Osler and Maclennan JJ.A. Burton C.J.O., dissenting.

The main contention by the present appellant in the court of first instance was that there were circumstances connected with the carrying out of the contract of exchange which rendered it inequitable for Morrison (and also for Campbell his assignee) to seek to enforce the alleged obligation to indemnify Morrison against the payment of the mortgage debt.

This was found against Maloney both by Mr. Justice Robertson and by the Court of Appeal, and we see no reason for reversing the conclusion come to upon the point.

In the Court of Appeal a re-argument was, however, directed upon the question whether such an obligation on the part of Maloney to indemnify Morrison was assignable either at all or before suit had been brought by Campbell against him for recovery of the

(1) 2 O. R. 536. (2) [1893] 2 Ch. 514.

1897

MALONEY v. AMPBELL.

King J.

amount of the mortgage debt. Upon this point the court decided in the affirmative, per Osler and Maclennan JJ.A. Burton C.J.O. dissenting.

It is admitted by the learned counsel for the appellant that the decisions in Ontario have been uniformly to this effect. Chief Justice Burton refers also to his agreement therewith in *Ball* v. *Tennant* (1). But having occasion to dig around the foundations, he now finds them too weak to bear the superstructure.

The earliest expression of opinion noted on the point is that of Vice Chancellor Spragge in *Irving* v. *Boyd* (2), who says:

> I have no doubt that the equity of the mortgagor to compel his assignee to pay would pass by express assignment to the mortgagee * * It would simplify the remedy for the recovery of the mortgage money, giving a direct right of suit between the party to receive and the proper party to pay. It would create a privity which alone was wanting to make such a suit sustainable.

In *British Canadian Loan Co.* v. *Tear* (3) Mr. Chancellor Boyd says of this dictum:

> It is intrinsically weighty and in my opinion correctly sets forth the law on this head.

And in *Ball* v. *Tennant* (1) already referred to, the present learned Chief Justice of Ontario says:

> It has always appeared to me that an assignment to any one but the person for whose benefit it could be enforced was an idle proceeding, but that the equity of the mortgagor to compel his assignee to pay would pass by express assignment to the mortgagee. It would, as in this case, simplify the remedy for the recovery of the mortgage money and create the privity which alone was wanting to make such an action maintainable.

The ground upon which the same learned judge now comes to an opposite conclusion, is that the obligation which is raised by the transaction to indemnify the vendor against his personal obligation to pay the

(1) 21 Ont. App. R. 602. (2) 15 Gr. 157.
(3) 23 O. R. 664.

money due upon the vendor's mortgage, is an obligation which is personal in its nature, and that until the vendor is himself damnified by payment, or at least by action brought against him for the amount, there is nothing assignable.

Agreements are said to be personal in this sense when they are based on confidences, or considerations applicable to special personal characteristics, and so cannot be usefully performed to or by another. An agreement to indemnify against payment of a possible money demand is no more personal in this sense than is one to indemnify against payment of a definite and matured liability or an agreement to pay a sum of money for another.

Then as to there being nothing to assign until the vendor is himself damnified by payment or action brought to recover payment; supposing it to be the case that there is nothing for the assignment to operate on until then, it would still leave the formal assignment good as an agreement to assign, which would become operative and effectual as an assignment immediately upon the circumstances arising which create the occasion for the indemnity being made. The assignability of the obligation and the existence of circumstances necessary to support an action upon it are distinct things. The cases cited in appellant's factum, *Eddowes* v. *The Argentine Loan and Mercantile Agency Co.* (1), and *Hughes-Hallett* v. *The Indian Mammoth Gold Mines Co.* (2), relate to the latter matter.

As to the suggested distinction between an assignment to the mortgagee and to one not interested in the payment of the mortgage debt, suppose the mortagor to have paid such debt, it would be competent for him to assign to any one his claim over against his vendee. And this being so, there would

(1) 63 L. T. 364. (2) 22 Ch. D. 561.

1897

MALONEY v. CAMPBELL.

King J.

seem to be no good reason for any such distinction in case of assignment prior to his discharge of the mortgage debt, assuming such to be a good assignment if made to the mortgagee. An assignment to a stranger to the mortgage debt in such case could, however, scarcely be conceived because he would get but a barren title.

The vendee is entitled to have his obligation enure to the discharge of the mortgage debt, so as to free the land from the charge, and consequently the assignee, if not interested therein, could derive no benefit, and the case is therefore one that would be little likely to arise.

The authorities referred to by Mr. Justice Maclennan also show that the vendor, becoming, as between himself and his vendee, a surety for the payment of the mortgage debt, is entitled, upon the debt becoming due and payable, to call upon the vendee to appropriate the balance of the consideration money suffered to remain in his hands to the relief of the vendor as surety.

As to settling the several rights in the one action, this is a matter of procedure, and certainly (as already observed), it simplifies the remedy and avoids circuity of action, and at the same time appears consistent with legal principle.

The appeal should therefore be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Macdonell & Bland.*

Solicitors for the respondent: *McPherson, Clark, Campbell & Jarvis.*

THE BANK OF HAMILTON (DEFENDANT) ..... APPELLANT;

AND

J. A. HALSTEAD (PLAINTIFF).....RESPONDENT.

1897
*Oct. 29.
*Dec. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Banking—Collateral security—R. S. C. c. 120, Schedule "C"—53 V. c. 31, ss. 74, 75—Renewals—Assignments.*

An assignment made in the form "C" to the "Bank Act" as security for a bill or note given in renewal of a past due bill or note is not valid as a security under the seventy-fourth section of the "Bank Act."

The judgment of the Court of Appeal for Ontario (24 Ont. App. R. 152) affirmed.

APPEAL from the judgment of the Court of Appeal for Ontario (1) affirming the judgment in the Common Pleas Division of the High Court of Justice (2) which maintained the plaintiff's action with costs.

The plaintiff as assignee for the creditors brought the action to set aside three assignments by Zœllner, an insolvent, upon his stock-in-trade made in form C to the Bank Act, dated respectively the 1st April, 1895, the 29th May, 1895, and the 23rd July, 1895, and purporting to secure the respective sums of $4,000, $4,000 and $3,670. On 5th December, 1894, Zœllner was indebted to the bank and they had obtained from him and then held an assignment purporting to secure $4,000, given to replace a prior security of the same character and amount upon the renewal of the note secured by the prior assignment. A new arrangement was then entered into and that day Zœllner

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard.

(1) 24 Ont. App. R. 152. (2) 27 O. R. 435.

1897

THE BANK OF HAMILTON v. HALSTEAD.

wrote a letter embodying in part the terms of the agreement, as follows:

"MOUNT FOREST, Dec. 5, 1894.

"THE AGENT, Bank of Hamilton, Mt. Forest.

"DEAR SIR,—I hereby authorize you to place the proceeds of all drafts made by me and handed to you for discount or collection to the credit of a special account to be held by you as general collateral security for any advances the Bank of Hamilton have made or may at any time hereafter make to me, and you are further authorized to apply the proceeds at credit of this special account towards the the payment or reduction of any advance or advances as you may from time to time deem expedient."

"Yours truly, E. F. R. ZŒLLNER"

It was part of the arrangement that Zoellner should pay off the debt which the assignment then held by the defendant was intended to secure, and a special account (called account No. 2) was opened in the defendant's books, to the credit of which were placed from time to time the proceeds of drafts or notes which Zœllner discounted or left for collection, and to it were debited the drafts and notes dishonoured at maturity. There then was at the credit of Zœllner in his general account (account No. 1, as it was afterwards called), a balance of $31.49, but he was indebted in a considerable sum, as security for which they held the assignment referred to, and after that date account No. 1 was not drawn on to pay any indebtness of Zœllner to the bank.

On the 24th Jan., 1895, Zœllner wrote a letter authorizing the bank to place ten per cent of the proceeds of drafts handed in for discount and collection, to the credit of a guarantee account to be held as general collateral security for past or future advances

made or to be made, and to be applied as the bank might deem expedient towards the payment or reduction of the account in respect to these advances. This third account was then opened and credited with ten per cent of the bills from time to time discounted or left for collection by Zœllner, and on the 5th of August, 1895, the balance at Zœllner's credit was $2,014.06, and so remained at the time of the assignment to the plaintiff for the benefit of creditors.

The three assignments in question originated as follows:

1st. On the 10th Dec., 1894, $4,000 was placed to the credit of Zoellner, in account No. 1, and he gave the bank his note for $4,000 and an assignment securing it. On the 29th May, 1895, the note was charged to account No. 2, and a new note for $4,000 and a new assignment to secure it were taken from Zœllner, and $4,000 were placed to his credit in account No. 1:—

2nd. On the 4th Feb., 1895, a note for $4,000 and an assignment were received by the bank from Zœllner, and $4,000 placed to his credit in account No. 2. On the 25th June, 1895, he paid the bank $330. On the 23rd July following, the balance of the note was charged to his account, No. 2, and he gave a new note and a new assignment to secure it, on the following day $3,670 being placed to his credit in account No. 1.

3rd. On the 1st April, 1895, Zœllner gave to the bank a note for $4,000 and an assignment to secure it and $4,000 were credited to him in account No. 1. On the following day the amount of Zœllner's note for $4,000 held by the bank and secured by the assignment held when the new arrangement of the 5th Dec., 1894, was charged to his account No. 2.

The result of the new arrangement and the manner of keeping the three accounts that were thus opened

1897

THE BANK OF HAMILTON v. HALSTEAD.

and kept with Zœllner was that, at the end of March 1895, the general account (No 1) was balanced by the withdrawal by Zœllner of $3, the amount then remaining at his credit, and there was at his credit in the special account (No. 2), $7,961.93, and in the guarantee account (No. 3), $727 85. On the 1st April, 1895, after giving credit for the $4,000 which were on that day entered in account No. 1, there was at the credit of Zœllner in that account $4,000 and on the following day by the debit of the $4,000 and a further debit of $92.80 for interest entered in account No. 2, the balance at his credit in that account which was then $8,215.18 was reduced to $4,122.38. On the 29th May, 1895, after giving credit for $4,000 that day entered in account No. 1, the balance at Zœllner's credit (the debits and credits up to that time being equal to one another), was $4,000, and by the debit of the $4,000 entered in account No. 2 on the same day his then credit balance in that account was reduced from $7,544.01 to $3,544.01. On the 24th July, 1895, after giving credit for the $3,670 on that day entered in account No. 1 (the debits and credits up to that time being equal to one another) the balance at Zœllner's credit in that account was $3,670, and by the debit of the same amount entered in account No. 2, and on the 23rd of that month the balance then at his credit in that account was reduced from $7,820.96 to $4,150.96.

At the time the assignments were made the respective sums, for which promissory notes were taken payable on demand, were placed to Zœllner's credit in account No. 1, but though the amounts of these advances were so credited, and there were sums standing to his credit in accounts Nos. 2 and 3, he was not in a position to draw any part of the moneys, because under his arrangement with the bank the moneys at

the credit of those accounts were held by the bank as security for his indebtedness, and he could draw nothing from account No. 1 unless he brought bills or notes for the amount he desired to obtain. At the date of the assignment to the plaintiff he had nominally $3,228.56 at the credit of account No. 1, $4,454.78 at the credit of account No. 2, and $2,014.06 at the credit of account No. 3, subject to these arrangements with the bank.

The judgment of the trial court declared the three assignments void as against the plaintiff as assignee of the estate of Zœllner and that the defendants had not any lien on the goods mentioned in them. The Bank now appeals from the decision of the Court of Appeal by which the trial court's judgment was affirmed.

*John J. Scott* for the appellant. The renewal of a note and taking of a new assignment, giving up the old assignment which was good until surrendered is clearly a "negotiating" within the meaning of the Bank Act. *Bank of Hamilton* v. *Noye Manufacturing Co.* (1) at page 637; *Foster et al* v. *Bowes* (2). See also *McCrae* v. *Molsons Bank* (3) per Spragge V. C. at page 522; *In re Carew's Estate Act* (4); and Daniels on Negotiable Instruments (4 ed.) ch. VII. We also refer to *Robertson* v. *Lajoie* (5) at page 199; *Larocque* v. *Beauchemin* (6); *Marthinson* v. *Patterson* (7); *Martin* v. *Sampson* (8); *Merchants Bank* v. *Smith* (9) per Taschereau J. at page 543; *Tallman* v. *Smart* (10); *Banque d'Hochelaga* v. *Merchants Bank* (11).

(1) 9 O. R. 631.
(2) 2 Ont. P. R. 256.
(3) 25 Gr. 519.
(4) 31 Beav. 39.
(5) 22 L. C. Jur. 169.
(6) [1897] A. C. 358.
(7) 19 Ont. App. R. 188.
(8) 24 Ont. App. R. 1.
(9) 8 Can. S. C. R. 512
(10) 25 O. R. 661.
(11) 10 Man. L. R. 361.

1897

THE BANK OF HAMILTON v. HALSTEAD.

*Gibbons Q.C* and *Henderson* for the respondent. A security taken in form "C" in order to be valid must be for present advances made at the time it is given. The only actual advance made to the insolvent was at the time of the original assignment in 1893 when the first loan of $5,000 was negotiated. No cash was advanced in consideration of the assignments in force at the time the insolvent assigned to plaintiff for the benefit of creditors. See *Bank of Hamilton* v. *Shepherd* (1). The methods adopted, even for that evasion of the statutes, are wholly inoperative. We refer to *Clarkson* v. *McMaster* (2); and as to the definition of a "discount" see *London Financial Association* v. *Kelk* (3) at page 134.

The judgment of the court was delivered by

GIROUARD J.—The appellants from time to time during the years 1893, 1894, 1895 advanced large sums of money to one Zœllner, furniture manufacturer at Mount Forest, upon what they understood to be security upon all his furniture on hand and the materials procured for manufacture, and also upon the paper of his customers. It is admitted that no money was advanced by the bank at the time the security was taken except at the time the first transaction took place when the first assignment was made for $5,000, but that security was abandoned by several renewals and more particularly three made in 1895, which are alone claimed to be in force. Zœllner has become insolvent and his assignee claims the articles assigned as part of the assets of the estate. The appellant contends that their security is valid under the 74th section of the Bank Act.

Chief Justice Meredith, who tried the case, held that it was invalid in an elaborate and clear opinion both

(1) 21 Ont. App. R. 156. (2) 25 Can. S. C. R. 96.
(3) 26 Ch. D. 107.

as to facts and law, and this judgment was unanimously confirmed by the Court of Appeal for Ontario.

We are likewise of opinion that the Bank Act, secs. 74, 75, contemplates only cash advances made at the time the assignments are acquired, and that a renewal of notes or bills is not a negotiation within the meaning of section 75. The bills or notes may be renewed, but not the security. The Act does not authorize the substitution of one assignment for another. Any assignment made under section 74 for advances already made or to be made is illegal and confers no lien or security. The appeal is therefore dismissed with costs for the reasons given by Chief Justice Meredith as reported in 27 O. R. 435.

*Appeal dismissed with costs.*

Solicitors for the appellants : *Scott, Lees & Hobson.*

Solicitors for the respondent : *Gibbons, Mulkern & Harper.*

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JACQUES PERRAULT (PLAINTIFF).....APPELLANT ;

AND

ALPHONSE GAUTHIER AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

1897
*Oct. 9, 11.
1898
*Feb. 16.

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

*Action, cause of—Trade Union—Combination in restraint of trade—Strikes—Social pressure.*

Workmen who in carrying out the regulations of a trade union forbidding them to work at a trade in company with non-union workmen, without threats, violence, intimidation or other illegal means take such measures as result in preventing a non-union workman from obtaining employment at his trade in establishments where union-workmen are engaged, do not thereby incur liability to an action for damages.

Judgment of the Court of Queen's Bench (Q, R. 6 Q. B. 65) affirmed.

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1897

PERRAULT v. GAUTHIER.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing the decision of the Court of Review (2) and restoring the judgment of the Superior Court, District of Montreal, (3) by which the plaintiff's action had been dismissed with costs.

The plaintiff brought his action for damages against the officers of a workingmen's union, known as "l'Union Ouvrière des Tailleurs de Pierre," alleging that these persons and the members of the Union had illegally combined and conspired together to injure the plaintiff and had maintained in existence a permanent plot against him in the form of an association amongst tradesmen in the City of Montreal following the same trade as himself, and thereby had completely deprived him of the free exercise of his trade and prevented him from obtaining employment as a stone-cutter, and thus reduced him to misery and rendered it difficult and almost impossible for him to provide for the wants of his family. The declaration set up three incidents in support of the plaintiff's claim, as follows:—First, that the defendants caused strikes at a stone-yard on account of plaintiff's employment, which however had been successfully resisted and plaintiff's employment there continued for some time: Secondly, that afterwards when he had established a stone-yard of his own where the work was done by non-union workmen the defendants approached his workmen with a request that they should raise their rate of wages, and being refused, they and their union illegally combined to make the sale of stone by him unprofitable, and brought about such a reduction, or "cut" in the prices of building stone that he was obliged to close his stone-yard and

(1) Q. R. 6 Q. B. 65. (2) Q. R. 10 S. C. 224.
(3) Q. R. 6 S. C. 83.

abandon the business; and Thirdly, that on a later occasion, when he had obtained employment in Perrault & Riopel's stone-yard, the union men employed there on being told that he belonged to an opposition union left work "without saying a word" or giving any reason; that this "strike" was maliciously instigated by the defendants and their union who had posted him as a "scab" on account of his having left their union and he was in consequence compelled to quit work there in order to avoid causing loss to his employers, (one of whom was his brother) and that as a result of such combination and conspiracies he was deprived of the means of earning a living at his trade in any stone-yard in Canada or in the United States.

The judgment of the Superior Court dismissed the action, but on appeal to the Court of Review this decision was reversed and a verdict entered in favour of the plaintiff. The Court of Queen's Bench, however, allowed an appeal from the judgment in Review and restored the first judgment, dismissing the action. From this latter judgment the plaintiff has taken the present appeal.

*Lafleur* and *Lanctot* for the appellant cited arts. 1053, 1106 C. C.; 20 Laurent, nos. 405, 408, 410-412; *Joost* v. *Syndicat de Jallieu* (1); 8 Huc, nos. 402-406; *Perrault* v. *Bertrand* (2); *Valin* v. *Lebrun* (3); Cooley on Torts 281; and referred to the remarks of Esher M. R. at pages 604, 607 dissenting, in *The Mogul Steamship Co.* v. *McGregor* (4); and to the language of Bower L. J. in the same case at pages 614, 617-619. Also 27 Dal. Rep. Jur. "Industrie et Commerce," n. 406, p. 785; Crankshaw, Criminal Code, pp. 457, 458, notes.

*Geoffrion* Q.C. for the respondent. As no violence or threats were used the defendants' conduct did not

(1) S. V. '93, 1, 41.
(2) 5 R. L. 152.
(3) 2 Stevens Dig. (Que.) 726.
(4) [1892] A. C. 25; 23 Q. B. D. 598.

1897

PERRAULT v. GAUTHIER

constitute an illegal act. Nothing unlawful has been done by them. We refer to *The Mogul Steamship Co.* v. *McGregor* (1); *Temperton* v. *Russell* (2); *Wood* v. *Bowron* (3); *Reg.* v. *Druitt* (4); 20 Lambert, no. 404.

TASCHEREAU J.—Je renverrais cet appel sans hésitation. Il m'est impossible de voir la moindre illégalité dans la conduite des intimés le 9 novembre, 1892, au chantier Perrault-Riopel. Le maxime "*sic utere tuo ut alienum non lædas*" que l'appelant invoque est sans doute un principe incontestable, mais il n'est pas moins incontestable que "*qui jure suo utitur neminem lædit.*" Or, les intimés dans l'occasion en question, n'ont fait qu'user d'un droit qu'ils partagent avec leurs concitoyens de toutes classes. Et ce droit, ils pouvaient s'entendre pour l'exercer tous ensemble, tout comme chacun d'eux pouvait le faire seul. Je ne vois pas que l'on puisse douter qu'un ouvrier ait le droit de stipuler avec son patron qu'il aura droit de se retirer, si un autre tel ou tel, est employé; ou qu'un procureur ait le droit de dire à son client que si tel ou tel lui est adjoint ou continué comme conseil, il se retirera de la cause; ou que les serviteurs d'un hôtel aient le droit de notifier leur maître qu'ils quitteront à la fin de leur terme d'engagement, si une telle ou telle classe, des nègres, des Chinois ou des Juifs, par example, est employée. L'appelant invoque la liberté du travail, mais il oublie que les intimés ne lui doivent rien, ne lui sont obligés à rien, et qu'ils ont eux droit à la liberté de ne pas travailler sans être tenus d'en donner leurs motifs à qui que ce soit, si leurs patrons ne s'y opposent pas, qu'ils en ait le droit ou non.

Depuis que j'ai écrit ces quelques mots le lendemain de l'audition de la cause, mon savant collègue le juge

(1) [1892] A.C. 25; 23 Q.B.D. 598.
(2) [1893] 1 Q. B. 715.
(3) L. R. 2 Q. B. 21.
(4) 16 L. T. 855.

1898

PERRAULT v. GAUTHIER.

Taschereau J.

Girouard, a bien voulu me communiquer ses notes. Je suis heureux de voir qu'il en soit aussi venu à la conclusion de renvoyer l'appel. Tant qu'à la cause *d'Allen* v. *Flood* (1), il me semble que même si la décision de la Chambre des Lords eût été en sens contraire, nous avons, dans l'espèce un état de choses si différent, que le résultat n'en aurait pas été plus favorable à l'appelant. Et pour ma part, mon opinion était bien et dûment formée avant la décision de la Chambre des Lords, comme je n'ai pas hésité de le faire voir à l'audition.

GWYNNE, SEDGEWICK and KING JJ. agreed that the appeal should be dismissed with costs.

GIROUARD J.—Cases involving civil responsibility, especially those affecting personal liberty, whether of trade, labour, speech or the press, are always perplexing; and the present one, which is the result of an alleged illegal and malicious interference of a trade union with the employment of a fellow workman, not a member, proves no exception to the general rule. Plaintiff's action was dismissed by the Superior Court in Montreal (Davidson J.), but was maintained in Review by Jetté and Tellier, JJ., Mathieu, J. dissenting; and in appeal the judgment of the Superior Court was restored by Sir A. Lacoste, C.J., Würtele and Ouimet, JJ.; contra, Bossé and Blanchet, JJ. Thus far, the pretensions of the appellant were upheld by four judges out of a total of nine. A recent decision by the House of Lords in a similar case, *Allen* v. *Flood* (1) still more strikingly illustrates the glorious uncertainty of the law. The trial before Mr. Justice Kennedy resulted in a verdict for the plaintiffs, which was maintained unanimously by the three judges sitting

(1) [1898] A. C. 1; 14 T. L. R. 125.

1898

PERRAULT v. GAUTHIER.

Girouard J.

in appeal. The case was taken to the House of Lords, but as there was a diversity of opinion among the noble and learned Lords, seven in number, a re-hearing was ordered, and this time judges of other courts were summoned to be present and tender their advice as assessors, according to an ancient practice. The re-hearing took place before nine Lords and eight assessor judges. The latter gave their opinion in June last, six being in favour of the plaintiffs, and two against. The decision of the Lords was, however, the other way, and the appeal of the trade union was allowed on the 14th December, 1897, by a majority of six to three. The reporter of the Times Law Reports (1). states that probably no precedent exists in which their Lordships have overruled such a preponderance of judicial opinion. Four judges below had unanimously been in favour of the plaintiffs, and thus, on this side, with the six assessor judges and the dissentient minority of the Lords, there were thirteen; and on the other side eight, six Law Lords and two judges. This decision is, however, the final expression of the highest tribunal in the British Empire, and must govern the present appeal if the circumstances of the case warrant its application.

The facts in the two cases are very similar in many respects, although in some *Allen* v. *Flood* (2) is much stronger for the non-union men. We dismiss two of the three incidents which at the argument before us and before every court were urged as causes of the action, although not set set forth in the declaration; they were rejected unanimously by the three courts, and we entirely concur in their finding. Therefore, the following remarks apply only to the third incident alleged in the declaration, which happened on the 9th November, 1892, at Perrault and Riopel's stone-yard,

(1) 14 T. L. R., at p. 126. (2) [1898] A. C. 1.

in the City of Montreal, and was alone the occasion of a conflict of opinion among the learned judges.

In the two cases, the contest was between union men and fellow workmen (in *Allen* v. *Flood* (1), two in number, Flood and Taylor, plaintiffs, respondents, and in this case one, the plaintiff, appellant), not members of the union, called "scabs" on this continent; the members were bound by regulations not to work with outsiders; there was no violence, nor threat of violence; the non-union men, in both cases, were working by the day.

It has been alleged that Perrault had been engaged for two months but the evidence discloses only a mere hope of employment for that length of time, and not an engagement or contract for any specific term. Clovis Perrault, one of the employers and a brother of the plaintiff, after stating that the latter was engaged by his foreman, Napoléon Goulet, says:—

Q. Votre frère avait-il de l'ouvrage pour longtemps chez vous? R. Pour une couple de mois, je pense bien. Q. Combien lui donniez-vous par jour? R. Il n'y avait pas de prix fixés.

The foreman, Napoléon Goulet, who engaged plaintiff, does not mention any contract; he merely states that plaintiff applied for work and got it.

The facts in the two cases vary in these important particulars: In *Allen* v. *Flood* (1) the non-union men, although employed by the same concern, were not doing the same kind of work; they were shipwrights doing wood-work on a vessel, whereas the union men, much larger in number, were doing iron-work on the same vessel. In the present case all the men belonged to the same trade and were employed in the same kind of work, that of cutting stone. In *Allen* v. *Flood* (1), the union men entertained a strong feeling against the non-union men, on the ground that on a previous occasion they, being shipwrights, had done iron-work

(1) [1898] A. C. 1.

1898

PERRAULT v. GAUTHIER.

Girouard J.

for another firm; and hence the element of malice so strongly urged by the plaintiffs. In this case there was no ill feeling whatever, beyond the reasonable regret that plaintiff had left the union to join a rival one, the "Progressive." One of the union men, Joseph Homier, who was also the "*surveillant*" of the union, approached him *en ami*, to use his own words, and asked him whether he intended to return to the union, and upon his answer

que non, qu'il appartenait à une société, qu'il n'était pas pour appartenir à deux,

Homier merely replied:

Ça c'est ton affaire, ça ne nous regarde pas.

In *Allen* v. *Flood* (1), a representative of the union called upon the employers and informed them that, if the shipwrights were continued on the job, the ironmen would leave work or be called out. In this case, the union men, numbering twenty or twenty-five, made no communication to the *patrons;* they merely withdrew in silence without, however, leaving the yard. Plaintiff says that one of them, Charles Latour, used intimidation to Clovis Perrault, and he quotes the following passage of his evidence:

Latour m'a dit que mon frère faisait bien mal de ne pas rejoindre la société, qu'il s'en repentirait plus tard.

But plaintiff has omitted the balance of the sentence: "*quand bien même il gagnerait son procès; qu'il s'en repentirait.*" These vague words can hardly amount to intimidation; but even if they did, they evidently were not used on the day of the strike, for according to plaintiff's own evidence, he had then no *procès* with the union, or the union men. In *Allen* v. *Flood* (1), the non-union men were dismissed at once in consequence of the request of the unionists. In this case the plaintiff was not dismissed; he was even

(1) [1898] A. C. 1.

pressed to remain, and told by foreman Goulet, although a member of the union, that other stone-cutters would be obtained; but he insisted upon leaving, and left at once, of his own free will, remarking to Goulet that he could not alone do the work of his brother.

The reasons why we should be guided by the English jurisprudence are plain. In 1872, the Parliament of Canada, which has jurisdiction over a matter of this nature, introduced into Canada the Imperial legislation of 1871, legalizing trade unions. The Canada Trade Unions Act (1) provides as follows:

Sec. 2. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

Sec. 3. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust.

Sec. 22. In this Act, the term "Trade Union" means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not been passed, have been deemed to be an unlawful combination by reason of some one or more of its purposes being in restraint of trade.

The Criminal Code of 1892 has re-affirmed the legality of trade unions. See sections 517, 518, 519, 524.

These enactments are far from the royal privileges granted in old France to the "*Corps et Communautés des Arts et Métiers*" which denied all outsiders the right to exercise any trade or occupation, although perhaps the practical results may be the same, if not worse, under the *régime* of trade unions. The privileged classes existed more or less in New France, in so far as they were suitable to the condition of a

(1) 35 Vict. ch. 30 ss. 2, 22; R. S. C. c. 131, ss. 2, 3, 22.

1898

PERRAULT v. GAUTHIER.

Girouard J.

new settlement (1); but they disappeared with the cession of the country to Great Britain in 1763, as being inconsistent with the public rights of British subjects, which, at that time and since, until modified by Parliament, secured to them liberty of trade and commerce, and avoided all contracts, and prohibited combinations in restraint of trade.

In France, the revolution put an end to all priviledged classes and proclaimed the British principle of freedom of trade and commerce; and in 1810, the Penal Code, arts 414, 415 and 416, were adopted to punish coalitions in restraint of trade and labour. These articles were modified in 1834, 1849, and again in 1864, but it was not till the year 1884 that trade unions were allowed to exist. This law, by its first article, repeals article 416 of the Penal Code, and enacts:—

Art. 2. Les syndicats ou associations professionnelles, même de plus de vingt personnes, exercant la même profession, des métiers similaires ou des professions connexes concourant, à l'établissement de produits déterminés, pourront se constituer librement sans l'autorisation du gouvernement.

Art. 7. Tout membre d'un syndicat professionnel peut se retirer à tout instant de l'association, nonobstant toute clause contraire, mais sans préjudice du droit pour le syndicat de réclamer la cotisation pour l'année courante.

It must also be borne in mind that the great principles of the Declaration of Rights of 26th August, 1789, have been emphasized in all the subsequent constitutional charters of France, and are still in force, namely: "*L'égalité civile des citoyens; la liberté de l'industrie*" (2). Articles 414 and 415 of the Penal Code are still in force, and, like sections 523 and 524 of our Criminal Code, punish intimidation, violence and threats which may be used to prevent any one from

(1) 2 Ed. et Ord. 68; 3 Ibid. 83.

(2) Gilbert sur Sirey, Codes Annotés, ed 1875, p. 1, n. 1.

working at any trade. If no violence or threat be resorted to, the offenders, whether members of a trade union or not, will not be liable to a criminal prosecution ; but in France their civil responsibility continues to attach, under the constitutional charters, as recently held by the Cour de Paris (1).

Spécialement, le syndicat professionnel qui, par des agissements abusifs, porte atteinte à la liberté du travail garantie par les lois et à l'indépendance des citoyens, commet une faute lourde engageant sa responsabilité.

The appellant relies upon a recent decision of the Cour de Cassation, *Joost* v. *Syndicat de Jallieu*, (2), decided the 22nd June, 1892, and quoted by the minority judge as an authority in his favour :—

Vu les art. 7 de la loi du 21 mars, 1884, et 1382 C. civ ; Attendu que l'art. 7, susvisé, donne à tout membre d'un syndicat professionnel le droit absolu de se retirer de l'association, quand bon lui semble ; que si, depuis l'abrogation de l'art. 416 C. pén., les menaces de grève adressées, sans violence ni manœuvres frauduleuses, par un syndicat à un patron, à la suite d'un concert entre ses membres, sont licites quand elles ont pour objet la défense des intérêts professionnels, elles ne le sont pas, lorsqu'elles ont pour but d'imposer au patron le renvoi d'un ouvrier, parce qu'il s'est retiré de l'association et qu'il refuse d'y rentrer ; que, dans ce cas il y a une atteinte au droit d'autrui, qui, si ces menaces sont suivies d'effet, rend le syndicat passible de dommages-intérêts envers l'ouvrier congédié * * * (3)

This *arrêt* has already been severely critised by eminent jurists and the remarks of Mr. Raoul Jay in a foot note (2) to the report of the same case in Sirey shew that the French jurisprudence is yet unsettled. He says :—

Admettons que l'ouvrier demandeur ait subi un dommage. L'existence de ce dommage ne peut suffire à faire naître une action en dommage-intérêts. Il faut, pour que l'action soit possible, une faute commise par les auteurs du dommage.

Cette faute, on ne la trouve pas dans notre espèce. Les membres du syndicat ne nous paraissent avoir fait qu'un usage licite d'un

(1) Dal. 96, 2, 184.
(2) S. V. 93, 1, 41.
(3) At p. 48.

1898

PERRAULT v. GAUTHIER.

Girouard J.

droit aujourd'hui formellement reconnu aux ouvriers, après leur avoir été longtemps dénié. Et c'est peut-être même parce que la véritable reconnaissance du droit de coalition est si récente qu'une partie de la jurisprudence a tant de peine à accepter franchement les corollaires logiques du droit nouveau.

Mr. Huc, in his *Commentaire du Code Civil* (1) although approving the *arrêt* under the special circumstances of the case, adds that it must be accepted with reserve :—

> Mais il ne faudrait pas généraliser la solution de la Cour de Cassation, car on peut concevoir une semblable menace d'interdit adressée à un patron dans un intérêt professionnel.

There is a great deal of force in the argument of Mr. Jay which covers several pages of Sirey, and although I am not prepared to go the whole length of it, I agree with him that the Cour de Cassation has greatly exaggerated the meaning of article 7 of the law of 1884. Whatever may be said for or against this decision, it is certain that the British and Canadian statutes vary in many respects from the French laws, and more particularly that article 7 of the law of 1884, upon which it is based, is not to be found in the Imperial or the Canadian statutes, and finally, as observed by Chief Justice Lacoste, there was no threat, coercion or intimidation in this case either to the *patrons* or the plaintiff; and for these reasons, that decision and others which followed in 1894, 1895 and 1896, all reported in Dalloz (2) cannot be accepted as safe guides in the interpretation of those statutes.

The Imperial Trade Unions Act (3) has been in force since 1871 and even before, in 1855, 1858, 1859 and especially 1869, laws had been enacted to remove partly the restrictions and disabilities of the common law against trade coalitions and promote trade unions. The present legislation of Great Britain, rightly or

(1) Vol. 8, n. 405, p. 538.
(2) Dal. 94, 2, 305 ; 95, 2, 312 ; 96, 2, 184.
(3) 34 & 35 Vict. ch. 31 [Imp.]

wrongly, for we have nothing to do with the policy of the law, was conquered by degrees by and through the increasing political influence of the workingmen. The English courts have had, therefore, several occasions to consider these statutes, which have been reproduced in our Canadian statute book; and finally the House of Lords has pronounced on them not only once, but twice; in 1897, in *Allen* v. *Flood* (1), and in 1892 in *The Mogul Steamship Co.* v. *McGregor* (2), and we have no hesitation in saying that its jurisprudence is binding upon us in a case like the present one.

It is contended that these statutes have merely legalized trade unions, and that, as such legal associations, they enjoy no greater rights than individuals, and that, in violation of article 1053 of the Civil Code, they cannot, with impunity, commit legal wrongs, *délits* or *quasi-délits*. Undoubtedly, such is the law; but all the commentators and the French jurisprudence unanimously hold that one who acts within the limits of his rights commits no fault, that is legal fault, and is not liable in damages. A recent writer, Baudry-Lacantinerie, and a high authority not only in France but also in Quebec, has summed up the French jurisprudence in these few words:

> Tout délit civil et tout quasi-délit engendre à la charge de son auteur l'obligation d'en réparer les conséquences. La réparation consistera dans une somme d'argent, suffisante pour compenser le préjudice causé et dont les tribunaux sont appelés à déterminer le montant en cas de contestation. Cette responsabilité est édictée par l'art. 1382, ainsi concu: "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer." On travestit souvent cet article au palais, en disant qu'il oblige chacun à réparer le préjudice dont il est l'auteur. Ainsi formulée, la règle est beaucoup trop générale. Il peut se faire que je cause préjudice à autrui en usant d'un droit qui m'appartient; devrai-je alors la réparation de ce préjudice? Certainement non. Ainsi, en construisant un mur sur mon terrain qui est libre de toute

(1) [1898] A. C. 1. (2) [1892] A. C. 25.

1898

PERRAULT v. GAUTHIER.

Girouard J.

servitude, je bouche la vue que la maison voisine avait sur la compagne ; ou bien, en creusant un puits dans ma propriété, je tombe sur la veine d'eau qui alimente le puits voisin, et je le taris ; je ne devrai aucune indemnité de l'un ou de l'autre chef, parce que je n'ai fait qu'user de mon droit. *Neminem lædit qui suo jure utitur.* Pour que l'obligation de réparer le préjudice causé à autrui prenne naissance, il faut que l'auteur de ce préjudice soit en faute. En un mot, le préjudice dont l'art. 1382 oblige à fournir la réparation, c'est le *damnum injuria datum*, qui faisait en droit romain l'objet des prévisions de la loi Aquilia. Cass., 28 juillet 1887, S. 93, 1. 198, D. 93. 1. 585, et 15 avril 1889, S. 91, 1. 292, D. 90, 1. 136 (1).

We therefore entirely concur in the following remarks of Chief Justice Lacoste (2), speaking for the majority of the Court of Appeal :

Puisque l'union ouvrière des tailleurs de pierre de Montréal est une association autorisée par la loi, et puisqu'aucun acte illégal n'a été commis par les ouvriers, il s'en suit qu'il n'y a pas lieu d'appliquer l'art. 1053 C. C. Il manque un des éléments nécessaires à l'action en responsabilité, c'est la faute.

And elsewhere, (3)

En outre, l'intimé confond l'intention malicieuse avec la conséquence de l'acte. Les ouvriers pouvaient croire que leur acte aurait pour résultat le départ de l'intimé, mais il ne suit pas de là que leur intention était de lui nuire. Le motif de leur conduite pouvait être uniquement d'obéir aux règlements et de sauvegarder les intérêts de l'union ouvrière. Auraient-ils eu, d'ailleurs, l'intention de lui nuire, ce n'est pas tout acte fait avec cette intention qui peut être attaqué, il faut de plus qu'il soit malicieux, et l'exercise d'un droit implique absence de malice.

That is the very argument of the Law Lords in *Allen* v. *Flood* (4) ; and it would be a grave mistake to suppose that art. 1053 of the Civil Code is peculiar to the countries governed by the French or the Roman law ; it simply enunciates an elementary maxim of universal or natural law adopted by all civilized nations :

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.

(1) 5 ed. vol. 2, n. 1349.
(2) Q. R. 6 Q. B. 93.
(3) At page 89.
(4) [1898] A. C. 1.

Lord Watson said :

Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad or indifferent. But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong, for which reparation is due. A wrongful act, done knowingly, and with a view to its injurious consequences, may, in the sense of law, be malicious ; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law (1).

Lord Herschell, at page 118, said :

It is to be observed, in the first place, that the company in declining to employ the plaintiffs were violating no contract ; they were doing nothing wrongful in the eye of the law. The course which they took was dictated by self interest ; they were anxious to avoid the inconvenience to their business which would ensue from a cessation of work on behalf of the ironworkers. It was not contended at the Bar that merely to induce them to take this course would constitute a legal wrong, but it was said to do so because the person inducing them acted maliciously. * * * (2) I understood it to be admitted at the Bar, and it was indeed stated by one of the learned judges in the Court of Appeal, that it would have been perfectly lawful for all the ironworkers to leave their employment and not to accept a subsequent engagement to work in the company of the plaintiffs. At all events, I cannot doubt that this would have been so. I cannot doubt either that the appellant or the authorities of the union would equally have acted within his or their rights if he or they had "called the men out." They were members of the union. It was for them to determine whether they would become so or not, and whether they would follow or not follow the instructions of its authorities, though no doubt if they had refused to obey any instructions which under the rules of the union it was competent for the authorities to give, they might have lost the benefits they derived from membership. It is not for your Lordships to express any opinion on the policy of trade unions, membership of which may undoubtedly influence the action of those who have joined them. They are now recognised by law ; there are combinations of employers as well as of employed. The

(1) [1898] A. C. 92.

(2) At page 129.

1898

PERRAULT v. GAUTHIER.

Girouard J.

members of these unions, of whichever class they are composed, act in the interest of their class. If they resort to unlawful acts they may be indicted or sued. If they do not resort to unlawful acts, they are entitled to further their interests in the manner which seems to them best and most likely to be effectual.

I now proceed (1) to consider on principle the proposition advanced by the respondents, the alleged authorities for which I have been discussing. I do not doubt that every one has a right to pursue his trade or employment without "molestation" or "obstruction" if those terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition, namely, that every one has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act not otherwise wrongful always becomes so if it interfere with another's trade or employment, and needs to be excused or justified, I say that such a proposition in my opinion has no solid foundation in reason to rest upon. A man's right not to work or not to pursue a particular trade or calling, or to determine when or where or with whom he will work, is in law a right of precisely the same nature and entitled to just the same protection as a man's right to trade or work. They are but examples of that wider right of which I have already spoken. That wider right embraces also the right of free speech. A man has a right to say what he pleases, to induce, to advise, to exhort, to command, provided he does not slander or deceive, or commit any other of the wrongs known to the law of which speech may be the medium. Unless he is thus shewn to have abused his right, why is he to be called upon to excuse or justify himself because his words may interfere with some one else in his calling? In the course of argument one of your Lordships asked the learned counsel for the respondents whether, if a butler on account of a quarrel with the cook, told his master that he would quit his service if the cook remained in it, and the master preferring to keep the butler terminated his contract with the cook, the latter could maintain an action against the butler. One of the learned judges answers this question without hesitation in the affirmative. As in his opinion the present action would lie, I think he was logical in giving this answer. But why, I ask, was not the butler in the supposed case entitled to make his continuing in the employment conditional on the cook ceasing to be employed? And if so, why was he not entitled to state the terms on which alone he would remain, and thus give the employer his choice? Suppose after the quarrel each of the servants made the termination of the contract with the other a condition of remaining

(1) At page 138.

in the master's service, and he choose to retain one of them, would this choice of his give the one parted with a good cause of action against the other? In my opinion a man cannot be called upon to justify either act or word merely because it interferes with another's trade or calling, any more than he is bound to justify or excuse his act or word under any other circumstances, unless it be shewn to be in its nature wrongful, and thus to require justification.

We have been invited to examine the American jurisprudence but, under the circumstances, we consider that such an inquiry would be a mere waste of time. The simple perusal of a very recent book published by Mr Albert Stickney, on "State Control of Trade and Commerce," will suffice to convince any one that the American jurisprudence is far from being settled, or that it is satisfactory even to the American Bar and public.

For these reasons we are unanimously of opinion that the appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *P. Lanctot.*

Solicitors for the respondents: *Geoffrion, Dorion & Allan.*

1898

*Feb. 16.
*Feb. 26.

GEO. A. MACDONALD (DEFENDANT)....APPELLANT ;

AND

ELLA GALIVAN (PLAINTIFF).....RESPONDENT.

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

*Appeal — Jurisdiction—Appealable amount—Monthly allowance—Future rights—"Other matters and things"—R. S. C. c. 135, s. 29 (b)—56 V. c. 29 (D)—Established jurisprudence in court appealed from.*

In an action *en declaration de paternité* the plaintiff claimed an allowance of $15 per month until the child (then a minor aged four years and nine months), should attain the age of ten years and for an allowance of $20 per month thereafter "until such time as the child should be able to support and provide for himself." The court below, following the decision in *Lizotte* v. *Descheneau* (6 Legal News, 107), held that under ordinary circumstances, such an allowance would cease at the age of fourteen years.

*Held*, that the *demande* must be understood to be for allowances only up to the time the child should attain the age of fourteen years and no further, so that, apart from the contingent character of the claim the *demande* was for less than the sum or value of two thousand dollars and consequently the case was not appealable under the provisions of the twenty-ninth section of "The Supreme and Exchequer Court Acts," even if an amount or value of more than two thousand dollars might become involved under certain contingencies as a consequence of the judgment of the court below, *Rodier* v. *Lapierre* (21 Can. S. C. R. 69) followed.

*Held* also, that the nature of the action and *demande* did not bring the case within the exception as to "future rights" mentioned in the section of the act above referred to. *O'Dell* v. *Gregory* (24 Can. S. C. R. 661) ; *Raphael* v. *Maclaren* (27 Can. S. C. R. 319) followed.

MOTION to quash an appeal from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), which affirmed the judgment of the Superior

* PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1898

MACDONALD v. GALIVAN.

Court, District of Montreal, in favour of the plaintiff with costs.

The respondent brought the action in her capacity of tutrix to her minor child, born about four years and nine months previously, and prayed that the defendant might be declared to be the father of the child and condemned to pay to her in her said capacity the sum of fifteen dollars per month until the child should attain the age of ten years and thereafter the sum of twenty dollars per month until such time as the child should be able to support and provide for himself.

The trial court rendered judgment in favour of the plaintiff and this judgment was affirmed by the Court of Queen's Bench which held also that under ordinary circumstances, an allowance such as that demanded would cease upon the child attaining the age of fourteen years.

*A. R. Hall* and *Smith* for the respondent moved to quash the appeal on the grounds that the matter in controversy was not of the amount or value of $2,000 and did not otherwise come within any of the exceptions stated in section twenty-nine of the Supreme and Exchequer Court Act as amended. The following cases were cited in support of the motion : *Lizotte* v. *Deschêneau* (1); *O'Dell* v. *Gregory* (2) ; *Rodier* v. *Lapierre* (3).

*St. Pierre* Q.C. for the appellant contra. The claim and condemnation are both indefinite and might involve the maintenance of the child for any number of years in case he proved an invalid or became crippled or otherwise unable "to support or provide for himself." In any reasonable view of the case the *demande* must be considered as liable to exceed $2,000. The

(1) 6 Legal News, 170. (2) 24 Can. S. C. R. 661.
(3) 21 Can. S. C. R. 69.

1898

MACDONALD v. GALIVAN.

effect of the judgment is to bind future rights of the parties and brings the case within the general terms "other matters and things" used in the last clause of section 29 of "The Supreme and Exchequer Court Act."

TASCHEREAU J.—This case is before us upon a motion to quash the appeal. The action is one "*en déclaration de paternité*," with conclusions—

that the said defendant (now appellant) be declared to be the father of the said minor, and be condemned to pay to the plaintiff *es qualité* the sum of fifteen dollars a month until the child shall have attained the age of ten years, and the sum of twenty dollars a month thereafter until such time as the said minor may be able to support and provide for himself.

The said child was four years and nine months old, less seven days, when the action was served, on the fifth of January, 1897. So that, leaving aside its contingent character, the claim does not amount to $2,000, if, as held by the judgment appealed from, fourteen years is the limit where an allowance of this kind ceases under ordinary circumstances. The claim must be read as if for an allowance up to that age and no further. But even if more than $2,000 might have become involved under certain contingencies, as a consequence of the judgment, it would seem that under *Rodier* v. *Lapierre* (1), the appeal would not lie. The amount claimed rules, but there is no direct claim for a definite sum of $2,000 or over. The appellant has attempted to rest his right to this appeal upon the amended section 29 of the Supreme Court Act, as to future rights, but under *O'Dell* v. *Gregory* (2), his contention cannot prevail. See also *Raphael* v. *Maclaren* (3). Parliament may have intended, by the amending

(1) 21 Can. S. C. R. 69. (2) 24 Can. S. C. R. 661.
(3) 27 Can. S. C. R. 319.

act, to give an appeal in cases like the present one, but has not done so.

The motion must be allowed with costs, and the appeal quashed with costs.

*Appeal quashed with costs.*

1898

MACDONALD v. GALIVAN.

Taschereau J.

Solicitors for the appellant: *St. Pierre, Pelissier & Wilson.*

Solicitors for the respondent: *Johnson, Hall & Donahue.*

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JOHN H. BALDERSON (SUPPLIANT).....APPELLANT;

AND

HER MAJESTY THE QUEEN (RESPONDENT) ..... } RESPONDENT.

1898

*Mar. 2.

*Mar 8.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Statute, construction of—Civil Service—Superannuation—R. S. C. c. 18—Abolition of office—Discretionary power—Jurisdiction.*

Employees in the Civil Service of Canada who may be retired or removed from office under the provisions of the eleventh section of "The Civil Service Superannuation Act" (R. S. C. c. 18), have no absolute right to any superannuation allowance under that section, such allowance being by the terms of the Act entirely in the discretion of the executive authority.

APPEAL from the judgment of the Exchequer Court of Canada (1) declaring that the suppliant was not entitled to the relief sought by his petition of right.

The appellant was appointed to the Civil Service of Canada on 1st January, 1883, by order of the Governor-General-in-Council, and since that date up to the 26th April, 1897, had been continuously in the employ of the Government of Canada, being a period of over fifteen years. During the last five years of his service, the appellant held office as secretary of the Department of

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*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 6 Ex. C. R. 8.

1898

BALDERSON v. THE QUEEN.

Railways and Canals in Canada, and his average yearly salary, based upon his salary for the last three years of his service was $2,275. All deductions for superannuation, as required by section six of the Civil Service Superannuation Act (1), had been made from time to time from the appellant's salary throughout the whole of his service.

On the 26th April, 1897, to promote economy in the public service, the appellant was, by order of the Governor-General-in-Council, retired from the service and placed upon the retired list with an annual allowance of six hundred and eighty-two dollars and fifty cents, the amount to which he would be entitled for fifteen years service at the average salary paid him for the three years preceding his retirement. He claimed the annual sum of $455 in addition to the allowance granted, alleging that the combined amount of these two sums was the compensation he was entitled to under the statute. This claim was based on the contention that ten years should have been added to his term of service, as provided by section eleven of the Act. The appeal was from the judgment of the Exchequer Court declaring that he was not entitled to the relief sought by his petition of right.

*Hogg Q.C.* for the appellant. The meaning and intention of the whole Superannuation Act is to give to retired civil servants who have performed good and faithful service a fair consideration and compensation for the service given, and by the deductions made from their salaries, to create a fund towards making good the superannuation allowances provided under the statute.

Under section nine the retired civil servant has a legal right to full superannuation allowance in case his retirement is based upon the causes therein mentioned, pro-

(1) R. S. C. c. 18.

vided the head of the department has not reported against him. The causes for retirement referred to in section nine are also mentioned in section eleven and the allowance, to which under section nine he would "be otherwise entitled," refers to the full or maximum allowance mentioned in section eleven. The correct interpretation is, that upon retirement of a civil servant for the causes mentioned in these sections, *primâ facie*, the amount of the superannuation grant should be the maximum allowance mentioned in section eleven subject to be reduced or dimished only upon a special adverse report, by the application of the provisions of the ninth section.

The appellant was retired to promote economy and comes under section eleven. The maximum compensation in the appellant's case, would be twenty-five-fiftieths of his average salary during his last three years of service, the twenty-five years on which the calculation is based, being made up under section eleven by adding ten years to the fifteen years of his actual service. There can be no reduction upon this estimate unless an adverse report has been made under section nine. The provision in the ninth section as to granting a superannuation allowance less than "that to which he would have otherwise been entitled," shews clearly an intention that when retired under the eleventh section the employee should be entitled to the full or maximum allowance except only upon an adverse report. The statute itself determines the amount of the retiring allowance.

The words "may grant" should be construed as mandatory, following the custom of Parliament when it is sought to lay an obligation upon the Crown or an officer of the Crown. The ninth section clearly gives discretion, for it differs from the eleventh section, which does not, by the insertion of the words "as to him

1898

BALDERSON v. THE QUEEN.

seems fit," after the word "may." *Julius* v. *Bishop of Oxford* (1) at page 225; Hardcastle, Statute Law, 2nd ed. 316; Maxwell, Interpretation of Statutes, 3 ed. [1896,] pp. 334, 350. *Reg.* v. *Bishop of Oxford* (2) at page 258; *M'Dougall* v. *Patterson* (3); *Crake* v. *Powel* (4); *The Board of Supervisors of Rock Island* v. *United States* (5) at page 446; *Attorney General* v. *Lock* (6); *In Re Eyre* v. *Corporation of Leicester* (7). The Governor-General-in-Council is bound to grant such an allowance as shall actually be a fair compensation. Such compensation will be estimated, if necessary, by the court and, if there is no adverse report, the court will be bound by the statute to grant the maximum amount. Pollock on Contracts (5 ed.), at pages 45 and 46; *Roberts* v. *Smith* (8); *Bryant* v. *Flight* (9).

The crown can dismiss its servants without compensation only where there is cause for dismissal; or under the Superannuation Act, where an adverse report has been made under section nine, in which case the compensation may be reduced to nothing. Sub-section 2 of section 8 does not confer a right, but only reserves a right already in the Governor-General-in-Council.

The Exchequer Court has jurisdiction under sub-section "*d*" of section 16 of the Exchequer Court Act, and should be directed to declare that the Governor-General-in-Council is bound, under the Act cited, to grant and pay such allowance as the court may find to be fair compensation for loss of office, and that a petition of right lies against the Crown under the above-cited sections of the Exchequer Court Act.

*Newcombe* Q.C., Deputy Minister of Justice, for the respondent. The appellant was a civil servant appointed

(1) 5 App. Cas. 214.
(2) 4 Q. B. D. 245.
(3) 6 Ex. 337 note.
(4) 2 E. & B. 210.
(5) 4 Wall. 435.
(6) 3 Atkyns, 165.
(7) [1892] 1 Q. B. 136.
(8) 4 H. & N. 315; 28 L. J. Ex. 164.
(9) 5 M. & W. 114.

under the provisions of "The Civil Service Act" (1), on 1st January, 1883, and retired by Order in Council of 26th April, 1897, in order to promote economy in the public service. By the same Order-in-Council, the appellant was granted an annual allowance of $682.50, under the authority of the Superannuation Act (2).

The appointment was during pleasure, and the executive had the undoubted right to dismiss him at any time. Civil Service Act, sec. 10; *Shenton* v. *Smith* (3); *Gould* v. *Stuart* (4); *Dunn* v. *The Queen* (5).

The appellant had not attained the age of sixty, nor was he incapacitated by bodily infirmity, and he was therefore not qualified for superanuation under section three. Section 11 applies and its provisions are merely enabling and intended to vest a discretion in the Governor-General-in-Council which may be exercised favourably or unfavourably to the officer being retired, in any case.

No right accrues until the allowance has been granted by His Excellency in Council. R. S. C. c. 18 s. 8. The courts have no jurisdiction to review the exercise of the discretion vested in His Excellency in Council. *Cooper* v. *The Queen* (6); *Kinloch* v. *The Secretary of State for India* (7); *Gidley* v. *Lord Palmerston* (8); *Matton* v. *The Queen* (9). The jurisdiction of the court in this case, if any, arises under section sixteen of the Exchequer Court Act (10), which is quite inadequate to confer a jurisdiction to review the exercise of discretionary authority.

It has not been shown that Her Majesty contracted with the appellant to the effect that he should receive upon retirement a superannuation allowance.

(1) R. S. C. c. 17.
(2) R. S. C. c. 18.
(3) [1895,] A. C. 229.
(4) [1896,] A. C. 575
(5) [1896,] 1 Q. B. 116.
(6) 14 Ch. Div. 311.
(7) 7 App. Cas. 619.
(8) 3 Brod. & Bing. 275.
(9) 5 Ex. C. R. 401.
(10) 50 & 51 Vict. ch. 16.

1898

BALDERSON v. THE QUEEN.

Taschereau J.

TASCHEREAU J.—This appeal must be dismissed. There is no room whatever for the appellant's contention that it was a condition of his contract of employment that, in the event of his being superannuated in order to promote economy in the civil service, he was to have a legal right to any allowance whatever. The superannuation allowance that the Governor-General-in-Council may grant in such a case to any person is a gratuity. It is so called in sec. 11 of the "Civil Service Superannuation Act" (1), and when the statute enacts that this gratuity which, in the discretion of the executive authority, *may* be granted, will be such as to fairly compensate the superannuated officer for his loss of office, it leaves it at the sole discretion of the executive to determine what is the amount he is to receive, if any. The members of the civil service of Canada hold their office during pleasure and have no absolute right to any superannuation allowance under that section. They accept office under that condition. The appellant here has been granted a yearly allowance of $682.50, calculated upon fifteen years of service. He contends that he is entitled to have ten years added to his term of service, amounting to $455, making in all the sum of $1,137.50. His contention cannot be sustained. The courts of the country have no jurisdiction to review the exercise of the discretion vested by the statute in the Governor-General-in-Council.

The appeal is dismissed, but the case must be viewed as a test case, and we give no costs.

GWYNNE J. concurred.

SEDGEWICK J.—The appellant can succeed only upon showing that the Crown contracted with him,

(1) R. S. C. c. 18.

upon his entering the civil service, that he would receive the increased superannuation allowance claimed upon any compulsory retirement therefrom. He relies upon section 11 of the Act, and argues that that section, though in terms enabling only, is in fact imperative and obligatory.

1898

BALDERSON v. THE QUEEN.

Sedgewick J.

We are unable to place this construction upon it, or upon the Act as a whole. Its whole scope and object is to confer authority upon the Government to appropriate public funds in a certain way, but as it expressly states (sec. 8), it does not confer "any absolute right to superannuation allowance, or impose any statutory obligation on the Crown to grant it."

KING and GIROUARD J.J. also concurred in the dismissal of the appeal for the reasons stated.

*Appeal dismissed without costs.*

Solicitors for the appellant: *O'Connor, Hogg & Magee.*

Solicitor for the respondent: *E. L. Newcombe.*

1898

*Mar. 8.

*Mar. 14.

HERMAN DRESCHEL AND MARY VAIL MELICK (DEFENDANTS)..... } APPELLANTS;

AND

THE AUER INCANDESCENT LIGHT MANUFACTURING COMPANY (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Appeal—Jurisdiction—Amount in controversy—Affidavits—Conflicting as to amount—The Exchequer Court Acts*—50 & 51 *V. c.* 16, *ss.* 51–53 (*D.*)—54 & 55 *V. c.* 26, *s.* 8 [*D.*]—*The Patent Act—R. S. C. c.* 61, *s.* 36.

On a motion to quash an appeal where the respondents filed affidavits stating that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate court, and affidavits were also filed by the appellants, showing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs, as the jurisdiction of the court to hear the appeal did not appear until the filing of the appellants' affidavits in answer to the motion.

MOTION to quash an appeal from the judgment of the Exchequer Court of Canada (1), which declared that the appellants had infringed certain valid and subsisting Letters Patent of Invention, the property of the respondents, and ordered the appellants to discontinue the manufacture and trade in certain incandescent devices and to deliver up all lights and devices in their possession, to render accounts and to pay over the gains and profits to be ascertained, with costs.

The plaintiffs brought action in the Exchequer Court of Canada for an injunction restraining the defendants

* PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 6 Ex. C. R.

from the importation, manufacture, use and sale of certain incandescent lights and devices covered by Letters Patent of Invention of the Dominion of Canada, issued to the Welsbach Incandescent Gas Light Company, on the 1st September, 1894, and from infringement of the plaintiffs' rights in respect of said letters patent, and for other appropriate relief under the circumstances. By the judgment of the Exchequer Court, the letters patent in question were declared valid and subsisting and to have been infringed by the defendants, and the court by injunction restrained the defendants as prayed during the continuance of the letters patent, and further ordered them forthwith to deliver up to the plaintiffs all lights or incandescent devices and material in their possession, and that accounts should be taken of the gains and profits made by the defendants under the infringement complained of. and to pay the same to the plaintiffs when ascertained upon a reference directed to the registrar of that court.

The defendants gave notice of appeal against the judgment to the Supreme Court of Canada and the respondents moved to quash on the grounds that there was no actual amount of money in controversy and that no order had been obtained from a judge of the Supreme Court of Canada allowing the appeal to be taken as required by 50 & 51 Vict. ch. 16, sec. 52. On the hearing of the motion affidavits were filed on behalf of both parties in which estimates were made of the amount of gains and profits likely to be ascertained upon the reference as resulting from the infringement adjudged by the Exchequer Court and the value of the lights, devices and material ordered to be delivered up by the judgment appealed from, those filed on behalf of the respondent, stating the amount as under $500, while the appellants showed by their

1898

DRESCHEL v. THE AUER INCANDESCENT LIGHT MANUFACTURING CO.

affidavits that the amount thus in controversy would exceed $500.

*Duclos*, for the respondent in support of the motion, cited the statutes of Canada, 50 & 51 Vict. ch. 16, secs. 51–53, as amended by 54 & 55 Vict. ch. 26, sec, 8, and referred to the authorities mentioned in Audette, Exchequer Court Practice, pp. 114–116.

*Sinclair* for the appellant contra. The affidavits filed against the motion should be received as shewing the amount to be over $500 and therefore there is an appeal as of right under the statute (1). As to establishing value by affidavits in cases such as this, see the remarks of Mr. Justice Strong at page 338 in *Joyce* v *Hart* (2). The Patent Act gives an appeal in every case (3), and in any event there is no necessity of getting a judge's order until after the appeal has been taken.

The judgment of the court was delivered by :

TASCHEREAU J.—The judgment appealed from affects a patent of invention. The respondents move to quash the appeal for want of jurisdiction, upon the ground that as the actual amount in controversy does not exceed $500, under sections 51 and 52 of the Exchequer Court Act, the appeal could not be taken unless allowed by an order obtained from a judge of this court, which has not been done. The judgment appealed from declares that the appellants have infringed respondents' letters patent, and condemns them to deliver up to the respondents certain articles of an undetermined value, and refers the case to the registrar to take an account of the gains and profits made by the infringement. The respondents filed with their motion to quash, an affidavit that the total

(1) 50 & 51 V. c. 16, s. 52. (2) 1 Can. S. C. R. 321.
(3) R. S. C. c. 61, s. 36.

amount in controversy in the case is less than $500. The appellants, in answer to that motion, filed two affidavits that the value in controversy exceeds $500. Under these circumstances the motion to quash must be dismissed, but the appellants must pay the costs. The case was not an appealable one, as of right, unless it appeared that the value in controversy exceeded $500. That did not appear until the appellants filed their affidavits in answer to respondents' motion. As the record stood when the motion was made, it was well founded.

Motion dismissed, with costs against the appellants, taxed at $25.

*Motion refused with costs against the appellants.*

Solicitors for the appellants: *Foster, Martin & Girouard.*

Solicitors for the respondents: *Atwater, Duclos & Mackie.*

1897

## FRASER *et al* v. DAVIDSON AND HAY.

*Mar. 12.
*May 1.

*Insolvency—Assignment—Preference—Payment in money—Cheque of third party.*

APPEAL from the decision of the Court of Appeal for Ontario (1), reversing the judgment of the Common Pleas Division which had allowed an appeal by the defendants against the judgment at the trial by Meredith J. in favour of the plaintiff in respect of one conveyance, and dismissing the action in other respects.

After hearing counsel for both parties the court reserved judgment, and on a subsequent day dismissed the appeal with costs and without giving any written reasons for judgment.

*Matthew Wilson* Q.C. for the appellants.

*G. G. Mills* for the respondent.

*PRESENT :—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

1897

## MAGUIRE *et al. v.* HART.

*May 5, 6.
*June 7.

*Assignment for the benefit of creditors—Affidavit of bona fides—Preferences—Distribution of assets—Arbitration—Conditions of deed—Statute of Elizabeth*—13 *Eliz. c.* 5.

APPEAL from a decision of the Supreme Court of Nova Scotia (2), which affirmed the decision of the trial court maintaining the plaintiffs' action with costs.

After hearing counsel for both parties the court reserved judgment, and on a subsequent day dismissed the appeal without giving any writen reasons.

*Appeal dismissed with costs.*

*Borden* Q.C. for the appellants.

*Allison* for the respondent.

*PRESENT.—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 23 Ont. App. R. 439. (2) 29 N. S. Rep. 181.

GEORGE GOODWIN (CLAIMANT).....APPELLANT; 1897

*Nov. 6, 8,

AND

1898

HER MAJESTY THE QUEEN (RESPONDENT) ..... RESPONDENT. *Mar. 8.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Contract, construction of—Public Works—Arbitration—Progress estimates —Engineer's certificate—Approval by Head of Department—Final estimates—Condition precedent.*

The eighth and twenty-fifth clauses of the appellant's contract for the construction of certain Public Works were as follows:—

"8. That the engineer shall be the sole judge of work and material "in respect of both quantity and quality, and his decision on all "questions in dispute with regard to work or material, or as to "the meaning or intention of this contract, and the plans, speci- "fications, and drawings, shall be final, and no works or extra or "additional works or changes shall be deemed to have been "executed, nor shall the contractor be entitled to payment for "the same, unless the same shall have been executed to the "satisfaction of the engineer, as evidenced by his certificate in "writing, which certificate shall be a condition precedent to the "right of the contractor to be paid therefor;" but before the "contract was signed by the parties the words "as to the mean- "ing or intention of this contract, and the plans, specifications "and drawings" were struck out.

"25. Cash payments to about ninety per cent of the value of the "work done, approximately made up from returns of progress "measurements and computed at the prices agreed upon or deter- "mined under the provisions of the contract, will be made to "the contractor monthly on the written certificate of the engineer "that the work for, or on account of, which the certificate is "granted has been duly executed to his satisfaction, and stating "the value of such work computed as above mentioned and "upon approval of such certificate by the minister for the time "being, and the said certificate and such approval thereof shall

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1897

GOODWIN v. THE QUEEN.

" be a condition precedent to the right of the contractor to be " paid the said ninety per cent or any part thereof.

* * * * * * * * * * * * *

A difference of opinion arose between the contractor and the engineers as to the quantity of earth in certain embankments which should be paid for at an increased rate as " water-tight" embankment under the provisions of the contract and specifications relating to the works and the claim of the contractor was rejected by the engineer, who afterwards, however, after the matter had been referred to the Minister of Justice by the Minister of Railways and Canals, and an opinion favourable to the contention of the contractor given by the Minister of Justice, made a certificate upon a progressive estimate for the amount thus in dispute in the usual form but added after his signature the following words:— " Certified as regards item 5, (the item in dispute,) in accordance with letter of Deputy Minister of Justice, dated 15th Jan., 1896."

The estimate thus certified was forwarded for payment, but the Auditor General refused to issue a cheque therefor.

*Held* that under the circumstances of the case the certificate sufficiently complied with the requirements of the twenty-fifth section of the contract; that the decision by the engineer rejecting the contractor's claim was not a final decision under the eighth clause of the contract adjudicating upon a dispute under said eighth section and did not preclude him from subsequently granting a valid certificate to entitle the contractor to receive payment of his claim, and that the certificate given in this case whereby the engineer adopted the construction placed upon the contract in the legal opinion given by the Minister of Justice, was properly granted within the meaning of the twenty-fifth clause of the contract.

*Murray* v. *The Queen*, 26 Can. S. C. R. 203, discussed and distinguished.

APPEAL from the judgment of the Exchequer Court of Canada (1) rendered on the 11th January, 1897, by which the preliminary decision of that court at the time of the trial was set aside and the appellants claim upon the reference made, under the provisions of the Exchequer Court Act (2), by the Minister of Railways and Canals, was refused without costs.

(1) 5 Ex. C. R. 293. (2) 50 & 51 V. c. 16, s. 23.

The Minister of Railways and Canals under the provisions of the twenty-third section of the Exchequer Court Act, (50 & 51 Vict. c. 16) referred to the Exchequer Court of Canada for adjudication the claim of the appellant arising in respect to work done by him under a contract with the Department of Railways and Canals of Canada on the construction of part of the embankments of the Soulanges Canal. Under this reference the trial took place in the Exchequer Court at Ottawa and on 20th June, 1896, a preliminary judgment was rendered declaring the appellant entitled to recover $58,260 for the work in question, subject to that amount being increased or reduced in accordance with such reference as might be directed upon the application of either party for the purpose of ascertaining, upon the basis of the said judgment, the exact amount to which he might be entitled, and granting the appellant costs of suit. Leave was reserved to the appellant to move to increase the amount to $73,260 the full amount of his claim and to the respondent to move to set aside the judgment or to reduce the amount upon certain principles mentioned in the judgment. Motions on behalf of both parties were afterwards heard with the result that the judgment was set aside as above stated. The present appeal sought to have it declared that the appellant was entitled to be paid the full amount of his claim, or at least, that he was entitled to the amount declared to be due to him by the preliminary judgment rendered at the trial.

The chief points at issue in the case were as to the validity of the approval by the Minister of Railways and Canals of a certain certificate or estimate made by the Chief Engineer of the Department of Railways and Canals relating to amounts payable for work done in water-tight embankments, and as to the sufficiency of

1897

GOODWIN v. THE QUEEN.

the certificate itself. The particulars of the case and circumstances under which the certificate in question was made are fully set out in the judgment of His Lordship Mr. Justice Sedgewick now reported. The clauses of the contract and specifications in question in the case are also quoted in the judgments reported.

At the close of the argument it was understood that, if the court should determine in favour of the Chief Engineer's certificate relied on by the claimant, the appeal should be allowed, and the case be at an end in this court, judgment being directed to be entered for the claimant for the amount claimed, and interest, if the court should so decide, after the parties were heard on the question of interest:—But that if the court should hold that the claimant was not entitled to recover upon the certificate, then that both parties should be heard upon the contentions before the Exchequer Court as to "alternative relief," and that all objections to the jurisdiction of this court and of the Court of Exchequer should then be open to the respondent as if the appeal were being heard for the first time; and in the latter case that no judgment should be entered in this court until after the parties should have been so heard on that second branch of the case.

*Osler Q.C.* and *Ferguson Q.C.* for the appellant. The opinion expressed by Mr. Justice Sedgewick at page 212 of the report in *Murray* v. *The Queen* (1), is mere dictum and is not a binding decision and, in any case, does not declare that the want of an express statement that the work had been executed to the satisfaction of of the chief engineer would be sufficient to defeat an action on such a certificate as he was discussing in that case. The expression of opinion, in that case, to the effect that the Minister of Railways and Canals must express his approval by counter-signing the certificate,

(1) 26 Can. S. C. R. 203.

is not well founded nor binding as authority because the point with reference to which it was given was neither argued nor involved in the decision of that case. See *Elmes* v. *Burgh* (1); *Roberts* v. *Watkins* (2); *McGreevy* v. *The Queen* (3), at page 401; *Kane* v. *Stone Co.* (4).

The certificate in this case shows sufficiently that the work was done in accordance with the contract and accepted, and the evidence shows it to have been done satisfactorily. See Hudson on Building Contracts (2 ed.) pp. 294, 299; *Harmon* v. *Scott* (5); *Clarke* v. *Murray* (6); *Galbraith* v. *Chicago Architectural Iron Works* (7); *Rousseau* v. *Poitras* (8); *Wykcoff* v. *Meyers* (9), at pages 145, 146; *McGreevy* v. *The Queen* (3), at page 405. The question before the court is a legal one as to the construction of the written contract and specifications annexed.

The engineer's position will appear on referring to Hudson on Contracts (2 ed.) p. 279, and the following cases. *In re Carus-Wilson* v. *Greene* (10), at pages 7, 9; *Sharpe* v. *San Paulo Railway Co.* (11), at page 609; *Ranger* v. *Great Western Railway Co.* (12) at page 115; *Farquhar* v. *City of Hamilton* (13).

If, in the opinion of the Minister of Railways and Canals, or in that of his legal adviser, the position taken by the appellant with reference to any additional claim or allowance, depending upon a construction of the contract, specifications or plans was well founded, the Chief Engineer was acting in accordance with his duty in certifying as he did in this case.

(1) 2 Hudson (2 ed.) p. 119.
(2) 14 C. B. N. S. 592.
(3) 18 Can. S. C. R. 371.
(4) 39 Ohio, 1.
(5) 2 Johnstons New Zealand Reps. 407.
(6) 11 Vict. L. R. 817.
(7) 50 Ill. App. R. 247.
(8) 62 Ill. App. R. 103.
(9) 44 N. Y. 143.
(10) 18 Q. B. D. 7.
(11) 8 Ch. App. 597.
(12) 5 H. L. Cas. 72.
(13) 20 Ont. App. R. 86.

1897

GOODWIN v. THE QUEEN.

Appellant is entitled to judgment for the $73,260 upon the merits of the dispute, in view of the facts proved, whether his contention as to the construction of the contract, specifications and plans in regard to his right to payment for earth in water-tight embankments is or is not correct. The formal reference is sufficiently wide in its terms to include the reference of the claim upon its merits to the Exchequer Court, and the claim was before the Exchequer Court by virtue of that reference. The learned judge of the Exchequer Court had jurisdiction to adjudicate upon the merits, and ought to have adjudicated by his last judgment, in view of his findings, that the appellant was entitled to judgment upon the merits of the claim for the full amount of $73,260.

There was error in the deduction, in the judgment of the judge at the trial, *provisionally* of 100,000 cubic yards for "mucked material, sand, &c.," which ought not, he thought, to be paid for as earth in water-tight banks as not being selected material, and in giving the respondent the right to a reference to show if possible a still larger quantity to be deducted under that head. The engineers considered the material all sufficiently good to put into the embankments, and rejected none of it as being unfit for that purpose, but passed it and directed or approved of putting it into the embankments, and the appellant is entitled to the price under item 5 of the schedule (1) for the whole of it. The engineer had no authority, under the contract or specifications, after the material has been put into the embankments under his directions and to his satisfaction, to say that it should not all be paid for under item 5 as "earth in water-tight banks."

The appellant also submits that he is entitled to interest and his costs in both courts.

(1) See p. 301.

*Ritchie Q.C.* and *Chrysler Q.C.* for the respondent. The dispute became subject to arbitration under the clause in the contract, and the engineer had no power to grant the amended certificate. He had full power to decide questions depending upon the construction of the contract, and having done so by the former certificate became *functus officio*. *Lloyd* v. *Milward* (1).

The Act respecting the Department of Justice does not apply, because the chief engineer was not acting as the head of the department, requiring to be advised upon a matter of law connected therewith, nor was he, as to the certificate in question, acting as a servant or officer of the Crown whose duty it was to sign any certificate that he was advised or directed to sign. In theory he was appointed by both parties as arbitrator to stand between the parties and do justice to both. The position of the chief engineer, under clause 25 of the contract, is incompatible with that ascribed to him by the Exchequer Court judgment, and he was not a person whose duty it was to seek and accept the advice of the Department of Justice, as upon a matter of law connected with the Department of Railways and Canals. See Hudson, Building Contracts, vol. 1 (2 ed.) p. 301. The discussion of the position of the engineer, in *Ranger* v. *Great Western Railway Company* (2) at page 91, is not a correct statement of the position of the engineer under the present and similar contracts. See also *Clements* v. *Clarke* (3), at page 221; *Sharpe* v. *San Paulo Railway Co.* (4); *Kimberly* v. *Dick* (5) at page 19; *Farquhar* v. *City of Hamilton* (6), and earlier cases there referred to, and *Peters* v. *Quebec Harbour Commissioners* (7).

(1) 2 Hudson, Building Contracts, 454.
(2) 5 H. L. Cas. 72.
(3) 2 Hudson, p. 207.
(4) 8 Ch. App. 597.
(5) L. R. 13 Eq. 1.
(6) 20 Ont. App. R. 86.
(7) 19 Can. S. C. R. 685.

1897

GOODWIN v. THE QUEEN.

The question was not wholly one of construction of the contract, but was partly a question of fact as to what had been laid out by the engineers as water-tight embankments, and how much of the banks had been constructed in accordance with the specification and of selected material. Upon both of these questions the determination by the Department of Justice, that the whole bank should be so paid for, was opposed to the views of the engineers as expressed in the certificate or therein included by reference. The certificate, as found by the learned judge himself, was in fact wrong, because upon the most favourable view for the contractor it included at least 100,000 yards of material not according to specification and was, upon the facts, given for at least $15,000 too much. Thus it is very clear, that the giving of the certificate was not a pure question of construction of the contract, to be determined by the Department of Justice, overruling the Chief Engineer.

The Department of Justice did not, in fact, advise the giving of a certificate for the full amount, and it seems to have been signed under a misapprehension, as to the scope or effect of the advice contained in the letter from the Department. The letter of the Deputy Minister merely contained an intimation that the late Minister of Justice, who at the time had ceased to be such minister, and was no longer the responsible adviser of the Crown, had come to the conclusion that the contractor's claim should be entertained. The duty and power of the Chief Engineer under clause 25 of the contract, was not affected by the omission from clause 8 of the usual provision making his judgment upon questions of the construction of the contract final. The cases cited show that the claim of the contractor to recover upon this certificate is inconsistent with the

claim urged in the alternative, that the proceeding is a reference of a matter in dispute. Clause 33 of the contract was only intended to be made use of in cases where the work was finished, and the Chief Engineer had finally certified under clause 25, and has no application to work under a pending contract. It contemplates a special reference of a matter in difference, and the evidence shews that there was no matter in difference but that the question was, whether the claimant had a valid certificate capable of being enforced by action. The decision of the Exchequer Court Judge is that of an arbitrator and is final and not appealable to the Supreme Court.

Upon the evidence it seems clear that the certificate is bad, on the grounds that it does not express the judgment of the engineer; that the parties agreed to accept his certificate; that he is the person designated by the contract, and the Crown are not bound by the decision or judgment of any other person. Clause 25 requires that two facts or findings by the Chief Engineer shall be stated in writing:—That the work has been duly executed to his satisfaction. The value of the work computed as therein above mentioned;—and this has not been done. The question as to how much earth was placed in the water-tight embankments, laid out and made up in accordance with the specification, was a matter peculiarly given to the engineer, and upon which the engineer's judgment was required; it was one of the things as to which his satisfaction had to be expressed under clause 25 of the contract. The certificate not only does not state that the work was done to the satisfaction of the engineer, but, by reference to the documents incorporated with it, expressly states the contrary. See *Eads* v. *Williams* (1) at page 686; *Ellison*

(1) 4 DeG. M. & G. 674.

1897

GOODWIN v. THE QUEEN.

v. *Bray* (1). Other cases are collected in Redman on Awards, p. 98, and Russell on Awards (7 ed.) 207. See also *In re Eastern Counties Railway Co. & The Eastern Union Railway Co., Arbitration* (2); *Jackson* v. *Barry Railway Co.* (3). The question is referred to incidently in *Peters* v. *Quebec Harbour Commissioners* (4) at page 696, by Strong J. and by Gwynne J. at page 698, and Patterson J. at page 700.

The certificate is also bad because it does not fulfil the requirements of clause 25 of the contract; *Murray* v. *The Queen* (5); *The Queen* v. *Starrs* (6). The certificate is invalid because the question was previously finally determined by the Engineer's decision. In regard to the classification of the same material in the former certificate or progress estimate, (no. 23,) is also final, and he had no power to revoke or recall his decision so given. Certificate no. 23 finally determined the rights of both parties, and the progress estimate now sued upon was void, as being made by an officer who had already given a final decision upon the same question, and was therefore *functus officio*, as to that question. The approval of the Minister, which should be in writing and is also a condition precedent to the right of recovery, was not established.

In any event, if the court assumes jurisdiction under clause 33, to determine the meaning of clause 11 of the specification, the judgment of the court should merely be a declaratory one, leaving the contractor to obtain a certificate under clause 25 of the contract, for the amount which may appear to be due to him, applying the principle of construction declared by the court.

TASCHEREAU J.—I have had communication of the elaborate notes of my brothers Sedgewick and Girouard

(1) 9 L. T. N. S. 730.
(2) 3 DeG. J. & S. 610.
(3) [1893] 1 Ch. 238.
(4) 19 Can. S. C. R. 685.
(5) 26 Can. S. C. R. 203.
(6) 17 Can. S. C. R. 118.

1898

GOODWIN v. THE QUEEN.

Taschereau J.

and I agree with them that this appeal should be allowed.

Without dissenting from any of the grounds upon which they have reached this conclusion, I deem it necessary to state concisely my views of the case. The claim referred to the Exchequer Court and now before us is the claim of the appellant for $73,260, based upon the Engineer's certificate no. 24. I am of opinion that this certificate under clause twenty-five of the contract, approved of by the Minister as it has been, is sufficient to entitle the appellant to his claim. It is clearly a certificate that the work "for which it is granted has been duly executed to the satisfaction of the Engineer" in the terms of the contract. It is, coupled with Munro's certificate, a certificate that this money is due under the contract and he was the sole judge of it. We cannot go behind it, and take upon ourselves to ascertain whether or not this amount is due, after he has certified that it is. I concur fully in what is said upon this point by my brothers Sedgewick and Girouard. If I mistake not such would have been the judgment of the Exchequer Court, if it had not been for a misconception of *Murray* v. *The Queen* (1). I agree also that certificate no. 23 does not militate against appellant's claim. Clause twenty-five of the contract expressly says that the value certified to under these certificates given during the construction is merely approximate, and clauses twenty-six and twenty-seven indicate clearly that there is no final certificate at all, under the contract, but the one to be given at the final completion of the work, an event which has not yet occurred.

The Crown's contention that because by certificate number twenty-three the engineer had not the power to issue certificate number twenty-four for that part of

(1) 26 Can. S. C. R. 203.

1898

GOODWIN v. THE QUEEN.

Taschereau J.

the work in question, is equivalent to nullify entirely clauses twenty-five and twenty-six and render them meaningless. The chief engineer's certificate number twenty-four must, in my opinion, be read as if all the words under the signature "Collingwood Schreiber" were struck out. I understood counsel for the Crown at the argument to rely exclusively on those words, and on certificate number twenty-three, in support of their case.

The appeal is allowed with costs and judgment is ordered to be entered for the appellant for $73,260 with costs, Mr. Justice Gwynne and Mr. Justice King dissenting. We will hear counsel as to the question of interest.

GWYNNE J.—The question which is before us upon this appeal is whether or not the claimant is entitled to recover the sum of $73,260, which upon the evidence in the case he claims to be entitled to recover under the terms and provisions of the contract set out in his statement of claim.

Upon the 9th May, 1893, the appellant entered into a contract with Her Majesty, represented by the Minister of Railways and Canals of Canada, for the performance of certain work upon sections 4, 5, 6 & 7 of the Soulanges Canal in the contract mentioned. For the determination of the present appeal it will be necessary to consider only a few of the clauses of the contract and of the specifications which are referred to therein, and made part thereof.

By the specifications which were made part of the contract it was provided among other things as follows:

5. There will only be two classes of excavation recognized or paid for, namely, "earth" or "solid rock."

6. The price tendered for "earth excavation" must cover the entire cost of excavating, hauling and forming into embankments, all kinds of materials found in the pits for lock, weirs or other structures, and

in the prism of the canal, raceways, side ponds or wherever excavation is necessary, except solid stratified quarry rock. This price shall include the cost of removing boulders of all sizes, indurated clay, hard pan, &c., for none of which will any extra or additional allowance be made. It is also distinctly understood and agreed upon that no excavation shall be paid for below the exact grade line of the bottom of the canal works, or outside the line of the slopes, unless the same be executed under the written instructions of the engineer.

7. No allowance whatever beyond the prices tendered for excavation will be made for haul. The surplus material arising from the prism, &c., on section no. 7 shall, after making up the banks on that section, be carried forward to widen the embankments of sections to the eastward; and the surplus on section no. 6 shall be dealt with in the same manner, so that all the excavation arising from the sections embraced in this contract west of lock no. 5, will be disposed of in making the embankments on each side of the summit level, between stations 180 and 460, filling around the various structures, &c. This distribution of material to be made as will be directed by the engineer without entitling the contractor to any extra allowance whatever. The attention of parties tendering is specially drawn to this section of the specification.

11. Wherever the surface level of the water in the canal is higher than the ground alongside, water tight banks shall be made when so directed. In these cases the top soil must be removed for such width and depth as may be considered necessary to form the embankment seats. The material arising from this mucking to be deposited where pointed out. It will be paid for as ordinary earth excavation. The seats shall also be well roughed up with a plough so as to make good bond with the first layer of earth forming the base of the embankment. Puddle walls or cut-offs to be made where required—the puddle to be prepared and laid as specified hereafter.

When the bank seats are properly prepared, inspected and approved, and not till then, the bank shall be carried up in layers of selected material, of about eight inches in thickness, well spread, the lumps broken, watered, trodden down or otherwise compacted and carefully shaped to the heights and slopes given by the engineer.

Only such portions of the embankments as shall be laid out by the engineer, and made up in strict accordance with the foregoing specifications, will be paid for as "earth in water tight banks."

99. The plans now exhibited are only intended to show the general mode of construction adopted; but detail drawings which must be strictly carried out will be supplied for the guidance of the contractor as the work proceeds.

1898

GOODWIN v. THE QUEEN.

Gwynne J.

By the contract it was specially covenanted and agreed by and between the parties among other things as follows:

Paragraph 3. That the contractor will at his own cost provide all and every kind of labour, machinery and other plant, materials, 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 hereunto annexed and set out or referred to in the plans and drawings prepared and to be prepared for the purposes of the work, and will execute and fully complete the respective portions of such works and deliver the same complete to Her Majesty on or before the day of (a day not material on this appeal) the said works to be constructed of the best materials of their several kinds and finished in the best and most workmanlike manner, in the manner required by and in strict comformity with the said specifications and the drawings relating thereto, and the working or detail drawings which may from time to time be furnished, (which said specifications and drawings are hereby declared to be part of this contract), and to the complete satisfaction of the chief engineer for the time being having control over the work.

Paragraph 8. That the engineer shall be sole judge of work and material in respect of both quantity and quality and his decision on all questions in dispute with regard to work or material shall be final, and no works or extra or additional works or changes shall be deemed to have been executed, nor shall the contractor be entitled to payment for the same, unless the same shall have been executed to the satisfaction of the engineer as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractor to be paid therefor.

Paragraph 9. It is hereby distinctly understood and agreed that the respective portions of the works set out or referred to in the list or schedule of prices to be paid for the different kinds of work, include not merely the particular kinds of work or materials mentioned in the said list or schedule, but also all and every kind of work, labour, tools, plant, materials, articles and things whatsoever necessary for the full execution and completing ready for use of the respective portions of the works to the satisfaction of the engineer, and in case of dispute as to what work, labour, material, tools and plant are or are not so included, the decision of the engineer shall be final and conclusive.

Paragraph 24. And Her Majesty in consideration of the premises. hereby covenants with the contractor that he will be paid for and in

respect of the works hereby contracted for and in the manner set out in the next clause hereof, the several prices or sums following :

* * * * *

earth excavation, per cubic yard, 20 cents, earth in water-tight embankments, per cubic yard, 15 cents.

Paragraph 25. Cash payments equal to about ninety per cent of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of this contract will be made to the contractor monthly on the written certificate of the engineer that the work for or on account of which the certificate is granted has been duly executed to his satisfaction, and stating the value of such work computed as above-mentioned and upon approval of such certificate by the Minister for the time being ; and the said certificate and such approval thereof shall be a condition precedent to the right of the contractor to be paid the said ninety per cent or any part thereof. The remaining ten per cent shall be retained, &c., &c. (unimportant on the present appeal).

As the work of construction progressed, the engineer gave to the contractor monthly progress estimates which at first were for earth in excavation only as no embankment had as yet been commenced, but in the month of August, 1893, he gave a progress estimate for July, 1893, in which he estimated for earth excavation at 20 cents per cubic yard 85,300 cubic yards and for earth in water tight embankments at 15 cents per cubic yard, 20,000 cubic yards. In September, 1893, he in like manner gave an estimate for the month of August, for earth excavation 121,700 cubic yards, and for earth in water tight embankments 30,000 cubic yards, and in like manner in October, 1893, he gave an estimate for September for earth excavation 169,800 cubic yards, and for earth in water tight embankments, 43,000 cubic yards, and in November, 1893, he gave an estimate for the month of October, for earth excavation 230,000 cubic yards, and for earth in water tight embankments 67,500 cubic yards. Payments were made to the contractor in accordance with all these progress estimates.

1898

GOODWIN v. THE QUEEN.

Gwynne J.

In the month of November, 1893, the contractor made a complaint to the Minister of Railways and Canals as to the manner in which his contract was being dealt with by the engineer, in a long letter dated 16th November, 1893, which is before us, contained in eight pages of the printed case. It is unnecessary to enter into the lengthy argument offered by the contractor in support of his complaint; it is sufficient to say that it related to three specific items, namely:

First. The interpretation of the specifications as to whether the 15 cents per cubic yard should be paid for the whole of the embankments formed from the excavation.

Second. The blue clay on sections 6 and 7, &c. &c.

Third. The difficulty and expense of bringing building for concrete to the site of the proposed lock, &c.

It is only with the first that we have to deal, and as to this it is sufficient to say that the whole of the contractor's argument in relation to it was to the effect that the contract and specifications afforded no warrant whatever for the action of the engineer in estimating for part only of the earth put into the embankments as to be paid for at 15 cents per cubic yard; and that by his contract and the specifications he was entitled to be paid 15 cents per cubic yard for every cubic yard of material put into the embankments in addition to the 20 cents per cubic yard on earth measured in excavation, and he added that even if the work should be done under the most favourable conditions these combined sums made but a moderate price for the work for which he claimed them, and he prayed that this his interpretation of his contract should be accepted as final and conclusive as to his right to the 15 cents for every cubic yard in embankments, or that he should be released from his contract upon certain

terms proposed in his letter. The Minister of Railways and Canals submitted this letter to the late Sir John Thompson, then Minister of Justice, for his opinion, and his opinion was, by a letter from the Department of Justice dated 28th February, 1894, communicated to the Minister of Railways and Canals, which in short substance is that the specifications do not admit of the construction contended for by the contractor; which opinion was communicated to the contractor in a letter from the Department of Railways and Canals, wherein the contractor was informed that in view of such opinion the Department must decline to entertain his claim.

In the meantime, while this complaint of the contractor was before the Minister of Justice for his opinion, and subsequently to that opinion having been given, the engineer continued to give to the contractor monthly progress estimates distinguishing as before between earth in excavation at 20 cents per cubic yard, and earth in water tight embankments, at 15 cents per cubic yard, until the 13th December, 1895, when the engineer gave to the contractor a progress estimate numbered 23 for the month of November, 1895, containing among other things as follows:

| | | |
|---|---|---|
| Earth excavation—1,103,713 cb. yds. at 20c... | | $220,742 60 |
| Earth in water tight embankments..... | 450,733 cb. yds. at 15c... | 67,609 50 |
| These two sums together make..... | | $288,352 10 |

In the month of March, 1895, however, the contractor had renewed his complaint to the Minister of Railways and Canals in a letter dated March 22nd, 1895. This complaint was referred to the engineer, who after hearing the contractor upon the subject made his report to the Minister of Railways and Canals upon the matter adversely to the contractor's claim. The

1898

GOODWIN v. THE QUEEN.

Gwynne J.

letter of the 22nd March together with various supplemental arguments supplied by the contractor between that date and the 10th December, 1895, was also submitted to Sir Charles Hibbert Tupper, who had succeeded the late Sir John Thompson as Minister of Justice, for his opinion.

The contention of the contractor as laid before Sir Charles Hibbert Tupper is substantially the same as that which had been laid before the late Sir John Thompson, although expressed in a more elaborate argument which is contained in thirty pages of the printed case laid before us. This elaborate argument, however, resolves itself simply into the contention that the question submitted is wholly one of law involving simply the legal construction of the contract, with which the engineer has nothing to do but to conform to it, and that such legal construction is: That it is apparent from the drawings upon which the contractor tendered for the work; that what was contemplated was one continuous embankment along each side of the canal to be constructed; that the position of the embankments indicated plainly that they must be made water tight, and that the contract gave to the contractor 15 cents for every cubic yard of earth put into these embankments within the dimensions assigned to them by the specifications; that the contract does not contemplate any such thing as a portion of the embankments respectively being made water tight, or authorise the engineer to estimate for a portion of the embankments as being water tight for the purpose of thereby limiting the allowance of 15 cents per yard to such part only; and that all that the contract excludes from the allowance of 15 cents per cubic yard is such part of the embankments, if there should be any, constructed by the contractor outside of the limits of the embankments as designed by the engineer and in excess

1898

GOODWIN v. THE QUEEN.

Gwynne J.

of the dimensions assigned to them by him in the specifications and drawings relating thereto.

In this is contained the whole substance of the elaborate argument presented on behalf of the contractor.

We have not the reasons for the conclusion at which the Minister of Justice arrived, but of his conclusion we are informed by a letter dated the 15th January, 1896, addressed by the Deputy Minister of Justice to the Secretary of the Department of Railways and Canals which is as follows :

SIR,

Referring to your letter of the 4th October last, enclosing additional correspondence and the report of your Chief Engineer with regard to Contractor Goodwin's claim as to payment for the construction of water tight embankments on the Soulanges Canal, I have the honour to state that Sir Charles Hibbert Tupper while Minister of Justice, gave the matter very careful consideration and heard Mr. Goodwin in support of his claim. The Minister came to the conclusion that the claim was one which should be entertained by your Department, but he resigned his office before that advice could be communicated to you. He desired me, however, to inform you that he had reached the conclusion which I have stated.

The question now arises : Which of those opinions should prevail ? If that of the late Sir John Thompson, which by the letter from the Department of Justice, dated the 28th November, 1894, of which only the result is given above, appears to have been identical with that of the engineer in accordance with which all his monthly progress estimates up to and including that of the 13th December, 1895, for the month of November of that year were given, then it is manifest that the matter was one which by the contract was submitted to the final judgment of the engineer whose decision has been adverse to the claimant.

The question arises before us in this manner : The claimant in his statement of claim filed in the Ex-

1898

GOODWIN v. THE QUEEN.

Gwynne J.

chequer Court under the provisions of section 23 of ch. 16 of 50 & 51 Vict. rests his claim upon what he contends is a certificate of the engineer, dated the 28th February, 1896, given in accordance, as he alleges, with the provisions of the contract in that behalf.

The respondent in the statement of defence sets out the material part of the contract and specifications as already given above, and in short substance and effect, insists that the document dated the 28th February, 1896, and relied upon by the claimant was not given, nor does it upon its face purport to have been given, as expressing the judgment or decision of the engineer as contemplated by the contract, but was given as shewn upon its face in deference to the opinion given by the Minister of Justice, Sir Charles Hibbert Tupper, as to the true construction of the contract, and did not express the judgment of the engineer, whose judgment and decision in the matter is contained in the certificate given by him dated the 13th December, 1895, which alone, as is contended, is binding, and that the claimant had received the amount so certified and that therefore his present claim should be dismissed.

To this defence the claimant filed a replication which is in substance and effect a renewal of his contention and the argument in support thereof submitted to the respective Ministers of Justice as already mentioned, and he insists that the certificate of the 13th December, 1895, was erroneous, inasmuch as it reported only 450,733 cubic yards as for earth in water tight embankments, and that the certificate of the 28th February, 1896, was given by the engineer to correct the error in his former certificate by giving credit to the claimant for 993,340 cubic yards as earth in water tight embankments instead of 450,733 cubic

yards, as had been erroneously certified in the certificate of December 13th, 1895.

The first point thus raised is whether the certificate of the 13th December, 1895, was erroneous as alleged, and this is precisely the question which had been submitted to the respective Ministers of Justice for their opinion, namely: Does the contract entitle the claimant to be paid 15 cents for every cubic yard of material put into the embankments constructed under the contract, or only for the earth put into such portions of those embankments as were laid out by the engineer for the purpose of being made, and as were required by him to be made, water tight and as should be certified by him as having been so made?

Now it cannot be disputed that as insisted by the claimant in his argument presented to the Ministers of Justice and urged before us on this appeal, that the drawings upon which the claimant made his tender, clearly shew that the embankments proposed to be constructed were two, namely, one continuous embankment (with which as extending from station 180 to station 460 on each side of the canal, proposed to be excavated, we alone have to deal); but the specifications upon which the claimant tendered also very clearly shew that for the earth to be deposited in a portion only of these embankments was the contractor to receive a sum per cubic yard to be agreed upon, and that for the earth deposited in all the residue of the embankments he was to be paid per cubic yard measured in excavation.

The 11th section of the specifications which provides for the construction of water tight banks can have relation to nothing else than to certain portions of these embankments on each side of the canal. It is in these embankments that the water tight banks are to be made when directed by the engineer, and the

1898

GOODWIN v. THE QUEEN.

Gwynne J.

mode of constructing these water-tight banks (as they are called) is specially described thus :

> The top soil must be removed for such width and depth as may be considered to be necessary to form the embankment seats.

These words "embankment seats" here used, plainly mean the seats of the portions to be made water-tight, and the material taken therefrom, that is, from the seat of the water tight portions, is to be removed from such seats and deposited where pointed out by the engineer, and wherever placed is to be paid for as earth measured in excavation only. From this direction it is obvious that the material so removed is to be deposited outside of the "water tight banks," as they are called, which are to be constructed in the embankments. Then the seats themselves from which such material shall be removed shall be roughed with a plough so as to make good bond with the first layer of earth forming the base of the embankment. This layer of earth plainly means that one first laid on the part so prepared by the plough. That all this applies to the portions only of the embankments which portions are designated in the specification "water tight banks," is very apparent from the whole tenor of the 11th specification, which goes on to provide that when the bank seats (already spoken of), and being to be constructed as the seats of water tight banks *in the embankments* are properly prepared, inspected and approved, and *not till then*, the bank shall be carried up (on the bank seats so prepared, inspected and approved) in layers of selected material of about eight inches in thickness, well spread, the lumps broken, watered, trodden down, or otherwise compacted, and carefully shaped to the heights and slopes given by the engineer, only such portions of the embankments as shall be laid out by the engineer and made up in strict accordance with the foregoing

specifications will be paid for as "earth in water-tight banks." This clause in plain language limits the right of the contractor to 15 cents per cubic yard to the earth put into those portions of the embankments which shall be laid out and so prepared as and for the water-tight banks in the embankments.

Then by the evidence we see that the portions so intended by the engineer to be made water tight were laid out by him and plainly indicated by stakes planted in a line at the distance in sections 5, 6, 7, of 112 feet from a line staked to mark the centre line of the prism of the canal, and in section 4 at the distance of 101 feet from such centre line except for the distance of 600 feet where the line was staked at the distance of 112 feet from such centre line. The spaces between these lines on either side of the canal and the southern and northern limit respectively of the prism of the canal were so laid out by the engineer as the portions of the embankments required to be made water tight, and were prepared with the plough for that purpose as directed by the specifications, and the material removed from such portions was as directed by the specifications removed by the claimant and placed by him by direction of the engineer outside of the portion so staked for the purpose of being made water tight, but within the base of the embankments, the outside limit of which was marked at such distance from the stakes planted to indicate the limit of the water tight portions on one side of the canal as would enable the top of the embankment to be fifty feet in width and on the other side thirty feet only. This disposition of the material so removed from the base or seats of the portions intended to be made water-tight plainly indicated that the part of the embankments in which such material was deposited, was not within the parts designated by the specifications as being required to be made water-

1898

GOODWIN v. THE QUEEN.

Gwynne J.

tight, and while the contract and specifications expressly provide that the contractor shall receive 15 cents per cubic yard *only for such portions* of the embankment as should be laid out by the engineer for the purpose of being made water-tight, the contractor by the adoption of the construction put upon the contract by Sir Charles Hibbert Tupper would receive 15 cents per yard for the earth removed from the seats prepared as the base of the water-tight portions as directed by the engineer and for which by an express provision in the contract and specifications he is to be paid only, wherever it should be placed, as earth measured in excavation, and by the evidence it appears that there is on a rough calculation 100,000 cubic yards so removed amounting to $15,000. It was argued further that the portions required by the engineer to be made water-tight, being so made the whole of the embankments were made water-tight; but the contract is very express that the 15 cents per cubic yard is to be paid only for earth in "portions of the embankments" and there cannot be any doubt that such portions are those only which were so as aforesaid required by direction of the engineer to be made water-tight and staked out by him for that purpose. This appears to be the plain construction of the contract and section 34 provides that:

> No implied contract of any kind whatsoever by or on behalf of Her Majesty shall arise or be implied from anything in this contract contained.

I can therefore come to no other conclusion than that the opinion of the late Sir John Thompson was correct and that the contractor is by his contract entitled to the 15 cents per cubic yard, only for the earth placed in the portions of the embankments so as aforesaid staked out by the engineer for the purpose of being made water-tight, and prepared for that purpose as prescribed

by the specifications. It was objected in argument that there was no slope given for the rear line of these portions, and that there was a variance in the mode adopted by the sub-engineers for the measurement of the earth in these portions in section 4 from that adopted in sections 5, 6 and 7, but as these portions were laid out as being well within the area of the whole of the respective embankments there could be no such rear slope. In such case the rear line of the portions laid out to be made water-tight would naturally seem to be a line drawn perpendicularly from the rear line of the base of such intended water-tight portions to the top of the embankments, and as to any variance in the mode of measuring the earth in such portions, hitherto there has been no controversy between the contracting parties upon that point; if any should arise the engineer is not only competent to correct any error if such there be, but is by the contract made final judge upon such a question. Neither of these objections, however, have any weight whatever upon the question raised by this appeal, which is simply as to the construction of the contract, namely whether it gives to the contractor 15 cents per cubic yard for all the earth in both of the embankments, the area of one of which is two-fifths larger than the area of the other, or only for the earth placed in the portions staked out by the engineer for the purpose of being made water tight, the areas of which in both embankments are equal.

It was further contended before us that whether the opinion of Sir Charles Hibbert Tupper was right or wrong mattered not, that is to say that whether the contract according to the true construction of it did or did not entitle the contractor to the 15 cents per yard for all the earth in the embankments as maintained by that opinion mattered not, for that the document upon

1898

GOODWIN v. THE QUEEN.

Gwynne J.

which the claimant relied as the certificate of the engineer given under the provisions of the contract having been approved of by the Minister of Railways and Canals, the right of the claimant to the amount claimed was now incontrovertible. I do not think we need upon this appeal decide whether, if an engineer should ever intentionally or in error, give a certificate for an amount in violation of the terms of a contract, such amount could ever be recovered in an action founded upon the contract. In the present case the certificate no. 23, the amount certified by which was paid to the contractor, equally required the approval of the Minister before it could have been paid, and the difference between that certificate and the one numbered 24 required explanation. The statement of defence filed in the present case opened an inquiry into the whole of the circumstances under which that certificate was given, and distinctly disputes the intent (as construed by the claimant) and the validity of that document. The claimant by his replication rests his support of that document upon the allegation that it was given by the engineer to correct an error alleged to have existed in no. 23, and has thus raised the specific issue: Did such error exist in no. 23?

Now, that alleged error consisted in this, that the engineer only estimated for the earth placed in the portions of the embankments laid out by him for the purpose of being made water tight, as the earth for which the 15 cents per yard was to be paid instead of certifying (as is contended by the claimant he should have certified) for all of the earth in the embankments as entitled to be paid for at such price, and the correction relied upon by the claimant is the statement which is made in no. 24 of the amount which would be due to the claimant assuming the opinion of Sir Charles Hibbert Tupper to be correct as the claimant

contends that it is. If, however, that opinion cannot be sustained, there was no error in no. 23 to be corrected, and so the issue raised by the claimant in support and justification of certificate no. 24 must fail and that certificate must therefore also fail.

Now the evidence plainly shews that certificate no. 24 does not represent and was not given for the purpose of representing the engineer's own opinion as to what the claimant was entitled to under his contract, which opinion is still as is stated in no. 23, but merely to show the quantity of all the earth in the embankments and the amount which would be due to the claimant if in accordance with the opinion of Sir Charles Hibbert Tupper he was upon the true construction of his contract entitled to be paid 15 cents for every cubic yard of earth in the embankments instead of as had been estimated by the engineer only for the earth placed in those portions of the embankments which had in point of fact been laid out and prepared for that purpose and required by him to be made watertight. The certificate no. 24 moreover shows upon its face that it is intended to be qualified by reference to other specified documents which must be referred to, and which being referred to, show that the certificate no. 24 was given for no other purpose than as just stated. Under these circumstances it appears abundantly clear that whatever force might be given to the certificate no 24 if the opinion of Sir Charles Hibbert Tupper as to the true construction of the contract could be supported, as that opinion cannot be maintained no. 24 cannot have no force to invalidate certificate no. 23 which is in accord with the true construction of the contract, nor can its approval by the Minister of Railways and Canals which must be intended also to be based upon the opinion of the Minister of Justice and must therefore fail with it, give it any force whatever.

1898

GOODWIN v. THE QUEEN.

For the above reason I must say that I am of opinion that this appeal should be dismissed with costs.

Sedgewick J.

SEDGEWICK J.—Prior to the month of May, 1893, the Government of Canada had adopted the policy of so improving the navigation of the River St. Lawrence that there should be continuously fourteen feet in depth of navigable water between the great fresh water lakes of the Dominion and the Gulf of St. Lawrence. As a part of this scheme the construction of the Soulanges Canal, a canal on the north side of the River St. Lawrence to be used in substitution for the Beauharnois Canal, a canal on the south side of the river, was undertaken. The proposed work was divided into sections, and on the 9th of May, 1893, a contract was entered into between the Crown and the present appellant for the construction of four of these sections. The clauses in the contract and specification especially affecting the questions involved in this appeal are as follows:

Clauses of contract:

3. * * * The said works to be constructed of the best materials of their several kinds, and finished in the best and most workmanlike manner, in the manner required by and in strict conformity with the said specifications and the drawings relating thereto, and the working or detail drawings which may from time to time be furnished (which said specifications and drawings are hereby declared to be part of this contract), and to the complete satisfaction of the chief engineer for the time being having control over the work.

8. That the engineer shall be the sole judge of the work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard to work or material, shall be final, and no works or extra or additional works or changes shall be deemed to have been executed, nor shall the contractor be entitled to payment for the same, unless the same shall have been executed to the satisfaction of the engineer, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractor to be paid therefor.

24. And Her Majesty, in consideration of the premises, hereby covenants with the contractor, that he will be paid for and in respect of the works hereby contracted for, and in the manner set out in the next clause hereof, the several prices or sums following, viz :

| No. of Items. | Description of Items. | Rate. |
|---|---|---|
| | | $ cts. |
| * | * * * * * " * * * * * | * |
| 4 | Earth excavation, §§ 5, 6, 7, 9, 11, 15, 19, 21, 63, 64, 70, 76..... .....Per c. yd. | 20 |
| 5 | Earth in water-tight embankments, §§ 5, 7, 11.. do | 15 |

* * * * * * * * *

N.B.—All materials to be measured in the work, and all cement used in the works of sections Nos. 4, 5, 6 and 7 will be furnished by the Department of Railways and Canals on the conditions set forth in section No. 89 of the specification. The figures placed after the various items in the above form of tender refer to the sections of the specification wherein they are described.

25. Cash payments equal to about ninety per cent of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of this contract, will be made to the contractor monthly on the written certificate of the engineer that the work for, or on account of, which the certificate is granted has been duly executed to his satisfaction and stating the value of such work computed as above mentioned, and upon approval of such certificate by the Minister for the time being, and the said certificate and such approval thereof shall be a condition precedent to the right of the contractor to be paid the said ninety per cent or any part thereof. The remaining ten per cent shall be retained till the final completion of the whole work to the satisfaction of the Chief Engineer for the time being, having control over the work, and within two months after such completion the remaining ten per cent will be paid. And it is hereby declared that the written certificate of the said engineer, certifying to the final completion of said works to his satisfaction shall be a condition precedent to the right of the contractor to receive or to be paid the said remaining ten per cent or any part thereof.

1898

GOODWIN v. THE QUEEN.

Sedgewick J.

26. It is intended that every allowance to which the contractor i fairly entitled, will be embraced in the engineer's monthly certificates; but should the contractor at any time have claims of any description which he considers are not included in the progress certificates, it will be necessary for him to make and repeat such claims in writing to the engineer within thirty days after the date of the dispatch to the contractor of each and every certificate in which he alleges such claims have been omitted.

27. The contractor in presenting claims of the kind referred to in the last clause must accompany them with satisfactory evidence of their accuracy, and the reason why he thinks they should be allowed. Unless such claims are thus made during the progress of the work, within thirty days, as in the preceding clause, and repeated, in writing, every month, until finally adjusted or rejected, it must be clearly understood that they shall be for ever shut out, and the contractor shall have no claim on Her Majesty in respect thereof.

33. It is hereby agreed, that all matters of difference arising between the parties hereto upon any matter connected with or arising out of this contract, the decision whereof is not hereby especially given to the engineer,—shall be referred to the Exchequer Court of Canada and the award of such court shall be final and conclusive.

## Clauses of the Specification :—

3. Dimensions of canal. The canal will be generally 100 feet wide at bottom with slopes in excavation of 2 to 1 throughout. The embankments forming the sides shall be of such top widths as will be directed, and be carried up to the height of 161 feet above datum on the summit level. Below lock no. 5, the top bank shall be 143 feet above datum or such other height as may be directed.

5. Classification of materials. There will only be two classes of excavation recognized or paid for, namely, "earth" or "solid rock."

6. Earthwork. The price tendered for "earth excavation" must cover the entire cost of excavating, hauling and forming into embankments, all kinds of materials found in the pits for lock, weirs or other structures, and in the prism of the canal, raceways, side ponds or wherever excavation is necessary, except solid stratified quarry rock. The price shall include the cost of removing boulders of all sizes, indurated clay, hard pan, &c., for none of which will any extra or additional allowance be made. It is also distinctly understood and agreed upon that no excavation shall be paid for

(*To face page* 303)

below the exact grade line of the bottom of the canal works or outside the line of the slopes, unless the same be executed under the written instructions of the engineer.

7. No allowance for haul.

No allowance whatever beyond the prices tendered for excavation will be made for haul. The surplus material arising from the prism, &c., on section no. 7 shall, after making up the banks on that section, be carried forward to widen the embankments of sections to the eastward; and the surplus on section no. 6 shall be dealt with in the same manner, so that all the excavation arising from the sections embraced in this contract west of Lock no. 5, will be disposed of in making the embankments on each side of the summit level between stations 180 and 460, filling around the various structures, &c. This distribution of material to be made as will be directed by the Engineer without entitling the contractor to any extra allowance whatever. The attention of parties tendering is specially drawn to this section of the specification.

11. Watertight banks.

Wherever the surface level of the water in the canal is higher than the ground alongside, water tight banks shall be made when so directed. In these cases the top soil must be removed for such width and depth as may be considered necessary to form the embankment seats. The material arising from this mucking to be deposited where pointed out. It will be paid for as ordinary earth excavation. The seats shall also be well roughed up with a plough so as to make good bond with the first layer of earth forming the base of the embankment. Puddle walls or cut offs to be made where required—the puddle to be prepared and laid as specified hereafter.

When the bank seats are properly prepared, inspected and approved —and not till then—the bank shall be carried up in layers, of selected material, of about eight inches in thickness, well spread—the lumps broken—watered—trodden down or otherwise compacted and carefully shaped to the heights and slopes given by the engineer.

Only such portions of the embankments as shall be laid out by the engineer, and made up in strict accordance with the foregoing specification, will be paid for as "earth in water-tight banks."

The plan shown to the contractor at the time of the execution of the contract, and which formed part of it, so far as the question involved in this case is concerned, is as follows: (1) This plan shows the surface of the ground

(1) See opposite.

1898

GOODWIN v. THE QUEEN.

Sedgewick J.

before any work was done, the intended bottom of the canal, the water-line when completed, and the embankments on each side, the northern embankment having a top fifty feet wide and the southern embankment thirty feet. The work, for payment of which the appellant has made the claim in controversy upon this appeal, has connection solely with the embankments on each side of the canal, and the only question is as to the amount which he is entitled to receive for the construction of these embankments. The work in question was to be done at places where the surface level of the water in the canal, when completed, would be higher than the ground alongside, and section 11 of the specification provided that in that particular case water-tight banks should be constructed on each side, but that before commencing these banks the top soil should be removed for such width and depth as might be considered necessary to form the embankment seats, the cost of removing this "muck" as it was termed, to be paid for as ordinary earth excavation, at 20 cents per cubic yard; (clause 24 of the contract); and that the ground where this mucking was taken from should be well roughed up with a plough so as to make good bond with the first layer of earth forming the base of the embankment. Further, that when the bank seats were properly prepared, inspected and approved—and not till then—the bank should be carried up in layers of selected material of about eight inches in thickness, well spread—the lumps broken, watered, trodden down or otherwise compacted and carefully shaped to the heights and slopes given by the engineer, and that only such portions of the embankments as should be laid out by the engineer and made up in strict accordance with the specification would be paid for as "earth in water-tight banks," at 15 cents per cubic yard.

(Clause 24 of the contract). It was further understood that the material of which the water-tight embankments on each side of the canal were to be made was to be taken from the excavation of the prism, if such material were suitable for the purpose, so that in effect it was provided that the contractor was to receive 20 cents per cubic yard for all earth excavation, and that in so far as this earth excavation was suitable for, and was used in, the construction of the water-tight embankments in pursuance of the terms of the specification, 15 cents per cubic yard in addition was to be paid. When the contractor entered upon his work the engineers of the government had laid out the line of the canal, indicating by stakes its central thread and the northern limit of the north embankment and the southern limit of the south embankment; indicating, too, that portion of the bed from which the top soil had to be removed in order to form the embankment seats; but there was nothing shown either upon the ground or upon any specification or plan, or by any verbal or other direction given to the contractor, that the position, height and width of the embankments themselves were to be other than indicated on the plan forming part of the contract and upon the faith of which the work was executed by the contractor. The embankments were built substantially according to the plan. The removal of the mucking or top soil to form the embankment seats was done, and the material deposited as provided by section 11 of the specification. Selected material of the character therein specified, taken from the prism of the canal, was, under the direction and with the approval of the Government engineers, and substantially in the manner specified in the clause last mentioned, used in the construction of the embankments and they were eventually completed as originally intended and as described in the original specifications and

1898

GOODWIN v. THE QUEEN.

Sedgewick J.

plans. There has never been any question or controversy between the Crown and the contractor, or between the Government engineers and the contractor, as to the work upon the embankments or the material of which they were composed, whether in respect of quantity or quality. All parties are satisfied that, so far as these matters are concerned, the appellant has fulfilled in every respect his contractual obligations; but it happened that after the completion of this particular work a dispute arose as to whether the contractor was entitled to be paid for the whole of the selected material used in the construction of the embankments, or only for a portion thereof. Sketch "D" in evidence at the trial clearly indicates the contention of the Government engineers. A line is drawn between "G" and "F" in each embankment, the bottom of the line indicating that portion of the bottom of its bed to which from the prism of the canal the top soil was to be removed and the seats prepared so as to make a good connection with the first layer of earth forming the base of the embankment, and the Government engineers claim that they have a right to draw from that point to the top of the embankment—each engineer upon the different sections having a different angle—and to say that only that portion of the embankments marked as "F" is a "water-tight embankment" within the meaning of the specification, the remaining portion of the embankments marked as "G" forming no part of such embankments, and that the contractor is not entitled to payment for that portion of them. As I have stated, there is no dispute as to the amount of material either in "F" or "G," whether as regards quantity or quality. The lines drawn as in the sketch through the embankments are purely imaginary ones. There

(See cut opposite page 303).

1898

GOODWIN v. THE QUEEN.

Sedgewick J.

is no difference in any respect between the work or material in "F" and in "G" (except as to the foundations), nor was there anything communicated to the contractor nor any indication given to him, but that the whole of the embankments as originally planned and as eventually constructed were to be otherwise than indicated in the plan forming part of the original contract. It was admitted at the argument, and the evidence showed, that had the embankments been built in the shape indicated in "F" they would have been altogether insufficient for the purpose; that they might possibly last for a season or so, but that they could not be considered as permanent or as properly constructed water tight embankments. Notwithstanding this, however, the engineers insisted that they had a right of their own motion, without reference to the contractor, to divide by an imaginary line the completed embankment, and to say that only a small portion of it (I have not been able to ascertain what particular portion or the dimensions of that portion) should be paid for by the Crown.

Upon the completion of the embankments a progress estimate, purporting to be under section 25 of the contract, was made by the Chief Engineer of Government Railways, based upon this view of the engineers upon the ground, and the contractor was allowed for earth in water-tight embankments 450,733 cubic yards, amounting in price at 15 cents per cubic yard to $67,609.95. As a matter of fact the quantity of earth in those embankments, being selected material used in construction, was 1,103,713 cubic yards, the price for which, after deducting 10 per cent for shrinkage, at 15 cents per cubic yard, would be $149,001, making a difference in price of the amount claimed by the appellant on this appeal (less the 10 per cent deduction). The date of this progress estimate was 13th

1898

GOODWIN v. THE QUEEN

Sedgewick J.

December, 1895. It appears that before this progress estimate or certificate was given by the chief engineer there had, as was natural, been differences and arguments between the contractor and Mr. Schreiber, who was Chief Engineer and Deputy Minister of Railways and Canals as well, as to whether the basis upon which the measurements for the material composing the water-tight embankments was correct in principle under the terms of the contract. The question was referred to the then Minister of Justice by the Department of Railways and Canals, and he gave an opinion based upon the statements then submitted to him as facts, that the contention of the engineers was the sound one, and it was acting upon that opinion as well as upon his own view that the chief engineer gave the limited certificate to which I have referred, of the 13th December, 1895. The contractor was dissatisfied with this action on the part of the chief engineer. He prepared a new statement of his case, presenting additional evidence and urging its re-consideration. This new statement, together with all the papers in connection with the case, was again referred by the Department of Railways and Canals for opinion to the then Minister of Justice (Sir John Thompson having in the meantime died). In replying to this reference the law officers of the Crown advised the Department of Railways and Canals, in effect, that the appellant's contention was correct, and that his claim should be considered by the chief engineer as a legal one under the terms of the contract. Influenced by that opinion the Minister of Railways and Canals authorized the issue of a progress estimate in order to entitle the appellant to payment of his money, and thereupon the certificate in question upon this appeal was issued. That certificate is as follows:

## RAILWAYS AND CANALS.

**FORM No. 7.**

TO THE ENGINEER MAKING THE ESTIMATE, INSERT AT

1. Progress or final.
2. Date up to which this estimate is made.
3. Name of contractor.
4. Contract or extra.
5. and 7. Number of the letter from the department to the engineer ordering the work to be proceeded with.
6. Name of person to whom this letter is addressed.
8. Date of this letter.
9. Maximum of expenditure authorized by letter.
10. The nature of the work for which the sum is granted.

Make an estimate for contract work alone, and a separate one for each order for extra work. The several estimates to be tied together with the summary of the whole at the end.

No. of Estimate—24. Date of Contract, 9 May, 1893.
Name of work—Soulanges Canal, Section Nos. 4, 5, 6, and 7.
Name of Contractor—George Goodwin.
Number of Contract—11,518,

(1) Progress estimate of work done and materials delivered from the beginning of the work to the (2) 30th November, 1895, by (3) George Goodwin, contractor, on (4) work done by letter No. (5).....

The works, the details of which are given in this estimate, were proceeded with under the order of the Department of Railways and Canals to (6).....No. (7)..... dated (8).....189 , authorizing an expenditure of (9) $..... to (10).....

| No. of Item. | Description of Works and Materials. | | | Quantity. | Prices. | Amount. | Totals. |
|---|---|---|---|---|---|---|---|
| | | | | | $ cts. | $ cts. | $ cts. |
| 1 | Clearing and grubbing | Acres | ..... | 8,34 | 20 00 | 166 80 | |
| 2 | Fencing | 100 L. ft. | ..... | 328 | 15 00 | 4,920 00 | |
| 4 | Earth excavation on section | C. yds. | ..... | 1,103,713 | 20 | 220,742 60 | |
| 5 | Earth in water-tight banks—Exen. as above.... 1,103,713 | " | | | | | |
| | Less 10 per cent shrinkage, say..... 110,373 | " | | | | | |
| | 993,340 | " | [*] 542,607 | 993,340 | 0 15 | 149,001 00 | 374,830 40 |
| | Materials delivered— | | | | | | |
| | Woven wire for fence | L. ft. | ..... | 24,000 | 0 06 | 1,440 00 | |
| | Posts, boards, etc | Bulk sum | ..... | $700 | | 700 00 | 2,140 00 |
| | [*] Classification in accordance with decision of Minister of Justice. See letter of 15 January, 1896. T. M. | | | | | | $376,970 40 |
| | Progress and final estimate sheet. | | | | | | |

[*] Added in red ink.

PROGRESS ESTIMATE AND CERTIFICATE.

*Folio 658.*

## RAILWAYS AND CANALS.

No. of Estimate, 24.

SUMMARY of the Estimates in favour of George Goodwin, Contractor, for work done and materials delivered up to 30th November, 1895, at Sections Nos. 4, 5, 6 and 7, Soulanges Canal.

| AUTHORITY BY DEPARTMENT OF RAILWAYS AND CANALS. | | | | | | |
|---|---|---|---|---|---|---|
| Date of Letter. | Number of Letter. | Name of the person to whom the letter authorizing the expenditure is addressed. | Amount Authorized. | | $ | cts. |
| | | | | | 376,970 | 40 |
| | | | | On extra work ordered to be proceeded with by letter No. — dated | | |
| | | | | On extra work ordered to be proceeded with by letter No. — dated | | |
| LESS. | | | | | | |
| Amount returned for Pay-lists and accounts ... | | | | | | |
| Amounts returned for work done under other contracts or for extra work authorized, and not included in present summary .... ..... | | | | | | |
| Amount returned under present summary..... | | | | Less drawback, 10% say..... | 37,690 | 40 |
| Forming the total amount certified up to date against sum authorized. | | | | $ | 339,280 | 00 |
| | | | | (In pencil.) | 266,020 | 00 |
| | | | | | 73,260 | 00 |

Dept. of Railways and Canals, FEBY. 28, 1896. Accountant's Office.

I hereby certify that the above estimate is correct, that the total value of work performed and materials furnished by Mr. George Goodwin, Contractor, up to 30th November, 1895, is three hundred and seventy-six thousand nine hundred and seventy and $\frac{40}{100}$ dollars; the draw-back to be retained thirty-seven thousand, six hundred and ninety and $\frac{40}{100}$ dollars; and the net amount due three hundred and thirty-nine thousand, two hundred and eighty dollars, less previous payments.

(Sgd.) THOS. MUNRO.

Dated COTEAU LANDING, P.Q.,
26th February, 1896.

[*] *Signed by me subject to conditions stated in my letter of 26th Feb., '96.* *T.M.*

[*] *Total amount certified on this contract $376,970. $\frac{40}{100}$.*

*COLLINGWOOD SCHREIBER.*

[*] *Certified as regards item No. 5 in accordance with letter of Deputy Minister of Justice, dated 15th Jan., 1896.*

*Ottawa, 27th Feb., 1896.* *Chief Engineer.*

ENGINEER'S AUDIT OFFICE,
Department of Railways and Canals.
Examined and checked,
G. A. MOTHERSILL. 27-2-96.
Progress and final estimate sheet.
[*] Added in red ink.

This certificate was sent to the office of the Auditor. General, accompanied by the following letter:—

Form D. 30. EXHIBIT 5.
Application No. 345.

DEPARTMENT OF RAILWAYS AND CANALS.

$73,260.

OTTAWA, February 28th, 1896.

*To the Auditor-General:*

SIR,—I have the honour to request the issue of a cheque in favour of George Goodwin, for the sum of seventy-three thousand, two hundred and sixty dollars, being for work done as per Est No. 24 to Nov. 30th, 1895.

Secs. 4, 5, 6. 7.

Total payments, $339,280.

Chargeable to Appropriation ; Soulanges Canal Cap.

I am, Sir, your obedient servant,

COLLINGWOOD SCHREIBER,
*Deputy Minister.*

LEONARD SHANNON,
*Accountant.*

But for some reason or other not disclosed by the evidence and not known to us, except from proceedings which form no part of the record, the Auditor General refused to issue the cheque, and thus the matter stands.

The matters in difference between the contractor and the Department of Railways and Canals was referred by the Minister of that Department to the Exchequer Court of Canada under section 23 of "The Exchequer Court Act." When the case was first heard before that court judgment was ordered to be entered in favour of the claimant, but upon a re-hearing that judgment was reversed and the claim dismissed, the court, however, still being of opinion that on the merits the claimant was entitled to recover, but out of deference to what was supposed to be a decision of this court in the case of *Murray* v. *The Queen* (1), the learned judge

(1) 26 Can. S. C. R. 203.

1898

GOODWIN v. THE QUEEN.

Sedgewick J.

gave judgment in favour of the Crown; hence the appeal to this court.

Only one question has so far been fully argued before us, namely, the question of the validity of the certificate of the 27th February, 1896, but the merits of the case were necessarily involved in that question and were therefore incidentally touched upon, and it was understood at the close of the argument that if we were of opinion that the certificate was good the appeal should be allowed, and that no further argument as to the merits of the claim would be necessary.

It was contended at the argument before us that the certificate was bad, first, because it was not in the form prescribed by clause 25 of the contract, inasmuch as it did not specifically state that the work had been done to the satisfaction of the engineer; secondly, that it was bad because there had been a decision by the engineer upon the question in dispute, and that by section 8 of the contract such decision was final and irreversible; and thirdly, that it was bad because the certificate of the engineer was his certificate in form only; that in substance it was the certificate of a "third party," namely, the Minister of Justice, upon whose opinion it was said to have been issued, and that such a certificate was no certificate within the meaning of section 25 of the contract.

Upon the first of these points I am of opinion that the certificate sufficiently complied with section 25 of the contract, when taken in connection with the evidence and the circumstances of the case. The clause requires a certificate that the work for, or on account of, which the certificate is granted, has been duly executed to the engineer's satisfaction, and that it should state the value of such work computed at the prices agreed upon or determined under the provisions of the contract. The schedule part of the certificate which

has been set out states that it is a progress estimate of work done and materials delivered from the beginning of the work up to the 30th November, 1895; and it then states the price, the items, and the different kinds of work done up to that date. The chief engineer's letter to the secretary of his Department, enclosing the estimate, states that he encloses therewith *duly certified for payment* the estimate in question for work done and materials delivered in connection with the sections in question. The following is a copy of the letter above referred to:—

EXHIBIT 4.

OFFICE OF THE CHIEF ENGINEER OF RAILWAYS AND CANALS.

OTTAWA, 28th February, 1896.

SIR,—I enclose herewith duly certified for payment an estimate, in favour of Mr. Geo. Goodwin for work done and materials delivered in connection with sections Nos. 4, 5, 6 and 7 on the Soulanges Canal up to the 30th November, 1895.

Gross Estimate, $376,970.40.

I am, Sir,

Your obedient servant,

COLLINWWOOD SCHREIBER,

*Chief Engineer.*

Per L. K. JONES.

To the Secretary,
Department Railways and Canals,
Ottawa, Ont.*

In these documents constituting the certificate there is, therefore, over the signature of the Chief Engineer the statement that the "estimate is correct," that the amount of money "mentioned is due," and that the estimate has been "duly certified." Having in view these statements it appears to me that it cannot be successfully contended that the certificate does not show that the work thereby certified for had been

*This letter bears on its face the dating stamp of the secretary's office, "Dept. of Railways and Canals, February 28th, 1896, 11 a.m."

1898

GOODWIN v. THE QUEEN.

Sedgewick J.

duly executed to the engineer's satisfaction. If the work was done as he certifies, it must mean—done in accordance with the contract—which means done to his satisfaction. When he said, as he did in the certificate, that the money was due, did it not necessarily mean that the work had been done to his satisfaction as the contract required? It necessarily meant this, otherwise he could not say that any money was due in respect of it. And if he said as he did, that the estimate was duly certified for payment, he, the chief engineer, knowing the requirements of clause 25, must be taken to have said that the work had been executed to his satisfaction, otherwise the requirements of the clause as to the certificate had not been duly complied with, and the estimate had not been duly certified. As a matter of fact that the work was done to the satisfaction of the engineer is proved beyond dispute. The evidence of Mr. Schreiber, conspicuously free as it was from impartiality or bias, is clear upon this point, as well as that of Mr. Coutlée, one of the engineers upon the ground, and others. There are no judgments of any court whose decisions we are bound to follow directly bearing upon the question, but such opinions or decisions as there are are all in favour of the validity of the certificate.

In Hudson on Building Contracts, second edition, page 294, that author states that it is his opinion on the authorities cited that

> if a certificate of payment and satisfaction is required, a certificate for payment will imply a certificate of satisfaction.

In *Harman* v. *Scott* (1) the contract provided for progress payments, and also that the balance of the stipulated price

> should be paid by the proprietor to the contractor within fourteen

(1) 2 Johnston's New Zealand Reports 407.

days from the architect's certificate being given that the works are completed to his satisfaction.

The architect gave a certificate in this form:

I hereby certify that Messrs. S. Brothers are entitled to the sum of £135 13s 5d, being balance of amount due to them on account of extras for your house at S.

The New Zealand Court of Appeal held that this was a sufficient certificate by the architect under the contract that the works were completed to his satisfaction. Sir George Arvery, in delivering the judgment of the court, composed of himself and three other judges, said, at page 418:

In the present case the certificate of the architect implies the approval of the work done. He certifies the balance of amount due to the builder by the employer on account of the contracts on which his certificate was based, and in pursuance of which he issued that certificate which he knew he had no power to give except and until the works were completed to his satisfaction. Assuming therefore that the certificate was honestly given, it is not consistent with any other supposition than that the architect was satisfied with the manner in which the works had been completed.

In *Clarke* v. *Murray* (1) the contract provided that percentage payments should be made to the contractor at intervals during the progress of the works at the discretion of the architect upon certificates in writing under his hand, and the balance when the whole work was completed to his satisfaction and his certificate given to that effect. The architect certified that the contractor was entitled to receive the sum of £64 19s 9d, this being the final certificate in full. The Supreme Court on a case reserved for the opinion of the full court held that that was a certificate to the effect that the whole of the work was completed to the architect's satisfaction, though the fact of satisfaction was not in terms expressed in the certificate.

(1) 11 Victoria L. R. 817.

1898

GOODWIN v. THE QUEEN.

Sedgewick J.

In *Galbraith* v. *Chicago Architectural Iron Works* (1), where the building contract provided as a condition precedent for payment that the architect should certify that the work had been done to his satisfaction, and upon the completion of the work the architect made his certificate omitting any reference to "his own satisfaction," the Court of Appeal held that the certificate that the work was completed implied that it was done as the contract required and to the satisfaction of the architect.

The New York Court of Common Pleas, in 1894, in *Snaith* v. *Smith*, reported in 27 New York Supplement 379, held that an architect's certificate that "there is now due to 'the contractor' the final payment of his contract," specifying the amount sufficiently complies with a contract requiring final payment within thirty days after completion provided that the architect should certify in writing that all the work upon the performance of which the payment is to become due has been done to his satisfaction.

These decisions confirm me in the opinion which I hold that the certificate, so far as this point is concerned, is sufficient in form and that the appellant's contention in this respect is the right one.

As to the second objection, namely, that the certificate of December 13th, 1895, had the effect of *res adjudicata* under clause 8 of the contract, I entertain no doubt whatever. This contention is based upon the assumption that there was a dispute within the meaning of clause 8; that there was an adjudication of such dispute, and that the certificate was the evidence of that adjudication. Now the evidence establishes conclusively that there never was in connection with this case any decision or adjudication at all by the engineer in a matter which under the contract he had

(1) 50 Ill. App. R. 247.

1898

GOODWIN v. THE QUEEN.

Sedgewick J.

authority or jurisdiction to decide. The question in dispute, as I have already indicated, was not a dispute as to the quantity or quality of the work or material, but as to the construction of the contract, the point being as to whether the embankment, as a whole, was to be paid for so far as it consisted of selected material, or whether it was competent for the government engineers after it was completed to divide it into two portions by an imaginary line and declare that only one of these portions was to be paid for and not the whole. That was a legal question, not a question of fact, the decision whereof was not given to the engineer but was a question to be settled by process of law, or as provided for by clause 33 of the contract, by a reference to the Exchequer Court. The decision of the engineer had no legal effect whatever so far as the legal question was concerned, whether that opinion was based upon advice of the law officers of the Crown or not. But even if it were so, the certificate of the engineer is not a decision within the meaning of the contract. The only office of the certificate under the contract is that it is a voucher to the department charged with the disbursement of public moneys that the claim is due, and at the same time the existence of such a certificate is a condition precedent to enable the contractor to obtain any money at all. That is its only purpose. It may of course be used by the claimant against the Crown in an action brought for the recovery of the money therein referred to as evidence in support of his claim, although even that in ordinary cases may be questioned. In the present case the certificate signed by Mr. Schreiber as chief engineer, in connection with the letter above set out from him to the Auditor General, writing in his capacity of Deputy Minister of Railways and Canals, does, in the absence of anything to the contrary, furnish conclusive evi-

1898

GOODWIN v. THE QUEEN.

Sedgewick J.

dence of the suppliant's claim. It may too be of service as evidence of a decision under clause 8 of the contract in a case where the engineer has jurisdiction, but even that is doubtful, as I think that the contract as a whole contemplates a written decision.

Mr. Goodwin in the present case is called a contractor because he has entered into a contract with the Crown. He is employed to do mechanical work for the Government. He is a contractor in the same way as any other employee is, and is entitled to be paid for his work when it is done. All parties are at liberty to make any stipulation they please as to the time and manner of compensation. It has been agreed in the present case that the contractor shall be paid for his monthly labour at the end of each month, subject to a reduction of ten per cent as security for good faith and as a guarantee that the whole contract will be completed; but it is further provided that a certificate of the kind specified must be produced before payment can be exacted. The certificate is nothing more, as I have said, than an instrument required to be signed by responsible officers of the Crown as evidence that the money demanded has been duly earned.

These considerations help us to come to a conclusion upon the third objection to the certificate, viz.: that it is not Mr. Schreiber's certificate, but the certificate of Sir Charles Hibbert Tupper, the then Minister of Justice. I am not prepared to say that even if Mr. Schreiber had under the contract authority to make a decision upon a question of law as the present is, he would not be perfectly justified in applying to the law officers of the Crown for advice and of following that advice even if he, a layman, were of opinion that such advice was erroneous. A judge in investigating a question which he is called upon judicially to decide may endeavour to obtain light from any source. He

may consult books, the opinions of his brother judges whether verbally expressed or forming part of written jurisprudence generally, and he may act upon the opinions which he has heard or read, even though they may not at first commend themselves to his judgment. But in the present case it was clearly Mr. Schreiber's duty to seek legal advice from the authority appointed by statute to give it, (see R. S. C. ch. 21, secs. 3 and 4), upon the legal question to be settled, before he could give a certificate at all. The contractor had been already paid, as I understand, for the work as originally allowed. Whether he should be paid the balance of the claim depended upon the conclusion to which the department came as to the merits of the legal controversy. It was only upon the settlement, so far as the Railway Department was concerned, of that legal question that any certificate could be given in respect to the remainder of the claim, and upon the settlement of it by the department upon the advice of the Minister of Justice it then became the clear duty of the chief engineer to measure the work and to compute the price for it under the provisions of the contract in that regard. It must be borne in mind that neither Sir John Thompson nor Sir Charles Hibbert Tupper expressed or was asked to express an opinion upon the quality, quantity or price of the work in question. They in no way sought to influence or did influence the engineer in his conclusions upon these points. In regard to them he exercised his jurisdiction and delivered his judgment solely upon his own responsibility and upon the information furnished him by his subordinate officers. The effect of the certificate so far as this point is concerned is that Mr. Schreiber has adopted the law as laid down by the law officers of the Crown and has made the measurements and fixed the price, assuming that opinion

1898

GOODWIN v. THE QUEEN.

Sedgewick J.

to be correct. I do not think the certificate can be objected to upon that ground. Further, I think it is reasonably clear from the special provisions of the contract, namely, clauses 26 and 27, which are above set out, that the monthly certificate was not a decision upon any legal question. Doubtless the contractor complied with the provisions of these two clauses and this claim was made and repeated in pursuance thereof.

One other point remains to be considered, viz., how far the decision in *Murray* v. *The Queen* (1) affects this case. We are all of opinion that it does not, notwithstanding the perhaps just criticism of the learned Exchequer Court Judge upon the phraseology of certain portions of it. In that case there was no question as to the form of the certificate, because all such objections were, at the instance of the court, formally waived, and the statement upon which the learned judge relies was a statement, not made in the course of a discussion of law involved in the case, but merely in a statement of the reasons which moved the court to insist upon a specific waiver. Inasmuch then as it was not a point in controversy in the argument of that case as to what form a certificate like the one in question must necessarily take, any statements of law upon that point were *obiter dicta*, and therefore, though entitled to consideration, not binding upon other tribunals.

It was further argued before us that the judgment in that case was conclusive upon the contention to which I have already referred, that the first certificate was an adjudication and that the engineer was *functus officio* at the time he made the second certificate, but the contract in that case was in this particular essentially different from the contract in the present case.

(1) 26 Can. S. C. R. 203.

1898

GOODWIN v. THE QUEEN.

Sedgewick J.

By its express terms it was there provided that the engineer should not only have the authority which he has in the present case, but that all matters in dispute whether of fact or law might be decided by him, and that his decision was to be final. In this contract his power to decide is of a much more limited and restricted character. He can decide and only decide upon disputes as to quantity or quality.

I would have dealt at greater length with some of the questions involved, had they not been most fully and satisfactorily discussed by my brother Girouard.

In consequence of the agreement come to at the close of the argument, there must be judgment for the appellant, we being of opinion that the certificate of the 27th February, 1896, is sufficient in form to comply with the provisions of clause 25 of the contract, and that its production satisfies the condition precedent therein specified, and that so far as it is concerned the appellant is entitled to judgment. The original judgment of Mr. Justice Burbidge enlarged unconditionally to the amount of the certificate stated upon the reference will stand to take effect from its date, the appellant being entitled to all costs in this Court and the Exchequer Court.

The parties will be heard on the question of interest.

KING J.—The works contracted for were, in the main, of the kind "where the surface level of the water in the canal was higher than the ground alongside." The price for earth excavation—20 cents per cubic yard—covered the hauling and forming of it into embankment, as well as the excavating, but it was provided that, in the case of such portions of the embankment as might be made water-tight under clause

1898

GOODWIN v. THE QUEEN.

King J.

11 of the specifications, there was to be a further allowance of 15 cents per cubic yard of embankment.

Clause 11 is as follows:

Wherever the surface level of the water in the canal is higher than the ground alongside, water-tight banks shall be made when so directed. In these cases the top soil must be removed for such width and depth as may be considered necessary to form the embankment seats. The material arising from this mucking to be deposited where pointed out. It will be paid for as ordinary earth excavation. The seats shall also be well roughed up with a plough so as to make good bond with the first layer of earth forming the base of the embankments. Puddle walls or cut offs to be made where required—the puddle to be prepared and laid as specified hereafter. When the bank seats are properly prepared, inspected and approved—and not till then—the bank shall be carried up in layers, of selected material, of about eight inches in thickness, well spread—the lumps broken—watered—trodden down or otherwise compacted and carefully shaped to the heights and slopes given by the engineer. Only such portions of the embankments as shall be laid out by the engineer, and made up in strict accordance with the foregoing specification, will be paid for as "earth in water-tight banks."

The plans exhibited at the time, and forming part of the contract, showed the general embankment, but did not in any way distinguish the water-tight portion. Detail drawings as the work proceeded were, however, provided for, but so far as regards the water-tight banks no detail drawings were at any time given to the contractor. Certain things, however, were done on the ground and certain directions given which, it is claimed, sufficiently indicated what was to be done.

The centre line of the canal, as also the inner and outer side-lines of the general embankments, were shown upon the ground by lines of stakes. Between these latter, and at a distance from the centre line of the canal of from 101 to 112 feet, another line of stakes was set by the engineer. These were called mucking stakes, and their clear and understood purport was to indicate that the top soil was to be removed from the area of the general embankment as far back as this

line of stakes with a view to the forming of the seats of the water-tight embankments.

This top soil was accordingly removed by the contractor, and deposited by direction of the engineer upon the adjacent embankment area lying immediately outside of the line of mucking stakes. Here also was deposited the top soil taken from the prism of the canal, and also that from an outer space required for a ditch. The effect of this was to accumulate upon that part of the area of the general embankment lying outside of the mucking stakes, a considerable body of loose and porous top soil which, *ex hypothesi* of the specification, was not deemed suitable for the formation of water-tight bank. The stripped portion of embankment area was then roughed up with a plough in order that it might form a good bond with the first layer of earth which, when deposited, would form the base of the water-tight embankment.

This completed the preparation of the seat of the water tight embankment, and, when inspected and approved, the bank, *i.e.* the water-tight portion of the embankment, was then to be carried up,—by which is meant that it was to be carried up upon its base, the layer of earth in contact and bond with the prepared seat,—in layers of selected earth of about eight inches in thickness, well spread, the lumps broken, watered, trodden down, or otherwise compacted, and carefully shaped to the heights and slopes given by the engineer.

The excavated material taken from the prism of the canal after removal of the surface soil was of a kind peculiarly well suited for the making of water-tight bank, and, in the opinion of the engineer, it was possible to dispense with the special requirements for compacting mentioned in the specification. The evidence shews that the minimum of labour was put upon it.

1898

GOODWIN v. THE QUEEN.

King J.

Then inasmuch as about all the excavated material was of this select quality, it was used in the formation of the entire embankment, the only difference in the treatment of it being, (as stated by Mr. McNaughton), that more care was taken in the spreading of it as far back as the mucking stakes. As completed, the front and the rear portions of the embankment differed then in this:—that the front portion was composed of the select material from top to bottom, and its base rested on and formed a bond with the prepared seat, while the rear portion was composed, above, of the select material, but below it was an accumulation of discarded and porous surface soil, resting on other surface soil in a natural and unprepared state, and therefore manifestly, and upon the evidence, not impervious to water that might reach it.

The omission of plans shewing the exterior slope of the front portion of the embankment, and the omission in point of fact to give to it an independent shaping, were not material, considering the uniform good quality of the material (apart from the top soil) used throughout the entire formation. To require this could only have involved the contractor in unnecessary expense, and, like the dispensing with the requirements for compacting, was advantageous to the contractor.

It was suggested that, in the absence of plans of water tight banks, the whole embankment is to be taken as having been laid out by the engineer as such. But it seems to me that neither could the engineer have intended to lay out for water-tight embankment the area upon which he directed the discarded porous surface soil to be deposited, nor could the contractor reasonably have supposed, from anything done or omitted to be done by the engineer, that it was so intended. Of course the question is not whether the embankment was or was not water-tight in fact, nor

whether it needed to be kept in position by the support of other material, but whether it was laid out and directed to be constructed as for water-tight embankment having regard to the description of it contained in the contract.

When, therefore, the chief engineer had occasion early in the execution of the contract to estimate the quantity of earth formed into water-tight embankment, he correctly treated such embankment as limited to what was carried up upon the prepared seats.

On the 16th November, 1893, the contractor, in a letter addressed to the Minister of Railways and Canals, objected to this, and claimed that "according to the contract the whole of the embankment should be paid for at 15 cents per yard," alleging that the whole had been laid out by the engineer as water-tight embankment.

This claim, although renewed, was as often rejected by the chief engineer, in successive estimates. In March, 1895, the contractor presented to the Minister a fully reasoned statement in favour of his view. This appears to have been submitted to the chief engineer, who, after full inquiry and hearing the contractor, decisively rejected the claim, both in departmental communications, and by his certificate number 23 covering all work down to and including the month of November, 1895. In this the total of earth excavation was given at 1,103,713 cubic yards, and the total of earth in water-tight embankments at 450,733 cubic yards. The amount found to be due on this estimate was paid to the contractor less amounts paid on previous certificates.

The contractor continued notwithstanding to press his views upon the department, and in the result, in consequence of an opinion from the Justice Department to the effect that the contractor's claim ought to

1898

GOODWIN v. THE QUEEN.

King J.

be entertained, another estimate (no. 24) was prepared to give effect to this view covering the same work and period as that of no. 23. In this the number of cubic yards of excavation was given, as before, at 1,103,713, but the quantity of earth in water-tight embankment at the full quantity of excavated earth with deduction for shrinkage, making 993,340 cubic yards instead of 450,733, as before, that is to say, the entire canal embankment was treated as water-tight bank under the contract.

In certifying this the chief engineer, in words inserted by him between the signature of his name and that of his office, declared that as regarded item No. 5, *i. e.*, as to the earth in water-tight embankment, he certified in accordance with the letter of the Deputy-Minister of Justice dated 15th January, 1896.

Before the money was paid upon this, the department reverted to the opinion of the chief engineer, and in these proceedings questions the binding character of the certificate.

Under this contract the engineer was impliedly empowered to determine, at least provisionally, all questions that might require decision in order to enable him to make his certificate, but he was (amongst other things) to compute the value of the work according to the prices named. His position was similar to that of the surveyor in *McDonald* v. *Mayor of Workington* (1), of whom Lord Esher said:

> He is an independent person. His duty is to give the certificate according to his own conscience, and according to what he conceives to be the right and truth as to the work done, and for that purpose he has no right to obey any order or any suggestion by these people who are called his masters. For that purpose they are not his masters.

But the works owner may waive a certificate to the extent that it makes for him, or to such end may dis-

(1) Hudson on Building Contracts, 2 ed. vol. 2, p. 222; 9 Times L. R. 230.

charge the certifying engineer from the obligation to exercise his own judgment. This in effect is what was done here. The department in effect says to him: "Never mind your own opinion. We know what you think, but we think differently, and we desire you to act on our opinion and not upon your own." And to show that his own mind did not go with his act the chief engineer was careful to explain how he came to add his signature. Such a certificate may be evidence of an admission of liability on the part of the works owner, or some evidence tending towards proof of waiver, but it is not, as it seems to me, the certificate contemplated by the contract.

Further, if the certificate had purported to express the mind of the chief engineer, and there had been no assent to it, it would have been open to objection by the works owner as being *ultra vires* inasmuch as the engineer had previously rejected the claim. By clauses 26 and 27 it is provided that in case claims of the contractor are not included in the progress certificate he may, until such claims are finally adjusted or rejected, repeat them in writing to the engineer within thirty days after the date of the despatch to the contractor of each and every certificate in which he alleges such claims to have been omitted. Claims might be of such a nature that their omission from a progress certificate would not imply their rejection, but the claim here made by the contractor was such that the determination in certificate no. 23 that the total quantity of earth excavation was 1,103,713 cubic yards, and that the quantity of earth in water-tight banks was but 450,733 cubic yards, was a rejection (after a full hearing) of the contractor's claim to be allowed, as for earth in water-tight embankment, the quantity of earth in the entire embankments, and it was not com-

1898

GOODWIN v. THE QUEEN.

King J.

petent for the engineer afterwards to reverse this determination.

The consent of the works owner to this being done did not amount to a contract, but was a bare assent to the engineer doing something, or rather a direction to him to do something which under the contract it was not competent for him to do. Under the contract a certificate of the engineer made within its provisions would, if approved by the Minister, create a debt due; and in relation to matters within the competence of the engineer to decide, I am inclined to think that an assent of the works owner adopted by the engineer as his own conclusion could not be retracted after the making of the certificate. But here the effect sought to be given to the certificate in question is to give to it a validity which, without such assent, it could not have, and this in two respects, viz.: in reversing his own determination expressed after hearing the contractor, and secondly, in computing the value of the work otherwise than according to the contract, as for example, in the allowance of more than 20 cents per cubic yard for top soil removed in the process of mucking.

For these reasons I think the appeal should be dismissed.

GIROUARD J.—Besides the reasons which have been advanced by Mr. Justice Sedgewick, I propose to offer a few remarks upon the validity of the engineer's certificate, which is the only point submitted for our determination.

The principal, and I may say the only, serious objection raised by the Crown to the form of the monthly estimate of the engineer of the 26th of February, 1896 —which it is sufficient to examine independently of the reservations made by the resident superintendent

engineer—is that it has been certified by the chief engineer on the 27th of the same month "in accordance with letter of Deputy Minister of Justice, dated 15th January, 1896." Taking for granted that he was sole judge of all matters in dispute under the contract, did he agree to the views embodied in that letter? Undoubtedly he did and deliberately so. He had ample time to consider the matter, the letter having been written more than a month previously. We must suppose that he is an intelligent, competent, firm and fair man as he is represented to be the sole arbiter between the parties, though in Her Majesty's service in the double capacity of Chief Engineer and Deputy Minister of the Department of Railways and Canals. He did not remonstrate nor resist, but very properly, in my opinion, accepted the final decision of the Minister of Justice, the law adviser of the Crown designated by statute, upon a point which was considered by him and both the Crown and the contractor as one of construction of contract, and a legal question. Naturally, he certified the estimate in accordance with that decision, thereby concurring in it. No threat or coercion was used to induce him to sign. I am inclined to apply here the general rules which govern consent in contracts; error, fraud, violence or fear alone vitiate such consent. Nothing of the kind is suggested.

The estimate of the 26th of February, 1896, was certified by the chief engineer on the 27th as above stated, but on the following day, the 28th, he despatched by letter his certificate to the Department of Railways and Canals without any qualification whatever, enclosing at the same time the estimate "duly certified for payment"; and on the same day that Department likewise requested, in the usual form, the Auditor General to pay the appellant without any reservation. The Crown informs us in its statement of defence that the

1898

GOODWIN v. THE QUEEN.

Girouard J.

Auditor General refused to do so. It is conceded, however, that this refusal has no importance to the determination of the case.

The letter of the 28th of February clearly shows that the chief engineer never intended that his signature of the 27th "in accordance with letter of Deputy Minister of Justice, dated 15th January, 1896," should be regarded as qualifying the certificate; in doing so, he properly thought—and says so in his evidence—that upon a question of this kind, he should express that he was guided by the opinion of the Minister of Justice; and it seems to me no better authority could be consulted or quoted so far as the Crown is concerned. At all events, his letter of the 28th establishes beyond doubt that on that day at least he considered the estimate as " duly certified for payment."

On the same day the engineer's certificate was approved in writing, without any qualification, by the Deputy-Minister of Railways and Canals, duly authorized to do so under the provisions of the Act respecting the Department of Railways and Canals (1), and it is further proved that, as a matter of fact, this approbation was given with the express sanction of the Minister personally; so both the Minister, Mr. Haggart, and his Deputy, Mr. Schreiber, declare under oath. Mr. Haggart—and the respondent had an opportunity to cross-examine him—says in his affidavit:

2. That I was fully aware long before the fifteenth of January last, of the nature of the claim of the claimant in question herein, and it was with my approval that the questions raised by said claim were referred to the Minister of Justice for opinion.

3. That I read the opinion of the Minister of Justice of the 15th of January last, in reference to said claim shortly after said date, and before the progress estimate of February last in question herein was given.

(1) R. S. C. ch. 37, ss. 9 and 23.

4. That I approved of the said estimate being given by the chief engineer and of the action of the Deputy-Minister in requesting by his letter of the 28th of February last the Auditor General to pay the same.

It is contended that Sir Charles Hibbert Tupper, Minister of Justice, referred to in the statement of defence, for reasons I do not appreciate, as "a third party," although not named, had no power to interfere, as the matter had already been disposed of by Sir John Thompson, his predecessor in the Department. But the statute, creating the Department of Justice, imposes upon its Minister the duty to "advise the Crown upon all matters of law referred to him by the Crown," and as Attorney-General, to advise "the heads of the several departments of the Government upon all matters of law connected with such departments" (1), no matter how many times they are referred to him. Sir Charles Hibbert Tupper came to a conclusion different from that of Sir John Thompson, but after a new hearing and the production of fresh evidence, and more particularly of an exhaustive and elaborate statement from the claimant, a report from the resident superintendent engineer and three letters from his assistants, who moreover were examined orally.

The main objection to the validity of the certificate is, that by considering the claim of the appellant in the first instance the engineer has put an end to his authority and is *functus officio*. But even if he had jurisdiction in the matter his certificate was not the final one; the contract directs that monthly certificates will be issued by the engineer, and expressly provides that the contractor may repeat any claim or claims omitted "until finally adjusted or rejected." The following are the clauses in the contract upon this point;

(1) R. S. C. ch. 21, ss. 3 & 4.

1898

GOODWIN v. THE QUEEN.

Girouard J.

26. It is intended that every allowance to which the contractor is fairly entitled, will be embraced in the engineer's monthly certificates ; but should the contractor at any time have claims of any description which he considers are not included in the progress certificates, it will be necessary for him to make and repeat such claims in writing to the engineer within thirty days after the date of the despatch to the contractor of each and every certificate in which he alleges such claims to have been omitted.

27. The contractor in presenting claims of the kind referred to in the last clause must accompany them with satisfactory evidence of their accuracy, and the reason why he thinks they should be allowed. Unless such claims are thus made during the progress of the work, within thirty days, as in the preceding clause, and repeated in writing every month, until finally adjusted or rejected, it must be clearly understood that they shall be forever shut out, and the contractor shall have no claim on Her Majesty in respect thereof.

On the 16th of November, 1893, in due time and form, the appellant first presented his claim to the Department of Railways and Canals for a certain increase of the certificate for work relating to earth and water-tight banks, contending that a true interpretation of the specifications justified the same. It was considered by Sir John Thompson, Minister of Justice, and by him rejected for reasons which are fully set forth in his written opinion of the 28th of February, 1894; but his decision was given or communicated only to the Department of Railways and Canals, and not to the contractor, who was merely advised by the Secretary of Railways and Canals on the 28th of August, 1894, that in the opinion of the Minister of Justice, " the specifications do not admit of the construction placed on them by you," and that " the department therefore in view of such opinion must decline to entertain these claims." From that date, that is the 28th of August, 1894, as before, his claim was simply ignored in the monthly estimates or certificates, which moreover were never " despatched " to him as directed in clause 26 of the contract, except at the time of the institution of the present proceeding or

reference, when he was allowed to have a copy of the same; until then cheques only for their respective amounts were given to him from time to time.

The chief engineer did not reach any conclusion until the 20th of August, 1895, when the matter had been re-opened and was still pending before the Minister of Justice at the request of the contractor and by the direction of the Minister of Railways and Canals. His decision was never delivered, or communicated or even mentioned to the contractor except after the commencement of the present proceeding.

Therefore, so far as the contractor was concerned, his claim stood at all times as having been simply "omitted" in the monthly certificates. As I read clauses twenty-six and twenty-seven of the contract, even claims coming within the exclusive jurisdiction of the engineer, and repeated by the contractor, but simply "omitted" in the progress certificates, may be considered and reconsidered by the engineer till his authority is exhausted by the completion of the work and the despatch of his final certificate, and he may do so as often as he pleases, "until finally adjusted or rejected;" and even if finally adjusted or rejected, I am inclined to think that he may reconsider his decision by and with the consent of the parties; (see Amer. & Eng. Encycl. of Law, vo. "Arbitration and Award," 2 ed. pp. 790, 791, 808); but it is not necessary to decide that question this case—which is very different from *Murray* v. *The Queen* (1), where the revision was made by a succeeding engineeer at the request of the Crown only. It is sufficient to say that no previous adjustment or rejection, no adjudication in fact, as contemplated by the contract was ever made; and consequently the certificate of the 27th of February, 1896, purporting to adjust the claim of the appellant, ap-

(1) 26 Can. S. C. R. 203.

1898

GOODWIN v. THE QUEEN.

Girouard J.

proved by the Minister of Railways and Canals, and accepted by the contractor, is valid, final and binding.

Finally, and this seems to be the decisive argument, it must be borne in mind that the engineer is not, as in *Murray* v. *The Queen* (1), the sole judge and arbitrator of all matters and differences which may arise under the contract. Under clause 8, he is

> the sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard to work or material shall be final.

But the question involved is not one of work and material, quantity or quality; there is no dispute as to that; it is one of construction of the contract, or, to speak more correctly, of the specifications which are declared to form part of the contract; it is a legal question, and was so considered by the engineer, the Crown and the contractor, and also by Sir John Thompson, Sir Charles Hibbert Tupper and the trial judge; all agree as to that point, and it is admitted in the statement of defence of the Crown:

> 9. The said engineer was not, under said contract, authorized to decide any question as to the meaning or intention of the contract, specifications and drawings, and the respondent will contend that in so far as the certificate referred to in the statement of claim determined or purported to determine a question of construction of said contract or specifications, it is not binding.

Under clause thirty-three of the contract, a question of such a nature must be determined, not by the engineer as formerly under Government contracts, but by the Exchequer Court of Canada.

> 33. It is hereby agreed that all matters of difference arising between the parties hereto upon any matters connected with or arising out of this contract the decision whereof is not hereby especially given to the engineer, shall be referred to the Exchequer Court of Canada, and the award of such court shall be final and conclusive.

It is difficult to understand how this clause of the contract can be worked out fairly to both parties. Of

(1) 26 Can. S. C. R. 203.

course, it is not sufficient to confer jurisdiction on the Exchequer Court; it contemplates a reference under section twenty-three of the Exchequer Court Act. But what will be the remedy of the contractor if the Minister of Railways and Canals refuses or neglects to refer the special case to the Exchequer Court? Perhaps he would be entitled to a Petition of Right. It is not necessary to examine this point, as the present claim has been duly referred to that court.

Clause thirty-three shews beyond doubt that legal differences do not fall within the exclusive province of the engineer; they are in fact excluded from it by the very terms of the contract. If any should arise, he should call the attention of the parties to it, if not known to them, and wait till a binding decision be reached by them; and finally, by framing his certificate in accordance with the legal decision he receives from them, he merely performs a ministerial duty, so as to comply with clause twenty-five of the contract which requires the engineer's certificate as a condition precedent.

That decision may be reached in two ways; first, judicially, by obtaining the award of the Exchequer Court of Canada; or secondly, by coming to a mutual solution. It is not supposed that the opinion of the Minister of Justice is binding upon the crown any more than it is upon the contractor; but if carried out by the engineer in his certificate and accepted by the parties, as undoubtedly it was in this case, namely, by the contractor and the Minister of Railways and Canals representing the Crown in the contract under powers conferred upon him by the statute (1), upon what ground of law or equity can the Crown now object to the engineer certifying upon that advice, and appeal to the Exchequer Court? None can be set up

(1) R. S. C. ch. 37, ss. 1, 2, 6, 7.

1898

GOODWIN v. THE QUEEN.

Girouard J.

seriously; and it seems to me the Crown is estopped from doing so.

As long as the parties consider that a just decision has not been reached in respect of such legal or any other exceptional matter, not coming within the exclusive province of the engineer, it is competent for, and indeed the duty of, the Crown, acting by its duly constituted representatives, to rectify that decision and direct at any time, either before or after a reference to the Exchequer Court, the engineer to issue a certificate according to law and justice, and thus avoid useless and expensive litigation before the Exchequer Court and this court. Unless such a course can be adopted the Department of Railways and Canals never can legally settle a claim like the present one, and in every instance an award of the Exchequer Court will be the only remedy, a conclusion utterly untenable in my opinion. Such a rule would seriously impede the administration of a great department like that of Railways and Canals.

I consider, therefore, the certificate of the Chief Engineer of the twenty-seventh of February, 1896, approved by the Minister of Railways and Canals, as perfect and final and binding upon the Crown and the contractor; and judgment should be entered in favour of the appellant for the amount of the same, in principal and costs as prayed for; the question of interest being reserved in pursuance of agreement between the parties.

*Appeal allowed with costs.*

Solicitor for the appellant: *A. Ferguson.*

Solicitor for the respondent: *F. H. Chrysler.*

1898

WILLIAM CUMMINGS & SONS (DEFENDANTS)..... } APPELLANTS;

*Feb. 15.
*May 6.

AND

ROBERT TAYLOR AND BAULD GIBSON & CO. (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Assignment for benefit of creditors—Preferred creditors—Money paid under voidable assignment—Levy and sale under execution—Statute of Elizabeth.*

Where an assignment has been held void as against the statute, 13 Eliz. c. 5, and the result of such decision is that a creditor who had subsequently obtained judgment against the assignor and, notwithstanding the assignment, sold all the debtor's personal property so transferred, becomes entitled to all the personal property of the assignor levied upon by him under his execution, such creditor has no legal right and no equity to an account or to follow moneys received by the assignee or paid by him under such assignment in respect to which he has not secured a prior claim by taking the necessary proceedings to make them exigible.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1), dismissing an appeal by the present appellants and affirming the judgment of the trial judge which declared that a certain deed of assignment was fraudulent and void as against the creditors of the assignor, appointed a receiver to his estate and directed accounts to be taken of such portion thereof as may have come into the hands of the present appellants either under the said deed of assignment or otherwise.

One Neil McKinnon made an assignment for the benefit of his creditors, to Selden W. Cummings, a solicitor, who acted under a power of attorney from

PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard

22 (1) 29 N. S. Rep. 162.

1898

CUMMINGS v. TAYLOR.

the appellants. Shortly after the making of the assignment, Robert Taylor, one of the appellants, recovered judgment, which he recorded against the lands so assigned and issued an execution thereon against McKinnon, under which the sheriff levied upon and sold the assignor's personal property remaining at the time of levy. The assignee thereupon took action against the sheriff for the conversion of the said personal property, and the sheriff justified under the execution, and attacked the assignment under the statute, 13 Eliz. ch. 5. The trial judge in that action decided in favour of the plaintiff, and upheld the assignment, and his judgment was sustained on appeal to the Supreme Court of Nova Scotia *in banc*, but on further appeal, was reversed by the Supreme Court of Canada (1).

In January, 1895, between the date of the argument of the last appeal and the delivery of judgment by the Supreme Court of Canada, the assignor brought his books to the appellants' office and assigned the book debts to them.

The present action was commenced in June, 1895, by the respondents, judgment creditors of McKinnon, against him, his assignee and two preferred creditors, the appellants and The Peoples' Bank of Halifax, claiming:—(*a*) A declaration that the said deed of assignment was fraudulent and void as against the plaintiffs and other creditors of the said assignor; (*b*) An account from the appellants of all property, money and assets received or paid by them under the provisions of said deed of assignment; (*c*) Payment of the respondent's claim out of any property, moneys, and assets received by the appellants under said assignment; (*d*) The appointment of a receiver for all the

(1) *Sub nomine, McDonald* v. *Cummings*, 24 Can. S. C. R. 321.

property, moneys, and assets hereinbefore mentioned; and the usual injunction, orders, directions, and so forth.

The appellants admitted the deed to be void for the reasons expressed in *McDonald* v. *Cummings* (1), but denied any liability to account for the moneys received by them or for the book debts assigned to them. They set up (*a*) the sale of the personal property of the insolvent under the execution of the plaintiff, Robert Taylor; (*b*) that all the moneys received for goods or debts, with the exception of $169, had been paid over by the debtor to creditors; (*c*) that these payments amounted to $839.88 and were made before the judgment of the Supreme Court of Canada above referred to, and to the creditors intended to be preferred by the said deed of assignment, including the Peoples' Bank of Halifax, and (*d*) that the balance of the moneys, said $169, came into the hands of the defendant, Selden W. Cummings, and was by him paid over to the appellants shortly after the said judgment in pursuance of an order made shortly before the said judgment by the debtor McKinnon on the said Selden W. Cummings, in favour of the appellants, creditors of the said Neil McKinnon. They alleged also that McKinnon at the same time assigned the balance of his book debts, the only other asset outside the land, to the appellants, and after the said judgment and before this action was commenced that the respondents delivered the books of account to the appellants and assented to the transfer.

The action was tried before Townshend J. without a jury and the learned judge, so far as the respondents on this appeal are affected, decided that, at the time the moneys were received by them, and the debts were assigned to them, they were aware that the deed had been attacked as fraudulent and void and under the decision of the court in *Cox* v. *Worrall* (2) they could

(1) 24 Can. S. C. R. 321. (2) 26 N. S. Rep. 366.

1898

CUMMINGS v. TAYLOR.

not retain the same against the creditors in the action.

The result was that the deed of assignment made by McKinnon to Selden W. Cummings, was declared fraudulent and void as against the creditors of the assignor; that a receiver was appointed for all the moneys, assets and property of the assignor, and that an account was ordered to be taken of the same which have come into the hands of defendants, William Cummings & Son, either under the deed of assignment or otherwise, and also from the defendant, McKinnon.

A decree was taken on that judgment, and the present appellants appealed therefrom and from the decree thereon to the Supreme Court of Nova Scotia *en banc*. The appeal was heard before Weatherbe, Graham and Henry JJ. who were unanimous in dismissing the appeal, and the formal judgment dismissing the appeal of William Cummings & Son, also dismissed an appeal of the defendant, McKinnon, and made each of the said appellants liable for all the costs of the appeal. From that judgment the present appeal is taken.

*Lovett* for the appellants. In this action the plaintiffs, the present respondents, sought to follow the sum of $200 paid by the assignor, McKinnon, to the Peoples' Bank under the deed of assignment, into the hands of that corporation. Their action was dismissed by the trial judge and the Supreme Court of Nova Scotia on the ground that the Peoples' Bank was a *bonâ fide* payee for value without notice, and on appeal to this court the judgments below were affirmed (1). We refer to the opinion delivered by Mr. Justice Sedgewick at pages 592 and 593. The trial judge decided against the present appellants in deference to the opinion of the majority of the Supreme Court of Nova Scotia in

(1) 27 Can. S. C. R. 589.

*Cox* v. *Worrall* (1), now overruled and expressly stated that but for that case he would have dismissed the action as against them, and the Supreme Court of Nova Scotia also followed *Cox* v. *Worrall*.

There are only two views to be taken of the facts. 1st. William Cummings & Son being creditors of Neil McKinnon received the assets under the deed on account of the claim due to them by McKinnon and for which they were preferred. 2ndly. They received these assets from the debtor independent of the deed and in payment of a *bonâ fide* claim against him. In the first view of the facts the appellants are clearly within the decision quoted above. In the second view their position is still stronger because they are in the position of creditors obtaining payment from their debtor, and if other creditors have no equity to follow money paid by the assignee under the deed, they certainly have no equity to follow payments made by the debtor to other creditors independent of the deed.

The appellants refer to the following authorities:— *Higgins* v. *York Buildings Co.* (2); *Reese River Silver Mining Co.* v. *Atwell* (3); *Cornish* v. *Clark* (4); *Bott* v. *Smith* (5); *Blenkinsopp* v. *Blenkinsopp* (6); *In re Maddever* (7); *Longeway* v. *Mitchell* (8); *Wills* v. *Luff* (9); and *Salt* v. *Cooper* there cited (10); *Davis* v. *Wickson* (11); *Masuret* v. *Stewart* (12); *Holmes* v. *Millage* (13); *Tennant* v. *Gallow* (14); *Harris* v. *Beauchamp* (15); *Crowninshield* v. *Kittridge* (16); In re *Shephard* (17);

(1) 26 N. S. Rep. 366.
(2) 2 Atkyns 107.
(3) L. R. 7 Eq. 347.
(4) L. R. 14 Eq. 184.
(5) 21 Beav. 511.
(6) 1 DeG., M & G. 495.
(7) 27 Ch. D. 523.
(8) 17 Gr. 190.
(9) 38 Ch. D. 197.
(10) 16 Ch. D. 544.
(11) 1 O. R. 369.
(12) 22 O. R. 290.
(13) [1893] 1 Q. B. 551.
(14) 25 O. R. 56.
(15) [1894] 1 Q. B. 801.
(16) 7 Metc. (Mass.) 520.
(17) 43 Ch. D. 131.

1898

CUMMINGS v. TAYLOR.

Burrell on Assignments, (4th ed.) sec. 461; May on Fraudulent Conveyances, p. 528; 2 Bigelow on Fraud, p. 419, 462, 490, 493; Bump on Fraudulent Conveyances, p. 566; *Cox* v. *Worrall* (1), per Townshend J.

So far as the assignment of the book debts is concerned that instrument is not impeached in this action and there was no evidence on which it could be impeached.

The receiver is not entitled to recover from these appellants the money and property received by them in right of the debtor, since the transaction remains good as between the debtor and the appellants and in any event the appellants could set off their debt in an action by the receiver and he can not recover in right of the assignee, he is not put in the assignees shoes, and, in any event, the assignee could not recover the property. It is not established that the creditors attacking the deed have any equity to recover back property received from the debtor by other creditors. The statute of Elizabeth confers no such rights and outside of the statutes the equities are equal and the appellants are in possession.

*McNeil* for the respondents. The appellants were parties to the assignment and to the fraud which rendered it void, *Cummings* v. *McDonald* (2). See also decision by Graham J. in the court below (3) at pages 168 *et seq.* Being parties to the fraud, although creditors of the assignor, they cannot retain what they obtained by virtue thereof. No person can take advantage of his own wrong. *Cox* v. *Worrall* (1); *Bury* v. *Murray* (4); Winslow's Private Arrangements between Debtors and Creditors, pp. 156-7; *Knight* v. *Hunt* (5); *Howden* v. *Haigh* (6); *Higgins* v. *Pitt* (7).

(1) 26 N. S. R. 366.
(2) 24 Can. S. C. R. 321.
(3) 29 N. S. R. 162.
(4) 24 Can. S. C. R. 77.
(5) 5 Bing., 432.
(6) 11 A. & E. 1033.
(7) 4 Ex. 312.

A person cannot avail himself of the fraud of another, unless he is innocent and has given some valuable consideration. A *fortiori*, a person who is cognizant of the fraud and a party to it cannot avail himself of the benefit gained thereby. *Bury* v. *Murray* (1) at page 84; *Scholefield* v. *Templer* (2); *Huguenin* v. *Baseley* (3) at page 289; *Daubeny* v. *Cockburn* (4) at page 643; *Topham* v. *Duke of Portand* (5) at page 569.

The respondents, before this action, recovered judgment for their debts against the assignor, and issued thereon legal executions, and realized all they could by virtue thereof. The assignment was in this action declared fraudulent and void, under the statute 13 Elizabeth, ch. 5, the appellants being not only cognizant of, but parties to the fraud which vitiated the deed. In an action to avoid the deed under such circumstances the respondents are entitled to an accounting from the appellants for all they received under the void deed, and all consequential relief by way of equitable execution. N. S. Judicature Act, 1884, sec. 13, sub-sec. 7, R. S., 5th series, p. 806. Also s. 12, ss. 7, p. 804; Daniels, Ch. Pr. Vol. I., pp. 931-2. *Ex parte Evans; in re Watkins* (6); *Anglo-Italian Bank* v. *Davies* (7); *Smith* v. *Cowell* (8); *In re Pope* (9); *Reese River Silver Mining Co.* v. *Atwell* (10) at page 352; *Longeway* v. *Mitchell* at page 193 (11); *McCall* v. *McDonald* (12); *The Queen* v. *Judge of the County Court of Lincolnshire* (13); per Hawkins J., at p. 171; *Westhead* v. *Riley* (14).

So long as the property of the executive debtor remains distinguishable, and so long as no purchaser for

(1) 24 Can. S. C. R. 77.
(2) 4 DeG. & J. 429.
(3) 14 Ves. 273.
(4) 1 Mer. 626.
(5) 1 DeG. J. & S. 517.
(6) 11 Ch. D. 691; 13 Ch. D. 252.
(7) 9 Ch. D. 275.
(8) 6 Q. B. D. 75.
(9) 17 Q. B. D. 743.
(10) L. R. 7 Eq. 347.
(11) 17 Gr. 190.
(12) 13 Can. S. C. R. 247.
(13) 20 Q. B. D. 167.
(14) 25 Ch. D. 413.

1898

CUMMINGS v. TAYLOR.

value without notice in tervenes, so long may the court award relief against that property in the hands of fraudulent or voluntary holders. *Tennant* v. *Gallow* (1). at p. 61; *Masuret* v. *Stewart et al.* (2); *Cornish* v. *Clark* (3).

Book debts are in the broad sense of the word exigible, and being in the hands of the appellants, fraudulent holders, they will be compelled to account for them to the creditors. *Labatt* v. *Bixel* (4); *Meharg* v. *Lumbers* (5).

The assignment made in January, 1895, from McKinnon to the appellant, William Cummings was of no avail:—Because the choses in action intended thereby to be assigned had previously been vested in Selden W. Cummings by the assignment for the benefit of creditors, dated November 11th, 1892, and this was known to William Cummings;—Because, the assignment for the benefit of the creditors was binding between the parties, and he was a party to the assignment, his firm, as creditors of the assignor, having executed the same, and,—Because after this assignment had been executed by the as signor, assignee, and any of the creditors, it was irrevocable. May on Fraudulent Conveyances (Blackstone Series) pp. 69, 70, 331, 471; *Curtis* v. *Price* (6) at page 103; *Smith* v. *Cherrill* (7); *Tanqueray* v. *Bowles* (8), at page 157; *French* v. *French* (9), at page 103; 2 Bigelow on Frauds, p. 408. See also cases cited in 9 Can. L. T. 125 & 145, and *Kincaid* v. *Kincaid* (10); and *Salt* v. *Cooper* (11) at page 552.

TASCHEREAU J.—I would be of opinion to adopt Mr. Justice Graham's reasoning in the court below, and dis-

(1) 25 O. R. 56.
(2) 22 O. R. 290.
(3) L. R. 14 Eq. 184.
(4) 28 Gr. 593.
(5) 23 Ont. App. R. 51.
(6) 12 Ves. 89.
(7) L. R. 4 Eq. 390.
(8) L. R. 14. Eq. 151.
(9) 6 DeG. M. & G. 95.
(10) 12 Ont. P. R. 462.
(11) 16 Ch. D. 544.

miss this appeal. The majority of the court, however, have come to the conclusion that the appeal should be allowed.

GWYNNE J.—Was of opinion that the appeal should be allowed for reasons given by Mr. Justice Sedgewick.

SEDGEWICK J.—On the 11th November, 1892, one Neil McKinnon made a general assignment to the defendant Selden W. Cummings, he then being in insolvent circumstances. Robert Taylor, one of the present plaintiffs, who subsequently obtained judgment against McKinnon notwithstanding this assignment, issued execution, recorded it in the county where McKinnon's lands were situated, and under it sold through the sheriff all the personal property transferred by the assignment. The assignee, Selden W. Cummings, then brought his action against the sheriff claiming under the assignment. That action was decided in favour of Cummings by the courts in Nova Scotia, but upon appeal to this court we held that the assignment was void as against the statute, 13 Eliz., chap. 5 (1), the result being that Taylor, the present plaintiff was held entitled to the proceeds of all of the personal property of McKinnon, levied upon by him under his execution. After that determination the plaintiff Taylor instituted these proceedings, making the insolvent trustee under the assignment, and William Cummings & Sons and the Peoples' Bank of Halifax, the latter having received benefits under it, defendants, by which they sought :—

(*a.*) A declaration that the assignment in question was fraudulent as against the plaintiff and the other creditors.

(1) Can. 24 S. C. R. 321.

1898

CUMMINGS v. TAYLOR.

Sedgewick J.

(*b.*) An account from the defendants, other than the insolvent, of all moneys received under the assignment.

(*c.*) Payment of the plaintiff's claim out of such moneys.

(*d.*) The appointment of a receiver ; and

(*e.*) An injunction.

In that action a judgment was entered for the plaintiffs giving them the declaration and account asked for, and appointing a receiver. That judgment was sustained upon appeal to the Supreme Court of Nova Scotia, except in regard to the Peoples' Bank, against which the action was dismissed. This is the second appeal before us from the judgment in question.

In the first appeal we decided that the claim of the plaintiff for an account against Wm. Cummings & Sons and the Peoples' Bank, with a view of making them pay over to the creditors the moneys received by them under the assignment on account of the assignor entitled to them was untenable ; that under English law, in the absence of any right of, or interest in, property transferred no decree could be made dealing with it, except a decree setting aside the assignment attacked. It follows, we think, as a necessary consequence, that this appeal must be allowed. The plaintiffs are entitled to whatever benefits they can get from the fact that the assignment in question has been declared void and may adopt such remedies as they see fit in order to obtain recovery of the balance of their debt from any debts, personal property, or real estate upon which they have or had any lien or charge or other right under their judgments or under any execution issued upon them. But so far as the evidence shows they have never taken any steps by garnishee process to obtain a charge upon the debts of the insolvent, and as to the personal property they have already

1898

CUMMINGS v. TAYLOR.

Sedgewick J.

obtained the proceeds of it under their execution. As they have no interest, either legal or equitable, in the debts of the insolvent, they have no legal right except by taking the necessary statutory proceedings to make them exigible, nor have they any equity to follow the moneys received by the assignee under his deed or paid by him under it. If the decree in this case can be supported there would appear to be but little necessity for a bankruptcy law, as, if it can be supported, the Supreme Court of Nova Scotia is itself a bankruptcy court empowered by its judgment, without any statutory or other authority that I am aware of, to take possession of an insolvent's estate and distribute it as it may think fit, whether ratably or otherwise, amongst creditors. The decree appealed from may be sustained so far as it contains a declaration that the assignment in question is void, but inasmuch as no case has been made out for the taking of an account or for the appointment of a receiver, the decree must be amended in that regard, the appellants being allowed all costs both here and in the court below.

KING and GIROUARD JJ. concurred in the dismissal of the appeal for the reasons given by Mr. Justice Sedgewick.

*Appeal allowed with costs.*

Solicitor for the appellants: *H. A. Lovett.*

Solicitor for the respondents: *Alexander McNeil.*

1898

*Feb. 19

*May 6.

GEORGE BULL BURLAND (DEFENDANT)..... } APPELLANT,

AND

ANDREW M. LEE (PLAINTIFF).....RESPONDENT.

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

*Master and servant—Negligence—Accident, cause of—Contributory negligence—Evidence.*

In an action for damages by an employee for injuries sustained while operating an embossing and stamping press, it appeared that when the accident causing the injury occurred, the whole of the employee's hand was under the press, which was unnecessary, as only the hand as far as the second knuckle needed to be inserted for the purpose of the operation in which he was engaged. It was alleged that the press was working at undue speed, but it was proved that the speed had been increased to such extent at the instance of the employee himself, who was a skilled workman.

*Held*, reversing the judgment sf the Court of Queen's Bench, that the injury occurred by a mere accident not due to any negligence of the employer, but solely to the heedlessness and thoughtlessness of the injured man himself, and the employer was not liable.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Supreme Court, District of Montreal in favour of the plaintiff for $3,000 damages and costs.

The plaintiff brought his action for $6,000 damages for injuries sustained whilst employed by the defendants in operating an embossing and stamping press, which, he alleged, worked irregularly, and at too great speed and was not in good order, and that upon being urged to hurry his work his right hand was crushed in the press and had to be amputated. The defence was in effect that no fault was to be attributed to the

PRESENT.—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

defendants, but that the accident was due to the carelessness of the plaintiff himself in thrusting his hand too far into a dangerous machine in a manner quite unusual, unnecessary and improper.

The trial judge, Mr. Justice Archibald, found the defendant guilty of negligence, because it appeared that up to about two months previous to the accident the machine was geared to run at about 18 revolutions per minute; that the speed was increased so that it ran at the rate of about 29 revolutions per minute, and that after the accident the machine was restored to its previous speed; that the operation of the machine was irregular, probably owing to the variable resistance offered by one or more large machines which were attached to the same shaft in defendant's premises; and that the lever provided to throw the press out of gear when necessary was uncertain in its action. The learned judge concluded that the speed at the time of the accident was excessive and dangerous, more especially when combined with the irregularity of the operation of the machine, and that the defendant, through his agent, was aware of the unsatisfactory condition and running of the machine previous to the accident in question, and should be held responsible in damages. The Court of Queen's Bench on the appeal affirmed the decision of the trial judge for practically the same reasons.

*G. Stuart Q.C.* and *Francis McLennan* for the appellant. The plaintiff was a skilled workman and had himself asked to have the speed of the machine increased. No fault attributable to the defendant is shewn to have caused the accident, but it was rather the result of plaintiff's own imprudence. The defendants cannot be held liable for injuries unless they were actually the result of negligence clearly chargeable against them. See remarks of Lord Chief Justice

1898

BURLAND v. LEE.

Coleridge in *Smith* v. *Baker* (1) at page 519, and by Mr. Justice Girouard in *The Montreal Rolling Mills Co.* v. *Corcoran* (2) at pages 599 and 600.

*Saint-Pierre Q.C.* for the respondent cited 2 Sourdat, Responsabilité, Nos. 912, 913, 913 *ter*; 20 Laurent, Nos. 474 and 475; Arts. 1053, 1055 C. C. and *Lefebvre* v. *The Thomas McDonald Co.* (1).

The judgment of the court was delivered by

GWYNNE J.—The cause of action stated in the plaintiff's statement of claim in this case is: that the plaintiff was in the employment of the defendant in the working of an embossing and stamping press which is alleged to have worked irregularly and at too great speed, and was not in good order; that while engaged in this occupation his hand was crushed by the press; that in consequence his right hand had to be amputated, "and that the accident was caused by the fault and negligence of the defendant *who had urged the plaintiff to hurry his work*."

Now, as to this hurry, which thus appears to be made the gist of the action, all that appeared was that the plaintiff was given 5,000 cards to emboss, and was told that the defendants wished to have them done that day, and the evidence showed that the press was capable of embossing ten thousand cards in nine hours. As to the speed at which the press was being worked it appears that the plaintiff, being a good workman, had himself some months previously procured the speed to be increased to that at which it was being worked when the accident occurred. As to the alleged irregularity in the working of the press all that appeared was that there was on the premises

(1) [1891] A. C. 325. (2) 26 Can. S. C. R. 595
(1) Q. R. 6 S. C. 321.

a large machine called a plating calendar which when worked was propelled by the same belting as that which propelled the embossing press at which the plaintiff worked, and when this plating calendar was set at work the effect which it had on the embossing press was to make it go a little slower and gradually to recover in a short time its regular speed; the irregularity thus caused was in the language of a witness: "just a slight variation in the speed, but nothing noticeable, and it did not make the press dangerous." However the evidence showed that this plating calendar was not in operation at all on the day upon which the accident happened, so that all idea of the accident having been due to the alleged irregularity in the speed of the embossing press was dispelled.

Robert Massie, one of the plaintiff's witnesses, alone gave intelligent evidence as to the actual cause of the accident. He saw the plaintiff immediately after its occurrence, he cleaned the press after the accident and had an opportunity of observing how it worked on that day and he said that it worked with perfect regularity. He said that he saw how the accident happened by finding on the floor a card having stamped on it the whole of the plaintiff's hand, which showed, as indeed the hand itself did, that it had been for its whole length under the press when in operation, and the evidence showed that for the performance of the work in which the plaintiff was engaged, this was unusual, unnecessary and improper; that the hand need not be and should not be ever inserted further than the second knuckle either for the purpose of inserting or of withdrawing a card. It thus appears, we think, very clearly, that the plaintiff's misfortune occurred by the merest accident, due not to any negligence of the defendants but solely to the heedlessness, thoughtlessness and misadventure of the unfortunate

1898

BURLAND v. LEE.

Gwynne J.

young man himself. We are of opinion therefore that the appeal must be allowed with costs and the action dismissed out of the court below with costs.

*Appeal allowed with costs.*

Solicitors for the appellant: *Hatton & McLennan.*

Solicitors for the respondent: *Saint Pierre, Pélissier & Wilson.*

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1898

*Feb. 19.

*May 6.

THE CANADA PAINT COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

EMMA TRAINOR (PLAINTIFF).....RESPONDENT.

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

*Master and servant—Negligence—Evidence—Probable cause of accident.*

Evidence which merely supports a theory propounded as to the probable cause of injuries received through an unexplained accident is insufficient to support a verdict for damages where there is no direct fault or negligence proved against the defendant and the actual cause of the accident is purely a matter of speculation or conjecture.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) affirming the judgment of the Superior Court, District of Montreal, in favour of the plaintiff for damages and costs.

The plaintiff was injured in some extraordinary and unexplained manner by her foot coming in contact with some portion of a printing press at which she was employed in the defendants' establishment and brought an action against her employers claiming damages for the injuries sustained and alleging them

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

to have been caused by the defendants' neglect to take proper precautions to protect their employees against any possibility of accident whilst at work upon the printing press in question. The plaintiff propounded the theory based upon her own evidence that in jumping to her position upon a box, upon which she was obliged to sit when at work, and which was insecurely fixed, she started the machinery by accidently pushing a lever with her knee and in falling thrust her other foot through the open front of the printing press into the machinery whilst in motion, whilst the defence suggested another theory, supported by evidence of the plaintiff's frivolous conduct at her work, that the injuries she received resulted wholly from her own recklessness and imprudence.

*Stuart Q.C.* and *Francis McLennan* for the appellant.

*Robidoux Q.C.* for the respondent.

The judgment of the court was delivered by

GWYNNE J.—This is certainly a very singular case and an important one, not only as affecting the plaintiff who in some way or other has suffered an injury which has necessitated the amputation of the tips of two of her toes, but also as regards the character of the evidence necessary to be established in order to charge the defendants with responsibility for the injury. The case presented by the plaintiff in her evidence given upon her own behalf is that she was in the employment of the defendants working a small printing press; that on the morning of the 12th of February, 1896, she had got down from her seat where she had been working the press, for the purpose of putting away some ink, and she stopped the machinery; that shortly afterwards she returned to her seat, and that standing upon the left side of it she put one hand on

1898

THE CANADA PAINT CO. v. TRAINOR.

Gwynne J.

the seat and the other on the table which was in front of the press, upon which she put her paper when at work, on the press and proceeded to make a jump into her seat, when, but how it happened she could not say, she pushed with her left knee the arm or lever by which the press is set in motion and her right foot got injured under the table which was in front of the press, but how or in what part of the press she could not say. All the explanation she could give was that on putting her hand on the seat it *slipped a little*. She gripped the table, and her foot was caught under the table but how or where she could not say. It appears however that she did get up on her seat, for she says that she remained for a few minutes upon it after the accident had happened, but that the pain was so great she came down and sat upon the frame of a window (which appears to have been behind her seat and about four feet distant therefrom); there she took off her shoe and found her shoe and her stocking cut and her foot bleeding. Another young woman who was working in the same room at the time, at the distance of about twenty feet from the plaintiff's seat, neither saw the accident occurring nor knew anything of its occurrence until she saw the plaintiff sitting on the window frame, when she went over to her and saw that she was injured.

Mr. Guyon, inspector of industrial establishments, was called as a witness for plaintiff. He examined the premises the day after the accident. He knew the machine. There are several in use in Montreal. The press he said was a good press, well fitted up in every particular, and furnished with all the protection against accidents known to the present time. He could not understand how the accident could have taken place. The plaintiff's foot, in his opinion, must in some way or other, but how he could not under-

stand, have got into a coupling ; that is the only way in which, in his opinion, the foot could have been caught. The couplings are on either side of the machine and two and a half feet apart. They are at the distance of thirty-three inches from the floor, and about ten or twelve inches under the table at which the plaintiff worked, in front of the press and just on a level with her seat ; below that point there was no dangerous place whatever, none where the accident could, in his opinion, have occurred, and how her foot could have got there he could not understand ; he never had heard of such an accident having occurred before. The plaintiff in performing her work had no occasion to put her foot there. The table in front of the press is about fifteen inches wide and the place where her foot must have caught being only ten or twelve inches under the table and on a level with her seat, she could have had no need of lifting her foot so high. It was, however, he said, much more easy to understand that the accident had occurred while she was sitting on her seat than that it should have occurred while she was getting into it when she would be standing on the floor. He does not think that an accidental blow struck with her knee upon the arm or lever with which the machinery is set in motion could have set it in motion—to do that would require a pressure made with sufficient force to move from sixty to eighty pounds weight, but then to get the right foot into the coupling where it was injured while the left knee was pressing on the lever would, he says, have placed the plaintiff in a very extraordinary position in which she could not have well been without knowing it ; a glance at the press, a plan of which was in evidence, will show this.

The coupling in which Mr. Guyon says that the plaintiff's foot must have been caught is just at the rear ex-

1898

THE CANADA PAINT CO. v. TRAINOR.

Gwynne J.

tremity of, and a few inches above, the lever which sets the machinery in motion. Now when the plaintiff proceeded to take her seat when she met with the accident she was standing, she said, on the left side of her seat with one hand, which must have been her right hand, on the seat, and the other, the left, upon the table. She was thus standing between her seat and the handle of the lever with her back to the handle which projected a little from under and in front of the table in front of the press. She then made a jump to reach her seat, which having reached, the accident, according to her, must have occurred while she was in the act of jumping; and if during that period her left knee was pressing on the lever with such force as to set the machinery in motion while her right foot was in the coupling where it was injured, the position in which the plaintiff must have been would seem to be that she must have been pressing upon the lever, not with her left knee only, but with the whole weight of her body as its sole support. That certainly would have been a most extraordinary position for the plaintiff to have got into as incidental to a jump made to reach her seat, but it would be something more than extraordinary that a jump attended with such circumstances, or with any circumstances whatever they may have been which occasioned the injury to the plaintiff, should have terminated in placing her upon her seat, which by her own admission it certainly did. It is not surprising that Mr. Guyon should have been of opinion that it was easier to understand that, and more probable that, the accident must have occurred while the plaintiff was upon her seat rather than when in the act of getting on it. In the former case it would be possible for the plaintiff to have gotten her foot into the coupling, in the latter to all appearance impossible. The plain-

tiff could give no explanation whatever as to how her foot got into the place where it was injured. Mr. Guyon could not understand how the accident could have happened. It was the most extraordinary occurrence he had ever heard of; no like accident had ever occurred to his knowledge. The only evidence upon the point which was offered upon the part of the plaintiff was her own evidence and that of Mr. Guyon, and at the close of the plaintiff's case it was a matter wholly of speculation and conjecture of which no intelligent explanation has been offered as to how the accident did in fact occur and what was its cause. Mr. Guyon said that he had instructed the defendants to put some sort of a lattice in front of the lower part of the press, but he said that no press in Montreal, of which there were several like the one in question, had any such guard as that which he ordered. He did not order this with any view of thereby obviating any apparent or probable danger for he said that the press itself was furnished with all precautions against accident known to the present time, and he said that in no part of the press below the coupling was there any dangerous place. He did not order anything to be put in front of the coupling doubtless because in the ordinary use of the press for the purpose for which it was constructed it was impossible for the foot of any person whilst working at the press to get into that place, and as he could not understand how this accident could have occurred, he could not intelligently set about preventing its occurrence or he more probably rightly judged that there was no necessity of trying to obviate the occurrence of an accident which could not occur in the ordinary and proper use of the press, and which was of such an extraordinary nature that he could not understand how it could have occurred, and which having occurred no intelligent ex-

1898

THE CANADA PAINT CO. v. TRAINOR.

Gwynne J.

planation of its occurrence had been offered. He also directed the defendants to furnish a seat with a back to it, not that such a seat would give any better security than the previous one against the recurrence of such an extraordinary and unexplained accident, but merely that young girls working the press, when tired, might have some support in order to rest themselves.

The defendants called some witnesses who propounded a theory as to the place where the accident might have occurred other than the coupling spoken of by Mr. Guyon. Their evidence may be summarized as follows:—They were of opinion that the plaintiff's foot had not been caught in the coupling. If it had been more than the tip of the toes would have been affected, and if the machinery had been in motion plaintiff's shoe and foot would have been cut clean across whereas the toe of the shoe was merely bent. It was impossible for the accident to have occurred either at the coupling or at any other part of the press unless when the plaintiff was sitting on her seat and then only by her purposely extending her leg and raising her foot to a point in the front part of the press where it had no business to be at the distance of from ten to twelve inches below the table. That as to the plaintiff having set the machinery in motion by a blow or a push with her left knee, this was quite impossible. That in point of fact the mode by which the machinery was set in motion was by a strong *pull* of the handle of the lever and not by a blow or a push upon it at all. Here it may be observed that if the plaintiff had had any intention of going to work at the press when she proceeded to take her seat in the manner described by her, it seems singular that she should not have *pulled* the lever to set the machinery in motion before pro-

ceeding to take her seat. However, according to the theory of the defendants the accident might have occurred without the machinery having been in motion. It appears that the plaintiff was in the constant habit, although frequently cautioned against continuing the practice, of amusing himself when not engaged at her work in rocking herself backwards and forwards on her seat assisting herself so to do by catching the table with her hands. Now in the upper part of a metal guard in the centre front of the press at a point at the distance of from ten to twelve inches below the table there is a small aperture which the right foot of the plaintiff could have reached if her leg had been properly *extended* under the table from her seat, but that was a position which the plaintiff could not be in if engaged in working the press. Now, into this aperture the toe of the plaintiff's right foot, if her leg should have been so extended, might (not easily but still possibly) have been inserted, but not so as to reach the machinery. If then when rocking herself backwards and forwards for her amusement her right leg had been so extended, her right foot might have reached this point and the tips of her toes might have become inserted, and either in the act of being inserted or in the exertion made to extricate the foot, might have received the injury which they did suffer without the machinery having been in motion. Then, as to the seat, instead of its having been as alleged in the statement of claim four feet six inches in height, it was only thirty-three inches high including a plank of three inches in thickness on which it stood. The seat was made of a box open in front with a wooden bar across the opening upon which to rest the feet. There was also at the bottom of the metal guard in the centre front of the press an iron bar for the feet to rest upon. The depth of the box from front

1898

THE CANADA PAINT CO. v. TRAINOR.

Gwynne J.

to rear was just eleven inches and its width the other way two feet. It stood upon a three inch plank which was three feet long by ten and three-quarter inches wide. It was said to have been perfectly safe and that the plaintiff had no occasion whatever to make a jump in order reach the seat in the manner described by her. A young girl who had worked at the press for nine months before the plaintiff worked at it and who is not so tall as the plaintiff found it always quite safe and always got into it by merely touching the table and sliding along the seat; she never had any difficulty in thus seating herself; it was the only mode at all necessary and there is evidence that the plaintiff herself had been repeatedly seen seating herself in precisely the same manner. Upon the whole of this evidence, we are of opinion that it does not warrant a judgment which pronounces the accident to have been caused by the fault and neglect of the defendants. The utmost that the evidence warrants is that the cause of the accident still is, as it was at the close of the plaintiff's case, a matter merely speculative and conjectural, and that there appears more probability in the theory suggested by the defendants than in that propounded on behalf of the plaintiff. The appeal must therefore be allowed and the plaintiff's action dismissed with costs.

*Appeal allowed with costs.*

Solicitors for the appellant: *Hatton & McLennan.*

Solicitors for the respondent: *Robidoux, Chenevert & Robillard.*

THE DOMINION CARTRIDGE COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

JAMES CAIRNS (PLAINTIFF).....RESPONDENT.

1898

*Feb. 16, 17.

*May 6.

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

*Negligence—Fault of fellow servant — Master and servant—Employer's liability—Arts.* 1053, 1056 *C.C.*

The defendants carried on the manufacture of detonating cartridges or caps made by charging copper shells with a composition of fulminate of mercury and chlorate of potash, a highly explosive mixture, requiring great care in manipulation. It is, when dry, liable to explode easily by friction or contact with flame, but has the property of burning slowly without exploding when saturated with moisture. It was the duty of defendants' foreman, twice a day, to provide a sufficient quantity of the mixture for use in his special compartment during the morning and in the afternoon, and to keep it properly dampened with water, for which purpose he was furnished with a sprinkler. It was also the foreman's duty to fill the empty shells with the fulminating mixture as they were handed to him set on end in wooden plates, and then pass them on, properly moistened, through a slot in his compartment, to a shelf whence they were removed by another employee and the charges pressed down to the bottom of the shells by means of a pressing machine worked by C at a table near by. An explosion took place which appeared from the evidence to have originated at the pressing machine, and might have occurred either through the fulminate in the shells having been allowed to become too dry from carelessness in sprinkling, or from an accumulation of the mixture adhering to and drying upon the metal portions of the pressing machine. It was the duty of C, the person operating the pressing machine, to keep it clean and prevent the mixture from accumulating and drying there in dangerous quantities. When the explosion occurred, the foreman and C and another employee were killed, but a fourth employee,

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1898

THE DOMINION CARTRIDGE COMPANY v. CAIRNS.

who was blown outside the wreck of the building and survived, stated that the first flash appeared to come from the pressing machine, and the explosion followed immediately. The theory propounded by the plaintiff, the father of C, assumed that nothing was known of the actual cause of the explosion, nor where it in point of fact originated, but inferred from a supposed condition of things, that the fulminate had not been sufficiently dampened, and that this indicated carelessness on the part of the foreman and raised a presumption that the explosion originated through his fault. The evidence of the survivor led to the conclusion that the explosion originated through C's neglect to clean the pressing machine. There was evidence to show that the defendant had taken all reasonable precautions to diminish risk of injury to their employees in the event of an explosion, and that conformity with rules prescribed and instructions given by them to their employees for the purpose of securing their safety, would be sufficient to secure them from injury.

*Held*, Taschereau and King JJ. dissenting, that as it appeared under the circumstances of the case, that the cause of the accident was either unknown or else that it could fairly be presumed to have been caused by the negligence of the person injured, whose personal representative brought the action, that there could not be any such fault imputed to the defendants as would render them liable in damages.

APPEAL from the judgment of the Court of Queen's Bench of Lower Canada (appeal side), affirming the judgment of the Superior Court, District of Montreal, which condemned the defendants to pay the plaintiff one thousand dollars damages with costs.

The plaintiff's action was for damages for the death of his son, a minor, caused through alleged negligence of the defendants, in whose service he was employed. The neglect specially charged against the defendants was carelessness on the part of the foreman of the detonating department of their factory in allowing fulminate of mercury, (which it was his duty to place in brass shells), to become so dry that it exploded, whilst the shells were being pressed in a machine operated by the plaintiff's son, and caused his death,

whereas if the fulminate had been kept properly moistened by the foreman the operation of pressing it in the shells could have been carried on with perfect safety. The plaintiff's theory as to the cause of the explosion depended entirely upon inferences to be drawn from testimony as to careless acts of the foreman upon former occasions, the survivor being unable to give any evidence beyond the fact that the first flash was seen by him at the pressing machine operated by the plaintiff's son and the explosion followed immediately. Further particulars, as to the arrangement of the factory and precautions taken for the safety of the employees, are given in the head note and in the judgments reported.

*Macmaster* Q.C. and *Fleet* for the appellants. There was no absence of care on the part of the employers; *Parrott* v. *Wells* ("*The Nitro-Glycerine Case*") (1); and nothing done by them could naturally and reasonably be supposed to have caused the injuries; *Victorian Railways Commissioners* v. *Coultas* (2). The presumptions are rebutted and there is evidence to support the theory that the deceased was himself responsible for the accident. See *Montreal Rolling Mills Company* v. *Corcoran* (3) and cases there cited. The appellants should not be condemned upon mere theory, they must be shewn to have committed a fault. *Mercier* v. *Morin* (4); *Judet* v. *Compagnie de Châtillon-Commentry* (5); "*The Nitro-Glycerine Case*" (1). Even if the fulminating mixture had dried prematurely owing to the great heat of the day, that would not be a reason for holding the appellants liable; *The Canadian Pacific Railway Company* v. *Chalifoux* (6). The employers took reasonable precautions, made rules and gave

(1) 15 Wall. 524.
(2) 13 App. Cas. 222.
(3) 26 Can. S.C.R. 595.
(4) Q.R. 1 Q.B. 86.
(5) Dal. '94, 1, 479.
(6) 22 Can. S.C.R. 721.

1898

THE DOMINION CARTRIDGE COMPANY. v. CAIRNS.

instructions which were sufficient to have secured their employees safety, if conformed to by them. An employee neglecting such rules and instructions is barred by his own rashness, *volenti non fit injuria*. See *Paterson* v. *Wallace* (1); *Desroches* v. *Gauthier* (2) per Dorion C. J. at page 28; *The Canada Southern Railway Company* v. *Phelps* per Henry J. at page 148 (3); *Grand Trunk Railway Company* v. *Bourassa* (4); *Tooke* v. *Bergeron* (5).

*Trenholme* Q.C. and *Hutchins* for the respondent. The defendants must be answerable for their foreman's carelessness in allowing the dangerous mixture to become dry and explosive even though there may be no actual proof of the immediate cause of the explosion. *Corner* v. *Bird* (6); 20 Laurent No. 475; 1 Beven on Negligence, 141. The use of rough target paper by the foreman as shewn in evidence may have caused an explosion in his compartment where the larger quantity of the explosive mixture was kept and thus caused the explosion of his supply of fulminate as well as of all the cartridges in course of manufacture. The want of care in using rough paper and in his probable neglect to use the sprinkler were faults in the defendants' system of manufacture. *Res ipsa loquitur*. An undue number of cartridges were allowed to accumulate and become too dry for pressing with safety. The defendants owed their young and inexperienced employees the special duty of protection against injury or loss of life; 1 Beven (2 ed.) 789; *Grizzle* v. *Frost* (7) per Cockburn C.J. at page 625; *O'Brien* v. *Sanford* (8); 22 R. L. Rep. vo. "Responsibilité" nos. 83-84.

(1) 1 Paterson H. L. Cas. 389.
(2) 3 Dor. Q. B. 25.
(3) 14 Can. S.C.R. 132.
(4) Q.R. 4 Q.B. 235.
(5) 27 Can. S.C.R. 567.
(6) M.L.R. 2 Q.B. 262.
(7) 3 F. & F. 622.
(8) 22 O. R. 136.

See also *Robinson* v. *The Canadian Pacific Railway Co.* (1); *St. Lawrence Sugar Refining Co.* v. *Campbell* (2); *Evans et al.* v. *Monette* (3); *Allan et al.* v. *Pratt* (4); *Tremblay* v. *Davidson* (5); *Poitras* v. *The Globe Woollen Mills Co.* (6), and the authorities therein cited; *Calhoun* v. *The Windsor Hotel Co.* (7).

The judgment of the majority of the court was delivered by:

GWYNNE J.—This is an action instituted by a father for damages for the death of his son caused, as is alleged, by the negligence and default of the appellant company in whose service the son was employed.

The material allegation in the plaintiff's statement of claim is that

> On the twenty-first day of June, one thousand eight hundred and ninety-two, through the carelessness and wilful neglect of the company defendant, an explosion took place in the detonating room at their works in Brownburgh aforesaid by which the said James Cairns, junior (the plaintiff's son), lost his life.

It appeared in evidence that four persons worked in the building which was wholly blown up and destroyed by an explosion which took place in it whereby three of the persons employed therein, namely, Gunn, Curran and Cairns, were instantly killed, the fourth, named Bourck, being the sole survivor. The building so destroyed was used as a "detonating-room," that is to say, as a room in which copper shells were charged with fulminate of mercury and chlorate of potash.

The building was described as being a perfectly safe building for the purpose of the operations which were carried on in it. It was built, as the evidence discloses, of the very best materials, but purposely

(1) [1892] A. C. 481.
(2) M. L. R. 1 Q. B. 290.
(3) M. L. R. 2 Q. B. 243.
(4) M. L. R. 3 Q. B. 7, 322.
(5) Q. R. 5 S. C. 405.
(6) Q. R. 5 S. C. 391.
(7) Q. R. 4 S. C. 471.

1898

THE DOMINION CARTRIDGE COMPANY v. CAIRNS.

Gwynne J.

slight, for the express purpose of diminishing the risk of damage to the persons employed, in the event of an explosion taking place; and in fact that, great as the explosive power of the mixture used undoubtedly is, conformity with the rules prescribed by the company and the instructions given by them to their employees for the purpose of securing their safety, would be abundantly sufficient to secure immunity from all risk of injury.

To supply the evidence of a witness since deceased whose testimony, after having been taken down in writing had been lost, the plaintiff admitted as a fact which that witness had testified unto, that in the management of their factory "all possible care and diligence had been used by the defendants."

The work in the building was conducted as follows: Copper shells were brought from an outbuilding in boxes and placed upon a table on one side of the building where Gunn and Bourck worked; a hard-wood plate, with two hundred holes in it nearly pierced through, was then filled by Gunn and Bourck with copper shells which stuck up about the one-eighth of an inch; these plates when so filled, were one by one, taken by Bourck across the room to a place partitioned off where Curran, who was foreman in control of all the other persons employed in the room, worked. Bourck passed the plates filled with shells through a hole in the partition, facing where Gunn worked, to Curran to be charged by him with the explosive mixture and he pushed each plate, as charged with the fulminate mixture, through a sliding opening in another partition of his, Curran's, department, at right angles with that through which he had received the plates from Bourck and facing the place where Cairns worked a pressing machine, to be there pressed. These plates Cairns took from the sill

on which they were so placed by Curran and pressed the fulminate in the shells at the press worked by him, and when so pressed, Bourck took the plates of shells as pressed back to the table where Gunn and he worked and thence they were taken to a drying house outside of and some distance from the detonating building.

A theory was propounded by a witness on behalf of the plaintiff as to how the explosion, in his opinion, might possibly have taken place. He admitted, however, that as to the actual cause of the explosion he knew nothing. That in point of fact he did not know where the explosion had originated, and that his opinion was not based upon any facts shown to have existed when the explosion took place, but wholly upon the supposition of the existence of certain conditions which he mentioned, and which, assuming them to have existed, the explosion, in his opinion, could have originated, and in his opinion probably did originate where Curran worked and by reason of carelessness on his part.

There was evidence utterly denying that some of the conditions upon which that witness proceeded as constituting negligence did, assuming them to have existed, constitute any carelessness whatever or anything at all improper in the performance of the work entrusted to him; but it is unnecessary to decide on this, for we have the evidence of Bourck, the sole survivor of the disaster, who speaks to facts observed by him which make it quite impossible to say that the explosion originated in or at the place where Curran worked.

The only evidence of any fact pointing to the origin of the explosion is that given by Bourck, the sole survivor of the catastrophy. He had just returned to his seat at the table where he and Gunn worked from the

1898

THE DOMINION CARTRIDGE COMPANY v. CAIRNS.

Gwynne J.

table where Cairns worked whither he had gone in the expectation of receiving an empty plate from Cairns, but found him pressing the shells with the plate fully half full before him, that is, with still one hundred loaded shells upon it. He returned to his seat across the room, immediately behind Cairns and sat watching him at work and waiting for him to complete the pressing of the shells in the plate for which he was waiting. In a short time he observed a flash of fire issue from the press machine which was instantaneously followed by the explosion which destroyed the building, killed the three other persons employed in it and blew Bourck outside of the wreck.

Upon the evidence it must be held that the explosion originated at the press at which Cairns was at the time pressing cartridges. There were on the table in front of him one hundred loaded cartridges and one hundred more which had been pressed and dropped into a box on the floor under the table. All these exploded. There was evidence that the explosion of the two hundred cartridges was alone sufficient to blow up and destroy the building, and there were three several causes for the explosion originating at the press machine mentioned, which, assuming them to have existed, would naturally account for the catastrophy and be due to carelessness on the part of Cairns, who had been cautioned as to them and instructed how to prevent their occurrence.

Bourck also testified that upon the sill outside of the window in the partition through which Curran was in the habit of passing the plates of shells for Cairns to press, there were two plates of shells—four hundred in all. It may be that, and very probably it was, negligence in Curran to place these two loaded plates so near the machine at which Cairns was working before he was prepared to take them away, but this

negligence did not form any part of the theory upon which the plaintiff rested his claim. There is no doubt that not only these shells but also all the explosive matter in Curran's compartment were exploded together. As, however, the whole went off in one explosion which originated at the press which was being worked by Cairns, it is unnecessary, as it is impossible, to attempt to determine to what extent the effect of the explosion may have been increased by the proximity of the loaded plates, at the window in the partition in Curran's compartment, to the pressing machine where the explosion originated. For the determination of the present case it is sufficient to say, that the evidence shows that the explosion originated at the press which was at the time being worked by Cairns; and that the evidence not only does not warrant an adjudication that the explosion was not caused by any negligence on the part of Cairns, but on the contrary does warrant the fair presumption that it was caused by his negligence. If not caused by his negligence the evidence fails to show what did in fact cause it, and it cannot therefore be imputed to the defendants. The appeal must therefore, in my opinion, be allowed with costs, and the action dismissed in the court below with costs.

TASCHEREAU J. dissented, but gave no written reasons for judgment.

KING J. dissenting.—I think that there is evidence of negligence in this case sufficient to support the judgments below. Assuming the contention of appellants to be correct, that the explosion originated at the pressing machine worked by the deceased lad Cairns, the proper conclusion, from the evidence of the witness Flood, is that no explosion causing serious or at least fatal injury could be expected to result from it if the ful-

1898

THE DOMINION CARTRIDGE COMPANY v. CAIRNS.

King J.

minate was sufficiently moist. According to him and according to Howard, a man of great experience, the working in these high explosives is made practically possible and safe upon condition, and only upon condition, that the proper degree of moisture is maintained; and while, with this, there might be minor and inconsiderable explosions, there could not be any involving serious damage to life or approaching in its effects what is here proved to have taken place.

Flood is described in his deposition as a fulminate maker in the employ of defendants, and at the time of giving his evidence was their foreman in this branch of their work. His capacity and experience and his fairness towards them is therefore unquestioned, and he says that the failure to keep the fulminate properly moist is the only source of danger of explosion; and he also says, what the whole evidence shows, that the duty of keeping it properly moist was upon the foreman, for whose neglect, if any, the company would, according to the law of Quebec, as I understand it, be responsible to Cairns.

Flood's evidence is as follows:

Q. Now, you are working at a very dangerous business, are you not?—A. I do not know, if I go according to orders, that it is very dangerous.

Q. You do not consider it dangerous, what you are doing?—A. Not if I go according to the orders.

Q. You think it can be run safely, do you?—A. I think so.

Q. Wherein consists the danger in working that business? How is there danger?—A. If you let your powder get too dry; that is the principal danger, I guess.

Q. If the powder is kept moist then there is no danger, is there?—A. No, sir.

Q. You mean by powder, the fulminate you put into these detonators?—If that is kept properly moist, you say there is no danger in the business?—A. No, sir.

Q. But if it is allowed to get dry there is danger, is there not?—A. Yes, sir.

Q. Because when it gets dry it will explode ?—A. If it gets any cause.

Q. Will it very easily explode ?—A. Yes, sir.

Q. Now, in running that business, you have said if it is kept properly moist there is no danger. Now, do you see that it is kept properly moist yourself ?—A. Yes, sir.

Q. You make a point yourself of attending to that ?—A. Yes, sir.

Q. Who has the watching of that ?—A. I have.

Q. It is your duty to moisten that, is it not ?—A. Yes, sir.

Q. The man who charges these detonators, it is his duty to keep that properly moist, is it not ?—A. Yes, sir.

Q. And that his failure to do that is the only source you know of danger of explosion ?—A. That is all.

Q. The only one ?—A. Yes, sir.

Q. Now, is that very dangerous work the boy is put to, the boy running the pressing machine—is that not very dangerous work ?—A. No, I do not consider that it is.

Q. You do not consider that it is dangerous at all ?—A. No, sir.

Q. Why ?—A. If the powder is damp enough, there is no danger.

Q. That is, if the plates, as passed to him, are damp enough, there is no danger of explosion ?—A. No.

*By the Court:*

Q. So that the explosion would not take place there, at the pressing machine ?—A. Not if the powder was damp enough.

Q. Did you ever know one of these detonators to go off in the machine ?—A. I have.

Q. What was the cause of that ?—A. Of course, if the boy that was running the machine allowed powder to gather around the point of the punch, it might explode in that way—that is, the punch that presses the shell.

Q. Did you ever know a detonator to explode there ?—A. Through that ? Yes, sir; in that way.

Q. And what was the result ? Did it hurt the boy ?—A. No, sir.

Q. Why did it not hurt the boy ?—A. There was a guard on the machine for one thing.

Q. He is protected against an explosion in that way, is he ?—A. Yes, sir.

Q. That was the same as in the old building, supposing he was protected ?—A. Yes, sir.

Q. So that if an occasional detonator went off in a machine, it would not hurt the boy, would it ?—A. No, sir.

Q. The boy has not been hurt since you have been there, by any of those explosions, has he ?—A. No.

1898

THE DOMINION CARTRIDGE COMPANY v. CAIRNS.

King J.

In the absence therefore of proof of other cause, *res ipsa loquitur* and points to a deficiency of moisture in the fulminate mixture as the efficient cause.

A circumstance pointing to the same conclusion exists in the fact that the foreman was charging the shells unnecessarily long before the time when the pressing could be undertaken. Two plates of 200 detonators each were charged in advance and lying on the sill prepared for Cairns to press them on completion of the plate he was working at. The day is proved to have been one of the hottest of the season, and in such a slight and small structure as that in which the operations were carried on, it is manifest that the process of evaporation would go on rapidly, and there is no evidence to warrant the suggestion that the shells were sprayed after they were charged and, in the nature of things, it is quite unlikely.

It is said that Cairns was negligent, but any neglect on his part could not reasonably result in any serious injury providing that the mixture was in the proper condition he had a right to expect it to be in, and besides there is really no proof of neglect at all on his part. Bourck speaks of having previously seen particles of the fulminate on the top of the dial of Cairns' machine, but he saw nothing of this sort when at the machine just before the accident took place. According to the rules the foreman was to see to the taking apart and cleaning of the machine every two hours.

In the operation of pressing from 14,000 to 15,000 caps per day slight slips would be unavoidable and were to be expected, and this, consistently with reasonable care on the part of the person so employed considered in his relation to the employer. Indeed slight accidents at the machine from one cause or another seem to have been calculated upon as likely

to occur as a steel shield was placed in front of the operator to protect him from their effects.

The courts below were not required to adopt the strained theories of the president of the company, who seems to have very different notions from Flood and Howard as to the protective value of moisture in ensuring safety. As for the boy Bourck, he manifestly had no experience that would warrant confident statements by him as to modes and causes of explosions. Besides, his evidence is affected by his admission that he had declined to give information to the plaintiff's solicitor on the ground that he was going to give evidence for the defence.

At all events the courts below have not adopted the theories of these witnesses, and in the evidence of Flood, already alluded to, they had sufficient upon which to base a judgment for the plaintiff. I therefore think that the appeal should be dismissed.

*Appeal allowed with costs.*

Solicitors for the appellants: *Robertson, Fleet & Falconer.*

Solicitors for the respondent: *Stephens & Hutchins.*

1898

*Feb. 24.

*May 6.

MARY SHANNON (MISE EN CAUSE).....APPELLANT;

AND

THE MONTREAL PARK AND ISLAND RAILWAY COMPANY (PETITIONERS) ..... } RESPONDENTS.

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

*Appeal—Jurisdiction—54 & 55 V. c. 25, s. 2—Prohibition—Railways—Expropriation — Arbitration — Death of arbitrator pending award—51 V. c. 29, ss. 156, 157—Lapse of time for making award—Statute, construction of—Art. 12 C. C.*

The provisions of the second section of the statute, 54 & 55 Vict. ch. 25, giving the Supreme Coart of Canada jurisdiction to hear appeals in matters of prohibition, apply to such appeals from the Province of Quebec as well as to all other parts of Canada.

In relation to the expropriation of lands for railway purposes, sections 156 and 157 of "The Railway Act" (51 V. c. 29, D.) provide as follows:—

"156. A majority of the arbitrators at the first meeting after their appointment, or the sole arbitrator, shall fix a day on or before which the award shall be made; and, if the same is not made on or before such day, or some other day to which the time for making it has been prolonged, either by consent of the parties or by resolution of the arbitrators, then the sum offered by the company as aforesaid, shall be the compensation to be paid by the company."

"157. If the sole arbitrator appointed by the judge, or any arbitrator appointed by the two arbitrators dies before the award has been made, or is disqualified, or refuses or fails to act within a reasonable time, then, in the case of the sole arbitrator, the judge, upon the application of either party, and upon being satisfied by affidavit or otherwise of such death, disqualification, refusal or failure, may appoint another arbitrator in the place of such sole arbitrator; and in the case of any arbitrator appointed by one of the parties, the company and party respectively may

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

each appoint an arbitrator in the place of its or his arbitrator so deceased or not acting; and in the case of the third arbitrator appointed by the two arbitrators, the provisions of section one hundred and fifty-one shall apply; but no recommencement or repetition of the previous proceedings shall be required in any case."

(Section 151 provides for the appointment of a third arbitrator either by the two arbitrators or by a judge.)

*Held*, that the provisions of the 157th section apply to a case where the arbitrator appointed by the proprietor died before the award had been made and four days prior to the date fixed for making the same; that in such a case the proprietor was entitled to be allowed a reasonable time for the appointment of another arbitrator to fill the vacancy thus caused and to have the arbitration proceedings continued although the time so fixed had expired without any award having been made or the time for the making thereof having been prolonged.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court, District of Montreal, which quashed the writ of prohibition in this matter with costs.

The following statement of the facts in the case is taken from the judgment of the court rendered by His Lordship Mr. Justice Taschereau:

The controversy between the parties arises from proceedings upon an arbitration under the Railway Act of Canada, 51 V. c. 29. The respondents on the 19th of June, 1896, gave the statutory notice to appellant of their intention to expropriate part of her land, offering $600 as compensation, and appointing one Brodie as their arbitrator. The appellant thereupon named one Davidson as her arbitrator, and the two named one McArthur, as a third. On the 12th of August, 1896, at their first meeting, the three arbitrators, as required by the statute, fixed the 15th of October following as the day on or before which the award had to be rendered. Meetings were

1898

SHANNON v. THE MONTREAL PARK AND ISLAND RAILWAY COMPANY.

held on the 17th and 22nd of August. On the latter date the meeting was adjourned *sine die*. On the 11th of October, Davidson died. On the 15th the two surviving arbitrators met and,seeing that no other arbitrator had been appointed by the appellant, adjourned *sine die*. On the 6th of November following, appellant gave notice of the appointment of one Hadley as her arbitrator; and on the 10th of November notice was given by two of the arbitrators, McArthur and Hadley, that the arbitration would be proceeded with on the 14th. The company's arbitrator, though present, refused to take part in this meeting as he considered that his fuuctions had ceased on the 15th of October preceding. The arbitrators having adjourned to the 30th of November and named the 30th of January, 1897, for the rendering of the award, were about to proceed, when a writ of prohibition was served on them by the company. The petition set out the above facts and prayed that a writ should issue against the arbitrators, enjoining them to cease and discontinue to receive evidence, examine witnesses, or do any official act in connection with the above expropriation. Appellant was *mise-en-cause* in the case and contested the petition. The Superior Court maintained her contestation, dismissed the petition and quashed the writ of prohibition. But the Court of Queen's Bench maintained the writ and granted the conclusions of the company's petition. It is from this judgment that the present appeal is taken.

*Holt* for the appellant. The judgment of the Court of Queen's Bench, (two out of the five learned judges dissenting,) was based upon the ground that the arbitrators did not extend the time for rendering their award which had been fixed, and that thus the arbitrators had on the 15th October become *functi officio*, and had no right to proceed and therefore declared the

prohibition absolute against the arbitrators. This judgment gave no effect to section 157, under which appellant had appointed another arbitrator in place of Davidson, deceased, and assumed that, the time for rendering the award having expired, there was no provision in the statute for relief. The appellant submits that section 157 gives the party whose arbitrator dies the right to name another arbitrator, and the right once given, the power and the time to exercise that right is necessarily also given, and that section 157 contains an exception to the general rule laid down in section 156 On the death of any of the arbitrators the provisions of section 157 apply and necessarily the general rule in section 156 is modified. The party whose arbitrator dies must then have reasonable time allowed to find a new arbitrator, give notice of his appointment and to have him sworn in, and the three arbitrators must then give notice calling a new meeting of the completed board of arbitrators for the purpose of proceeding. This appears to be the meaning and intention of the Act, and we respectfully submit it to be the duty of the court to give it effect. We refer to the general principle laid down in the Interpretation Acts (1).

The arbitrator, Davidson, died on the 11th October, a Sunday, the date for the award being fixed for the 15th. It is quite clear that no one but his relatives would know of his death before, in all probability, the Tuesday following which would give the appellant one day only in which to search for a new arbitrator, explain the position of matters so as to induce him to act, give notice to the company, have the arbitrator sworn in, and allow the new arbitrators time to call a meeting. It would be impossible to do this.

(1) R. S. C. c. 1, sec. 7, s.s. 37; R.S.Q. Arts. 12 and 13; Art. 12 C. C.

1898

SHANNON v. THE MONTREAL PARK AND ISLAND RAILWAY COMPANY.

To show further the disastrous results which might ensue if the respondents' pretensions were to prevail, appellant respectfully submits, that if the railway company's arbitrator were to die or resign upon the day fixed for the award, and that in consequence no award should be given, respondents could consistently claim that the proprietor must take the amount offered by them. The proprietor might object that it was through no fault of his that the company's arbitrator had died, but the company could consistently invoke section 156, and insist that time having expired the owner must take what they offered. It is immaterial for the purposes of this argument which arbitrator has died. The company admits the right to appoint a new arbitrator, but denies the time within which to do so. The proprietor claims the right to name a new arbitrator and also to the time to find him and appoint him.

As to the objection raised to the jurisdiction of this court to hear the present appeal the appellant submits that there is no limitation in the second section of the statute 54 & 55 Vict. ch. 25, and that it gives the right of appeal in all matters of prohibition irrespective of the question or amount in controversy.

*Lajoie* for the respondents. This appeal is entirely upon the writ of prohibition. The question is whether the arbitrators had or not jurisdiction; there can be no question of title to lands or value in controversy being over $2,000, because, even should this appeal be dismissed, respondents will have to take other and further proceedings to obtain title to the land. The only point at issue is the right of the arbitrators to arbitrate, and in such a case, the Supreme Court Act gives no appeal from judgments rendered in matters of prohibition in the Province of Quebec. We therefore submit that the court has no jurisdiction to hear the appeal.

1898

SHANNON v. THE MONTREAL PARK AND ISLAND RAILWAY COMPANY.

The arbitrators were *functi officio* after the 15th of October, the date fixed for the rendering of the award. The 156th and 157th sections of the Railway Act cause a forfeiture to operate in the nature of *péremption*. In the absence of any consent or resolution prolonging the time for making an award the court can give no relief. See Russell on Arbitration (7 ed.) p. 147; Rolland de Villargues, vo. "Arbitration," No. 99. The powers of arbitrators are strictly limited by the statute and no power to extend the time is given in the event of the death of one of their number. The Railway Act must govern, and it makes no distinction. Once the time has expired any rights the parties may have had are determined by the statute.

The judgment of the court was delivered by:

TASCHEREAU J.—This is an appeal from a judgment upon a writ of prohibition. The respondent raised an objection to the jurisdiction of this court on the ground that the Act 54 & 55 V. c. 25, sec. 2, which gives the right to appeal in such cases, does not apply to the Province of Quebec. But this contention cannot prevail. The enactment applies to the whole Dominion.

(His Lordship then stated the circumstances under which the controversy arose as given above.)

The sections of the Railway Act that govern the case are sections 156 and 157, which read as follows:

156. A majority of the arbitrators at the first meeting after their appointment, or the sole arbitrator, shall fix a day on or before which the award shall be made; and if the same is not made on or before such day or some other day to which the time for making it has been prolonged, either by the consent of the parties or by resolution of the arbitrators, then the sum offered by the company, as aforesaid, shall be the compensation to be paid by the company.

157. If the sole arbitrator appointed by the judge, or an arbitrator appointed by two arbitrators dies before the award has been made, or is disqualified, or refuses or fails to act within a reasonable time, then,

1898

SHANNON v. THE MONTREAL PARK AND ISLAND RAILWAY COMPANY.

Taschereau J.

in the case of the sole arbitrator, the judge, upon the application of either party, and upon being satisfied by affidavit or otherwise of such death, disqualification, refusal or failure, may appoint another arbitrator in the place of such sole arbitrator; and in the case of any arbitrator appointed by one of the parties, the company and party respectively may each appoint an arbitrator in the place of its or his arbitrator so deceased or not acting; and in the case of the third arbitrator appointed by the two arbitrators, the provisions of section one hundred and fifty-one shall apply; but no recommencement or repitition of the previous proceedings shall be required in any case.

The company's contention is that, as the time for making the award had elapsed, and not been extended under section 156, the appellant has to be satisfied with the $600 they had originally tendered as compensation for the land taken from her. No fault or negligence on the part of the appellant can be reasonably contended for. She could not have been expected between the 11th and 15th of October to find another arbitrator willing to act, and have him sworn in. She possibly was not even then aware of Davidson's death. The company contends that, in the case of a sole arbitrator, if he dies say the day before the date fixed for the award, the proprietor's claim is gone altogether. Can it be that the statute is so unreasonable and unjust? It should require a very clear text to have a court of justice so decide.

We are bound to construe the sections in question so as to ensure the attainment of their object, and the carrying out of their provisions according to their true intent, meaning and spirit.

The company would have us read section 156 textually and gain an advantage over the expropriated owner by a fortuitous event. But section 157 cannot so be read out of the statute, and that section clearly provides for the appointment of another arbitrator when one of the two named by the parties or both

of them, or the third arbitrator, die, at any time before the arbitration is at an end, be it the day before.

That is conceded, but it is argued on behalf of the company, that if the delay has not been extended, the award, not being made on the day fixed, section 156 ends the arbitration. That cannot be. The right to name an arbitrator to replace a deceased one would be vain and illusory if the company's contentions were to prevail. It would be virtually refusing to a party whose arbitrator dies under these circumstances, the right to appoint another one, whilst section 157 clearly gives him that right. Nay, more, if it was the company's arbitrator who had so died, the arbitration would likewise be at an end, and the owner's claim extinguished, according to the judgment under review.

We cannot, in my opinion, so construe this legislation. I would allow the appeal with costs, and restore the judgment of the Superior Court.

*Appeal allowed with costs.*

Solicitors for the appellant: *Morris & Holt.*

Solicitors for the respondents: *Bisaillon, Brousseau & Lajoie.*

1898

*Feb. 28.

*May 6.

HECTOR G. CADIEUX (PLAINTIFF).....APPELLANT;

AND

THE MONTREAL GAS COMPANY (DEFENDANT).....RESPONDENT.

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

*Contract, construction of—Statute, construction of—*12 *Vict. ch.* 183, *s.* 20 *—Contract, notice to cancel—Gas supply shut off for non-payment of gas bill on other premises—Mandamus.*

An agreement to furnish gas contained an express provision that either of the contracting parties should have the right to cancel the contract by giving twenty-four hours notice in writing. Notices were sent in writing to the consumer that his gas would be shut off at a certain number on a street named unless he paid arrears of gas bills due upon another property.

*Held*, that such notices could not be considered as notices given under the contract for the purpose of cancelling it.

The Act to amend the Act incorporating the New City Gas Company of Montreal and to extend its powers, (12 Vict. ch. 182,) provides: "That if any person or persons, company or companies, or body corporate supplied with gas by the company, shall neglect to pay any rate, rent or charge due to the said New City Gas Company, at any of the times fixed for the payment thereof, it shall be lawful for the company or any person acting under their authority, on giving twenty-four hours previous notice, to stop the gas from entering the premises, service pipes, or lamps of any such person, company or body, by cutting off the service pipe or pipes, or by such other means as the said company shall see fit, and to recover the said rent or charge due up to such time, together with the expenses of cutting off the gas, in any competent court, notwithstanding any contract to furnish for a longer time, and in all cases where it shall be lawful for the said company to cut off and take away the supply of gas from any house, building or premises, under the provisions of this Act, it shall be lawful for the company, their agents and workmen, upon giving twenty-four hours previous notice to the occupier or person in charge, to enter into

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ

any such house, building or premises, between the hours of nine o'clock in the forenoon and four in the afternoon, making as little disturbance and inconvenience as possible, and to remove, take and carry away any pipe, meter, cock, branch, lamp, fittings or apparatus, the property of and belonging to the said company."

*Held*, Taschereau J. dissenting, that the powers given by the clause quoted are exorbitant and must be construed strictly; that the company has not been thereby vested with power to shut off gas from all the buildings and premises of the same proprietor or occupant, when he becomes in default for the payment of bills for gas consumed in one of them only; and that the provision that the notice to cut off must be given "to the occupier or person in charge," indicates that only premises so occupied and in default should suffer.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court, District of Montreal, which ordered a peremptory writ of mandamus to issue enjoining the defendant to furnish gas to the plaintiff on the conditions usual for such supply in the City of Montreal with costs of suit against the defendant.

The company cut off the supply of gas at plaintiff's residence in Montreal which was not in default for non-payment of bills for gas consumed there, claiming the right to do so on account of there being unpaid arrears due by him for gas consumed in a building belonging to him in another part of the city. The circumstances under which the controversy arose and the questions at issue are stated in the head-note and fully referred to in the judgment of Mr. Justice Girouard now reported.

*St. Jean* for the appellant.

*Brosseau* for the respondent.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed. When the statute says that if any person neglects to pay *any* rate, rent or charge due

1898

CADIEUX v. THE MONTREAL GAS COMPANY.

Taschereau J.

for gas, it is lawful for the company to stop the gas from entering the *premises* of any such person (*d'empêcher le gaz de s'introduire dans les édifices de telle personne*), I do not feel at liberty to hold that it does not mean what it says; when it says *les édifices*, it means *tous les édifices*, the premises, all the premises. To restrict this enactment as the appellant contends should be done, would be legislation, not interpretation of the law. The judgment of the Court of Queen's Bench is clearly right.

GIROUARD J.—The appellant is applying for a writ of mandamus to compel the respondent to supply him with gas at his private residence, number 282 St. Charles-Borrommée Street, in the City of Montreal. The Superior Court (Mathieu J.) granted the petition, but in appeal, this judgment was reversed for two reasons:—First, the agreement of the fourth of May, 1887, under which the respondent undertook to furnish gas to the appellant, contains an express provision that

> either of the contracting parties will have the right to cancel this contract by giving twenty-four hours notice in writing

and that such notice was served upon the appellant; and secondly, the appellant having failed to pay his bill for gas supplied, upon his order, to premises known as number 1125 of Notre Dame Street, occupied by a tenant of the appellant, the respondent was justified, under section twenty of its charter, (12 Vict. ch. 183), in cuting off their supply of gas from number 282 St. Charles-Borrommée Street, where he was not in default.

It is not necessary to express any opinion as to whether under the contract of the fifteenth of November, 1895, with the City of Montreal, the respondent could enforce the power to cancel stipulated in the

agreement of the fourth day of May, 1887. It is sufficient to say that the respondents were in duty bound to supply the citizens of Montreal with gas, unless duly relieved from that duty by contract or its charter; as to the contract, we have come to the conclusion that the stipulation above quoted does not apply.

When the respondents cut off the gas they did not intend to enforce it in the present case. No notice in writing was ever given to cancel the contract with the appellant. Witness Burke, one of the clerks in the office of the respondents, says that

> on the first of November I sent notice in writing that we should shut off the gas at number two hundred and eighty-two St. Charles-Borrommée Street, unless he paid the account for number eleven hundred and twenty-five Notre Dame Street, but he took no notice of that.

Another similar notice was sent on the second of December, 1895, and, appellant having paid no attention to it, the gas was shut off on the fifth of the same month.

The collector of the respondents, Darling, corroborated this statement. He notified, verbally, the appellant, that unless the account was paid immediately on the Notre Dame Street premises, the gas supply would be discontinued at number 282 Saint Charles-Borrommée Street.

It is therefore plain, that no notice to cancel the contract was given or even intended to be given, and that the notice sent was the one contemplated by section twenty of 12th Vict. ch. 183.

By that section it is enacted that:—

> If any person or persons, company or companies, or body corporate, supplied with gas by the company, shall neglect to pay any rate, rent or charge due to the said New City Gas Company, at any of the times fixed for the payment thereof, it shall be lawful for the company or any person acting under their authority, on giving twenty-four hours previous notice, to stop the gas from entering the premises,

1898

CADIEUX v. THE MONTREAL GAS COMPANY.

Girouard J.

service pipes or lamps of any such person, company or body, by cutting off the said service pipe or pipes, or by such other means as the said company shall see fit, and to recover the said rent or charge due up to such time, together with the expenses of cutting off the gas, in any competent court, notwithstanding any contract to furnish for a longer time, and in all cases where it shall be lawful for the said company to cut off and take away the supply of gas from any house, building or premises under the provisions of this Act, it shall be lawful for the company, their agents and workmen, upon giving twenty-four hours' previous notice to the occupier or person in charge, to enter into any such house, building or premises, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon, making as little disturbance and inconvenience as possible, and to remove, take and carry away any pipe, meter, cock, branch lamp, fittings or apparatus, the property of and belonging to the said company.

The reading of this clause brings us to the consideration of the second reason advanced by the Court of Appeal in support of their judgment. We do not attach any importance to the use of the word *édifices* in the French version of the statute, to arrive at the true meaning of the word "premises" used in the English version. We believe that the word *édifices* here simply means *lieux* where the gas is consumed and not paid for, and not distinct buildings or premises where no fault exists. "Premises" cannot mean *édifices* only, as gas may be, and is in fact consumed out of *édifices* or buildings, for instance, in the open air, gardens and grounds, parks, streets and avenues. Exorbitant powers like those conferred by section twenty must be construed strictly, and if ever intended to cover all the buildings or premises of the same proprietor, or occupant, when in default with regard to one of them only, must be granted in clear and no ambiguous language. The express provision contained in that section that the notice to cut off must be given "to the occupier or person in charge," plainly indicates that only premises so occupied and in default must suffer. Clause six of the contract of the respond-

ents with the city of Montreal, containing a stipulation that they will "collect and receive the several sums of money at any time due by the gas consumers from the latter only," and not from the city, conveys the same idea. Cutting off the gas is the most efficient mode of collection and must therefore be enforced against the consumer, that is the occupant only of the premises in default. To allow a different interpretation of the words of the statute would lead to the most absurd consequences, as for instance, when the proprietor has ordered gas meters for several premises occupied by different tenants in the same or separate buildings, or when a corporation like the city of Montreal neglects to pay its gas bill on its buildings, or some of them, but not on its streets. These results must be avoided if a reasonable construction of the statutes would permit us to do so. We believe that the interpretation given by the Superior Court is not only reasonable, but that it is the only one contemplated by the legislature. *Sheffield Waterworks* v. *Carter* (1); *In re The Commercial Bank of Canada* and *The London Gas Company* (2).

For these reasons we are of opinion that the appeal should be allowed and the judgment of the Superior Court restored with costs in all the courts.

GWYNNE, SEDGEWICK and KING JJ. concurred.

*Appeal allowed with costs.**

Solicitors for the appellant: *Préfontaine, St. Jean, Archer & Décary.*

Solicitors for the respondent: *Bisaillon, Brosseau & Lajoie.*

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(1) 8 Q. B. D. 632. (2) 20 U. C. Q. B. 233.

* Leave has been granted for an appeal from this judgment to the Judicial Committee of the Privy Council.

1898

*Mar. 1.

*May 6.

EDMUND JAMES KING, *et al.* (OPPOSANTS) ..... } APPELLANTS;

AND

PHILEAS DUPUIS *dit* GILBERT PLAINTIFF AND CONTESTANT) ..... } RESPONDENT.

AND

ALPHONSE TASCHEREAU,

*Defendant in the Superior Court.*

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA SITTING IN REVIEW AT QUEBEC.

*Appeal — Jurisdiction — Amount in controversy — Opposition afin de distraire—Judicial proceeding—Demand in original action—R. S. C. c. 135, s. 29—Contract—Construction of—Agreement, to secure advances—Sale—Pledge—Delivery of possession—Arts.* 434, 1025, 1026, 1027, 1472, 1474, 1492, 1994 *c., C. C.--Bailment to manufacturer.*

An opposition *afin de distraire*, for the withdrawal of goods from seizure, is a "judicial proceeding" within the meaning of the twenty-ninth section of "The Supreme and Exchequer Courts Act," and on an appeal to the Supreme Court of Canada, from a judgment dismissing such opposition, the amount in controversy is the value of the goods sought to be withdrawn from seizure and not the amount demanded by the plaintiff's action or for which the execution issued. *Turcotte* v. *Dansereau* (26 Can. S. C. R. 578), and *McCorkill* v. *Knight* (3 Can. S. C. R. 233; Cass. Dig., 2 ed. 694,) followed; *Champoux* v. *Lapeirre* (Cass. Dig. 2 ed. 426), and *Gendron* v. *McDougall* (Cass. Dig. 2 ed. 429), discussed and distinguished.

K. B. made an agreement with T. for the purchase of the output of his sawmill during the season of 1896, a memorandum being executed between them to the effect that T. sold and K. B. purchased [all the lumber that he should saw at his mill during the season, delivered at Hadlow wharf, at Levis; that the purchasers should have the right to refuse all lumber rejected by their culler; that the lumber delivered, culled and piled on the wharf should be paid for at prices stated; that the seller should pay the

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

purchasers $1.50 per hundred deals, Quebec standard, to meet the cost of unloading cars, classification and piling on the wharf; that the seller should manufacture the lumber according to specifications furnished by the purchasers; that the purchasers should make payments in cash once a month for the lumber delivered, less two and a half per cent; that the purchasers should advance money upon the sale of the lumber on condition that the seller should, at the option of the purchasers, furnish collateral security on his property, including the mill and machinery belonging to him, and obtain a promissory note from his wife for the amount of each cullage, the advances being made on the culler's certificates showing receipts of logs not exceeding $25 per hundred logs of fourteen inches standard; that all logs paid for by the purchasers should be their property, and should be stamped with their name, and that all advances should bear interest at the rate of 7 per cent. Before the river-drive commenced, the logs were culled and received on behalf of the purchasers, and stamped with their usual mark, and they paid for them a total sum averaging $32.33 per hundred. Some of the logs also bore the seller's mark, and a small quantity, which were buried in snow and ice, were not stamped but were received on behalf of the purchasers along with the others. The logs were then allowed to remain in the actual possession of the seller. During the season a writ of execution issued against the seller under which all moveable property in his possession was seized, including a quantity of the logs in question, lying along the river-drive and at the mill, and also a quantity of lumber into which part of the logs in question had been manufactured, at the seller's mill.

*Held* (Taschereau J. taking no part in the judgment upon the merits), that the contract so made between the parties constituted a sale of the logs, and, as a necessary consequence, of the deals and boards into which part of them had been manufactured.

APPEAL from a judgment of the Superior Court for Lower Canada, sitting in Review, at Quebec, affirming the judgment of the Superior Court, District of Beauce, which dismissed the appellants' opposition *afin de distraire*, with costs.

The appellants filed an opposition *afin de distraire* claiming ownership, under a written contract, in effect as stated in the head-note, of a quantity of logs and lumber worth $3,500, seized in execution under a writ

1898

KING
v.
DUPUIS.

of *fi. fa. de bonis* issued by the plaintiff, (present respondent), upon a judgment recovered by him in an action in the Superior Court, District of Beauce, against Alphonse Taschereau, the defendant, for $119.57 and costs, being the full amount of his demand in the action. The plaintiff, as execution creditor, contested the opposition and, after the adduction of evidence and hearing upon the issues joined, the Superior Court at Beauce, dismissed the opposition with costs. The judgment now appealed from was rendered in the Court of Review at Quebec, affirming the decision at the trial.

A motion was made to quash the present appeal on the ground that the amount in controversy was limited to the amount of $119.57 demanded by the plaintiff's action, and that consequently the Supreme Court of Canada had no jurisdiction to hear the appeal. After hearing the parties on the motion to quash, the court reserved judgment and directed the hearing upon the merits to be proceeded with, and that the questions raised both upon the motion to quash and upon the merits of the case should be disposed of together.

*Fitzpatrick Q.C.*, (Solicitor General), and *Taschereau Q.C.* for the appellants. The opposition is a distinct "judicial proceeding" within the meaning of sec. 29 of "The Supreme and Exchequer Courts Act," and raises a new controversy as to the ownership of a quantity of logs and lumber worth more than the sum or value of $2,000. See *Turcotte* v. *Dansereau* (1). The issues between the plaintiff and the defendant in the original action are not now in question, but new issues tried between the opposant, and the contestant, as to the logs and lumber seized, quite aside and apart

(1) 26 Can. S. C. R. 578.

from the plaintiff's claim by his action or under the execution. See *Miller* v. *Déchène* (1), per Casault J., at page 22. An opposition of this kind is to all intents and purposes a new action in revendication.

The agreement amounted to an absolute sale of the mill output for the season, the clauses in relation to advances of money to carry on the log making in the bush and the river-drive to the mill do not alter the character of the bargain made for the purchase of the lumber output. See *La Banque d'Hochelaga* v. *The Waterous Engine Works Company* (2). The delivery of all the logs was completed at the time of the culling and marking in the bush, *Church* v. *Bernier* (3), and the defendant never had any possession of them thereafter except as the agent of the opposants and for their benefit and purposes. The boards and deals manufactured out of these logs were consequently the property of the opposants and, although in the defendant's temporary possession, they never ceased to belong to the opposants. See *Price* v. *Hall* (4). There was merely a bailment of the logs for the purpose of having them sawn into boards and deals and delivered at the Hadlow wharf after manufacture. Articles 1025-1027, 1472, 1492 and 1493 C. C. apply. See also 24 Laurent, no. 167; 6 Marcadé p. 223; *Vankoughnet* v. *Maitland* (5); *Young* v. *Lambert* (6); *Ross* v. *Thompson* (7); *Tourville* v. *Valentine* (8); Troplong, "Nantissement," nos. 308, 309, 320, 335; Dalloz, Rep. Jur. "Nantissement," nos. 125-128, 130, 132. This is not a question of goods sold by weight or measure but a "lump" sale of effects, certain, fixed and well defined. Art. 1474 C.C.; Pothier "Vente," no. 308; 2 Pardessus pp. 321, 322;

(1) 8 Q. L. R. 18.
(2) 27 Can. S. C. R. 406.
(3) Q. R. 1 Q. B. 257.
(4) 2. Q. L. R. 88.
(5) Stuarts K. B. 357.
(6) L. R. 3 P. C. 142.
(7) 10 Q. L. R. 308.
(8) Q. R. 2 Q. R. 588.

1898

KING
v.
DUPUIS.

Merlin, Rep. "Vente,"; 16 Duranton, no. 92; Cass. 11, Nov. 1892; Troplong "Vente," no. 85.

*Belcourt* for the respondent, (*Letellier* with him.) There is no jurisdiction in the Supreme Court of Canada to hear this appeal as the amount demanded and recovered and for which the execution was issued is less than the requisite appellate amount of $2000; R. S. C. c. 135, s. 29. The opposant seeks to avoid an execution for $119.57 and costs and at the present moment the payment of $119.57 with a few dollars for interest and costs would put an end to all controversy in this matter, and release the property from seizure. As to the question of jurisdiction we rely upon *Gendron* v. *McDougall* (1); *Champoux* v. *Lapierre* (2); *Flatt* v. *Ferland* (3); *Kinghorn* v. *Larue* (4); *The Bank of Toronto* v. *Le Curé et Les Marguilliers de l'Œuvre et Fabrique de la paroisse de la Nativité de la Sainte Vierge* (5).

There was no sale to the appellants, and they did not obtain delivery and possession of logs or lumber at the date of the agreement, for the defendant had not then cut any logs, and even the culling was not done until long afterwards. Whilst the defendant was cutting and driving the logs he had the exclusive control of the men who did the work under him; he had sawn at his mill all the lumber seized; he alone was bound at his own expense to deliver the deals upon the wharf at Hadlow. With the exception of the culling, the appellants never interfered in the operations of the defendant. The marking of the logs was merly to identify them as having been culled. The agreement establishes that the moneys given by the appellants

(1) Cass. Dig. (2 ed.) 429.
(2) Cass. Dig. (2 ed.) 426.
(3) 21 Can. S. C. R. 32.
(4) 22 Can. S. C. R. 347.
(5) 12 Can. S. C. R. 25.

to the defendant at each culling were only advances to help him in his operations and did not constitute the real and definite price of the logs, and by its very terms it appears that no complete and definite sale took place of a fixed and determined quantity of movable goods. Arts. 1474 and 1026 of the Civil Code apply. See *Kelly* v. *Merville* (1); *Le Mesurier* v. *Logan* (2); *Contant* v. *Normandin* (3); *Ross* v. *Hannan* (4); *Villeneuve* v. *Kent* (5); *Archambault* v. *Michaud* (6). Until the measurement and culling of the lumber had been completed there was no perfect sale, and, until these formalities were accomplished no payment was exigible, and collateral security was provided for to ensure the repayment of the advances made.

The appellants may have rights and certain privileges as pledgees in connection with this lumber, but they are not in possession of it, and the respondent claims with respect to it, rights and privileges in preference to those of the appellants under 57 Vic. c. 47 (Que.) and Art. 1494 of the Civil Code.

TASCHEREAU J.—In this case a certain quantity of logs and deals having been seized by the respondent in execution of a judgment for $119, he had recovered against the defendant, the present appellants fyled an *opposition afin de distraire*, alleging that these logs and deals, worth $3,500, are their property. Upon contestation by respondent of this opposition, the judgment appealed from maintained this contestation, and dismissed appellants' opposition.

The respondent moved to quash the appeal for want of jurisdiction upon the authority of *Champoux* v. *Lapierre* (7), and *Gendron* v. *McDougall* (8). Not relying

(1) 1 R. L. 194.
(2) 1 Rev. de Leg. 176.
(4) 19 Can. S. C. R. 247.
(4) 19 Can. S. C. R. 227.
(5) Q. R. 1, Q. B. 136.
(6) 1 Rev. de Jur. 323.
(7) Cass. Dig. (2 ed.) 426.
(8) Cass. Dig. (2 ed.) 429.

1898

KING
v.
DUPUIS.

Taschereau J

on the summary of these decisions as given in the digest, I have referred to the cases themselves to ascertain precisely what was the nature of the appeals therein, and the grounds upon which it was held that this court had no jurisdiction. It was at that time, I may premise, though perhaps unnecessarily, the amount in controversy upon the appeal to this court that ruled not, as it is now, the amount of the original demand, when the extent of our jurisdiction depends upon the amount in controversy. In *Champoux* v. *Lapierre* (1), Champoux who had recovered judgment against the Société de Construction for $640, had caused an immovable property of the *Société* to be seized in execution of that judgment. Lapierre fyled an opposition to this seizure, not claiming the ownership of this property, not in any way questioning the title to it, but simply on the ground that Champoux, with the other directors, had agreed that this property would not be sold without his, Lapierre's, assent, as long as he, Lapierre, was not paid a claim of $31,000 which he had against the *Société*. Champoux contested this opposition, not at all denying that Lapierre had a claim of $30,000 against the *Société* defendant, but controverting his right to oppose the sale on the grounds he alleged. The judgment appealed from to this court by Champoux maintained the opposition and set aside the seizure. Under the circumstances we held that as the amount in controversy upon the appeal did not amount to $2,000, the appeal should be quashed. Such is the entry in the minute book. There was clearly nothing there in controversy before this court other than Champoux's right to sell this property in execution of his judgment for $640. There was no controversy about Lapierre's claim of $30,000, no controversy as to the *Société*'s title to this

(1) Cass. Dig. 2 ed. 426.

1898

KING v. DUPUIS.

Taschereau J.

property. These two facts were admitted by all the parties. The case has, therefore, no application here.

In *Gendron* v. *McDougall* (1), Gendron had seized a certain immovable property, the value of which was not alleged or proved, upon a judgment against Ogden for $231. McDougall fyled an opposition, claiming this property as owner. Gendron answered that McDougall held it as pledgee, not as owner. The amount for which this property was so held in pledge, if at all, was admitted on the record to be $637. The judgment appealed from to this court by Gendron, though maintaining McDougall's opposition, denied him the ownership of this property, simply declaring that he had a right to retain it as pledgee without saying for what amount. (It was one of the grounds of appeal, that the judgment was *ultra petita*). McDougall submitted to that judgment which rejected his claim to the ownership, so that there was no question of title to land upon Gendron's appeal to this court. All that he claimed, all that was in controversy upon the appeal, was Gendron's right to have it sold for $231, and McDougall's right to retain it and oppose the sale, till he was repaid his disbursements of $637, if the evidence is coupled with the judgment, or disbursements to an undetermined amount, if the judgment appealed from is taken alone, and the entry in the minute book is "appeal quashed for want of jurisdiction, the amount in dispute being under $2,000." That case again is clearly distinguishable.

Here it is the ownership of $3,500 worth of lumber that is in question. The appellant, by his opposition, intervened in the original case to assert his title to this lumber that the respondent had caused to be seized. Upon that opposition the respondent has recovered a judgment which holds that the appellant

(1) Cass. Dig. 2 ed. 429.

1898

KING
v.
DUPUIS.

Taschereau J.

is not the owner of this lumber. From this judgment the appeal is taken.

I do not see how, on this appeal, [upon what is clearly a judicial proceeding, *Turcotte* v. *Dansereau* (1),] it can be denied that the matter in controversy, and demanded by that opposition, is of the value of $2,000 or over. *Macfarlane* v. *Leclaire* (2) is in that sense. I analysed that case in *Kinghorn* v. *Larue* (3). In *McCorkill* v. *Knight* (4) certain lots of land seized in execution of a judgment against appellant's brother for $730 were claimed by her, the appellant, as her property. Plaintiff, respondent, had as here obtained the dismissal of the opposition from which appellant appealed. Objection was taken at the hearing that this court had no jurisdiction because the amount in controversy, that is to say, the amount of the judgment recovered by respondent in the original suit, was only $730. But, upon an affidavit and an extract from the valuation roll on fyle in the registrar's office, that the property in question on the opposition was of a value exceeding $2,000, the appeal was heard and determined on the merits (5). This is a precisely similar case.

The motion to quash is dismissed with costs.

On the merits, I do not take part in the judgment.

GWYNNE, SEDGEWICK and KING JJ. concurred in the judgment dismissing the motion to quash with costs, and were of opinion that the appeal should be allowed with costs and that the conclusions of the appellants' opposition should be granted.

GIROUARD J.—On the 13th day of August, 1896, the respondent brought a personal action in the

(1) 26 Can. S. C. R. 578.
(2) 15 Moo. P. C. 181.
(3) 22 Can. S. C. R. 347.
(4) 3 Can. S. C. R. 233.
(5) Cass. Dig. 2 ed. 694.

1898

KING
v.
DUPUIS.

Girouard J.

Superior Court in the district of Beauce, against the defendant, Alphonse Taschereau, lumber dealer and proprietor of a sawmill in Saint Joseph de la Beauce, for the sum of $119.57, owing him for wages as a river-driver, and also for board of drivers in his employ during the spring of the same year.

On the 21st of August he obtained judgment upon a confession, and on the 24th of the same month, by consent, he issued a writ of *fieri facias de bonis*, and caused to be seized, for the benefit of all his creditors, all the defendant's movable property, and among other things, a certain quantity of boards, deals and sawlogs, the boards and deals fully described in the *procès verbal*, of seizure, and being in the neighbourhood of the defendant's mill, or near the station of the Quebec Central Railway, and 8,000 sawlogs lying along the rivers Chaudière and Calway from the mill upwards.

On the 26th of August, 1896, the appellants, King Brothers, lumber merchants of Quebec, produced an opposition *afin de distraire* to this seizure and claimed as their sole and exclusive property all the sawlogs and a certain quantity of boards and deals among those seized, under a certain agreement in writing, or *convention sous seing privé*, dated Quebec, the 11th day of December, 1895.

It appears by that document that Taschereau

vends et King Brothers, de la cité de Québec, achètent tous les madriers, en épinette et en pin, que le vendeur devra scier à son moulin la saison de 1896, livrables au quai des acheteurs à Hadlow (*at Levis*), pas plus tard que le 15ième Septembre.

Les madriers devront être bien et correctement sciés et les acheteurs auront le droit de laisser tous les madriers rejetés par leur culleur.

Prix : Les prix pour les madriers livrés des chars cullés, et empillés sur les quais des acheteurs à Hadlow, seront : Etc.

Here follows the enumeration of the divers prices, according to the size and quality of the deals.

1898

KING
v.
DUPUIS.

Girouard J.

The parties further agreed:

Il est covenu que le vendeur paiera aux acheteurs $1.50 par 100 madriers Q. S. (*Quebec standard*), pour rencontrer les frais de recevoir le bois des chars, le classifier et l'empiler sur le quai.

Le vendeur s'engage de faire scier les billots d'épinette, tant que possible en madriers de 11 pouses, mais il est entendu que les acheteurs auront le droit de faire scier les billots en autres largeurs ou en autres épaisseurs et que leur notification â cet effet sera assez.

Les acheteurs feront prendre la spécification du bois reçu une fois par mois, et ils payeront au vendeur la balance qui lui sera due, comptant moins 2 et demi par cent.

Les acheteurs averanceront sur l'achât de madriers, aux conditions suivantes:

Pourvu que le vendeur fournira comme sureté un acte de vente en réméré de sa propriété, y inclus le moulin et toute la machinerie qui l'appartient, ou qu'il fera passer par sa femme un billet promissoire pour le montant de chaque cullage, comme sureté collatérale, à l'option des acheteurs, les dits acheteurs avanceront sur le certificat du culleur qu'il a reçu tant de billots un montant à chaque cullage pas excédant $25 par 100 billots de la toise de 14 pouces.

Tous billots payés pour par les acheteurs seront leur propriété et seront reçus et étampés dans leur nom.

Toutes avances porteront intérêt à raison de sept par cent.

It is not alleged, nor does it appear from the evidence that this contract was in fraud of the creditors. The appellants were not creditors of Taschereau except for a small balance of about ten dollars. A fair price was stipulated for the deals and boards; it represented in fact the current market value in Quebec. It is not even suggested either that on the 11th December, 1895, and during the following winter and spring, Taschereau was insolvent, or even in financial difficulties. His insolvency only came out during the summer of 1896, about the time he was sued by the plaintiff and other creditors, long after the logs had been driven down the rivers Calway and Chaudière to his mill or near it, and partly turned into deals and boards.

It is also in evidence, and not disputed, that before the river-drive commenced the logs were culled and

received on behalf of the appellants on the shores of the Calway, and stamped by their culler with their initials or usual mark "K.B." according to the practice prevailing among lumbermen. The last culling and stamping was made on the 13th of April, 1896, in the presence of the respondent himself. Upon the receipt of the returns of the culler in Quebec the appellants paid Taschereau for the logs a total sum of $3,131.38, or 32.33 per hundred logs, when they had agreed to advance only $25. The payment for the last culling was made on the 16th April, 1896.

It is stated that some of the logs bore also the stamp of "A.T." the initials of the defendant, and that a small quantity of them was not stamped at all. The stamp of the defendant affixed before the appellants put their own could not defeat their rights, the defendant admitting himself that the property of the logs was transferred to the appellants. (4 Massé, n. 1607). As to the small quantity of logs which were not stamped because they were buried in the snow or covered by ice, they were received by the culler of the appellants on their behalf along with the others, and although the stamping is *primâ facie* evidence of ownership, any other proof is admissible and the reception of the whole lot by the appellants from the defendant is sufficient, especially as the monies paid by them to him exceed the amount they agreed to pay him for the same. Art. 1493. C. C

These facts are established by the book-keeper of the appellants, E. Quirouet, and their culler, G. McNaughton, and admitted by the defendant Taschereau. When examined as a witness for the appellants he says:

Q. Veuillez prendre communication de l'opposition afin de distraire des opposants en cette cause et dire 1o.—d'où proviennent les billots qu'ils revendiquent, qui a acheté ces billots et à qui ils ont été livrés et au nom de qui ils ont été étampés: 2o.—d'où proviennent

1898

KING
v.
DUPUIS.

Girouard J.

les planches et madriers qu'ils revendiquent aussi?—R. 1o. Les billots revendiqués ont été achetés par moi des habitants et MM. King n'avaient pas d'affaire dans cela, et ensuite, les MM. King ont envoyé un homme pour les culler et les étamper au nom des MM. King. 2o. Les madriers et les planches revendiqués proviennent d'une quantité de billots ainsi achetés par moi de la même manière.

Q. Les billots qui ont produit ces planches et madriers avaient-ils d'abord été cullés par le culler de King Brothers, et étampés en leur nom?—R. Oui.

Q. Tous ces billots ont-ils été faits et achetés par vous et puis étampés au nom de King Brothers, en vertu du contract dont vous venez prendre connaissance et marqué exhibit "A" des opposants?—R. Oui.

Q. Connaissez vous l'étampe ou marque commerciale de King Brothers et quelle est cette étampe?

Objecté à la deuxième partie de cette question.

Objection réservée et réponse prise "de bene esse."—R. Je la connais, et l'étampe K.B., c'est-à-dire, c'est celle qui était mis sur les billots par le culler.

Q. Est-ce la marque dont généralement se servent les opposants pour indiquer les billots qui leur appartiennent?—R. Je crois que oui.

Q. Est-ce qu'il ne se trouvait pas dans les "drives" du printemps, de l'éte et de l'automne dernier, une certaine quantité de billots portant votre nom seul ou vos initiales et qui n'étaient point frappés des initiales K.B.?—R. Il pouvait s'en trouvér quelques-uns mais pas beaucoup et ils auraient dû tous porter la marque des opposants.

Finally, when examined by the respondent, and speaking of the logs, he says:

Q. Si quelques-uns de ces billots n'ont pas été revêtus les lettres K.B., c'est donc qu'ils étaient recouverts de neige et de glace?—R. Oui, ou bien par négligence, car ils auraient dû tous être marqués des lettres K.B. car j'en avais tout vendu le bois aux opposants.

It has been contended that Taschereau was hostile to his creditors and favourable to the appellants. The trial judge who heard and saw the witnesses, does not consider him so, nor does he throw any suspicion or discredit upon his character or credibility; the record rather shows an inclination on his part to favour his creditors generally. He gave to the respondent a confession of judgment and consented that an execution be taken out at once for the benefit of all his creditors, even against

1898

KING
v.
DUPUIS.

Girouard J.

the timber of the appellants; and when pressed, later on, to make a *cession de biens*, he did not resist, but immediately submitted. The record further discloses the fact that he is an honest man. Having consented that the whole of his movable estate should be sold *en justice*, to satisfy all his creditors in consequence of his insolvency, but remembering that, by mistake, he had omitted a portion of it, he went to the bailiff and insisted upon his taking possession of the same.

It must finally be remarked that the respondent claims a privilege upon the logs for the amount of his claim. Whether he has such a privilege or not, whether he can yet enforce it having parted with his possession of the logs, it is not necessary to consider. Such a privilege is no answer to the opposition of the appellants, if they are the true and lawful owners of the property seized, and we therefore believe that the demurrer fyled by them should have been maintained, and it is hereby maintained with costs.

The real question to be decided is, whether, under the said contract and the circumstances of the case, the appellants are the owners of the movable property they revendicate; in other words, does the agreement between the parties amount to a sale? The Superior Court (Pelletier J.), held that the appellant were mere pledgees not in possession, and the Court of Review (Caron and Andrews JJ., Sir L. N. Casault C.J. dissenting), confirmed this judgment for the reasons given by the Superior Court:

Considérant que la convention entre les opposants et le défendeur et telle qu'interprétée par eux, n'établit pas une vente parfaite, mais seulement un engagement par lequel les acheteurs ont fait des avances au vendeur, qui, de son côté s'est obligé à fournir des garanties en vue de la livraison d'une certaine quantité de madriers moyennant un prix déterminé lors qu'ils seront livrés, comptés et empilés sur le quai des opposants à Lévis.

1898

KING
v.
DUPUIS.

Girouard J.

It is apparent from the wording of the written agreement of the 11th day of December, 1895, that though two contracts were entered into by the parties —one affecting the deals and boards and the other respecting the logs - only one transaction was intended, and only one object was in view, namely, the ownership of the timber by the appellants upon the payment of a fixed price.

As to the deals and boards, the terms of the agreement leave no doubt that the parties intended to make a sale of the same. But was it a sale of something uncertain or determinate within the meaning of article 1026 of the Civil Code, or a sale of movable things by weight or measure and not in the lump, contemplated by article 1474? The appellants contend that it was not, Taschereau selling not so many thousand pieces or feet of lumber to be counted or measured, but "all the pine and spruce deals that the vendor shall cut in his mill during the season of 1896, to be delivered at the purchasers' wharf at Hadlow." The thing sold, they argue, is therefore certain and determinate and in the lump, and is not by the number or measure. The price is certain and fixed, and the amount of the purchase money alone is uncertain and indeterminate and can be ascertained only when the deals and boards are delivered from the railway cars, culled and piled up at Hadlow. Under articles 1025, 1027 and 1472, they say finally, the sale was perfect by the mere consent of the parties, irrespective of any delivery, even against third parties in good faith. There is no doubt much force in this argument but it is far from being free from difficulty; it has caused a great deal of diversity of opinions among the commentators and the tribunals of France under Art. 1585 C.N., which is not so sweeping as art. 1474 of the Quebec Code. We do not intend to pronounce upon this delicate point and we

prefer to base our judgment upon that part of the contract which deals with the logs. Were the logs actually sold? Taschereau understood it so, and he so declares in his deposition quoted above. Both McNaughton and Quirouet, employed by the appellants, had the same understanding of the transaction. It is very well known that the best mode of acquiring the property of logs by lumbermen is to stamp them with the initials or trade mark of the purchaser. McNaughton says that is the custom, and if we consult the law reports of the various provinces, we will see that that custom prevails over the whole Dominion and, we may add, over the entire continent of America. That custom has been sanctioned by high judicial authority both in France and in the Province of Quebec, and also by the Canadian Parliament: Criminal Code, Art. 338; *VanKoughnet* v. *Maitland* (1); Paris, 15th April, 1579, reported by Charondas; Cass. 26th January, 1808; Dal. Rép. Vo. Biens, n. 45-46; 21st June, 1820, S. V. 21, 1, 109; 15th January, 1828, D. 28, 1, 90; 25th March, 1844, S. V. 45, 2, 137; 9th June, 1845, S.V. 45, 1, 658; 17th January, 1865, S.V. 65, 2, 127; Dal., Rép. Vo. Vente, n. 616, 617; Charondas, 1, 7, c. 77, 7, 222; 16 Duranton, n. 96; Troplong, n. 103, 283; 1 Duvergier, n. 250; 24 Laurent, n. 167; 4 Aubry et Rau, p. 361; 1 Larombière, art. 1141, n. 13, p. 499; Gilbert sur Sirey, art. 1604 à 1607; Bédarride, Achats et Ventes, nn. 154, 238; 3 Delamarre et 4e Potevin n. 225, 234, 235; 6 Marcadé, p. 232; 4 Massé, ed. 1862, n. 1606; 3 Baudry-Lacantinerie, n. 514; 1 Guillouard, n. 210. The Roman law also recognized the stamping of timber as proof of sale and delivery. *Videri autem trabes traditas quas emptor signasset*, says Paul. So held Straccha, Menochius, Favre and Casageris, quoted by Massé.

(1) Stuart K. B. 357.

1898

KING
v.
DUPUIS.

Girouard J.

The ownership is presumed from the mere stamping of the logs, unless the contrary be proved; in this case the presumption is supplemented by oral evidence that a transfer of property was really intended. But there is more. The proof of the sale appears upon the face of the written agreement. It is therein stipulated that "all logs paid for by the purchasers shall be their property and shall be received and stamped with their name." The price to be paid is mentioned, viz.: $25 for each 100 logs of 14 inches standard, which, and more, has been paid by the appellants to Taschereau.

It is contended that the next paragraph destroys the above stipulation, inasmuch as it provides for the charge of interest at 7 per cent on "all advances," and that therefore the parties intended to make a pledge and not a sale, to secure the payment of those advances. Here and elsewhere in the contract, the word "advances" does not mean a loan of money, but a payment in advance on the price of the deals to be delivered at Hadlow, and the contract says so in express terms; "The purchasers shall advance on the price of the deals on the following conditions, etc." The parties intended to operate a sale of the logs; they so declare under oath, and the stipulation made in the written agreement that they will become the property of the appellants would receive no effect, if a pledge only was created. No pledge can convey any permanent or absolute right of owership; it merely gives to the creditor the right to be paid by privilege, and the thing pledged remains in his hands only as a deposit to secure his debt. Here there was no debt, but a mere payment by anticipation on the deals; morever, it matters very little if the monies paid by the appellants were advanced in relation to or independently of the sale of the deals; the parties intended to make and did make a sale and delivery of

the logs. It was the natural sequence of the sale of the deals. Without it, Taschereau could not secure the necessary material, and it is only reasonable that the ownership of the two should be vested in the same name. The transaction could not be carried out successfully in any other manner. Any other conclusion would seriously disturb the business operations of dealers in lumber, if not render them unsafe and impossible in many cases.

It is also argued that after the stamping, Taschereau remained in possession of the logs; so he did, but for the benefit and in the name of the appellants, to carry out his part of the contract to drive the logs down the river to his mill, saw them, and deliver them at Hadlow. His possession was the same as that of any other driver who would undertake to carry the lumber of any merchant, or of a mill owner who uses the material of another; his possession was qualified and limited to those objects only. Finally it is proved that the appellants advanced $400 to pay the men who made the drive, and that they had a man named Olivier Côté, to oversee the drive.

It is finally stated that the fact that the appellants required further security for their advances, for instance, a deed of sale *à réméré* of his mill or a note of his wife, demonstrate that the logs formed the subject matter of a separate transaction, in fact a debt independent of the deals. The written agreement proves the very reverse. The additional security mentioned was only reasonable, as privileges for a large amount might be allowed to be taken on the logs by workmen in the shanties, or in the mill, or by river drivers. As a matter of fact, the appellants did not exercise the option given to them of additional security, whether in consequence of neglect on their part, or by reason of being satisfied that Taschereau would act honestly with the

1898

KING
v.
DUPUIS.

Girouard J.

money paid to him in advance, the record does not show. The ownership of the logs being established, that the deals and boards cut out of the same must follow (art. 434, C. C.) the appellants having more than paid the cost of workmanship fixed by the contract. The statements and the evidence produced show that Taschereau was entitled to a total sum of $6,199.63 for deals and boards delivered at Hadlow both before and after the seizure, whereas the appellants actually paid and disbursed the sum of $7,809.61 on account of the deals and boards received at Hadlow, as well from Taschereau as from one Joseph Morin, who, after security being furnished by the appellants in due course, sawed the logs remaining not cut at the time of the seizure. Even as pledgees in possession of the logs, it would seem, upon the authority of the Privy Council in *Young* v. *Lambert* (1), that the appellants are entitled to succeed. But it is not necessary to examine this point. We hold that the written agreement and the evidence show that the contract between the parties constituted a sale of the logs, and, as a necessary consequence, of the deals and boards.

For these reasons, we are of opinion that the appeal should be allowed and the judgment of the Court of Review reversed. The opposition *afin de distraire* of the appellants is therefore maintained with costs before all the courts.

*Appeal allowed with costs.*

Solicitors for the appellants: *Taschereau, Lavery & Rivard.*

Solicitor for the respondent: *D. Doran.*

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(1) L. R. 3 P. C. 142.

WILLIAM MACKENZIE (DEFENDANT)...APPELLANT; 1898

AND

THE BUILDING & LOAN ASSOCIATION (PLAINTIFFS)..... } RESPONDENTS.

*Mar. 7, 8.
*May 6.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Mortgage—Leasehold estate—Assignment of equity of redemption—Aquisition of reversion by assignee—Priority.—Merger.*

The assignee of a term, who takes the assignment subject to a mortgage and afterwards acquires the reversion, cannot levy out of the mortgaged premises, to the prejudice of the mortgagees, the ground rent reserved by the lease which he was himself under an obligation to pay before becoming owner of the fee. *Emmett* v. *Quinn* (7 Ont. App. R. 306) distinguished.

Judgment of the Court of Appeal (24 Ont. App. R. 599) affirmed.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Meredith C. J. at the trial (2).

A lease of land for a term of twenty-one years with right of renewal and purchase of the fee was mortgaged to the plaintiffs. The equity of redemption was afterwards assigned to the defendant Mackenzie, who eventually purchased the fee. The plaintiffs by their action claimed that their mortgage became a charge upon the fee, while the defendant claimed that as owner of the reversion he had priority of lien over the mortgagees and a right to collect the ground rents from the mortgagees in possession and the sub-tenants. Both courts below held against the latter contention.

The facts are fully set out in the judgment of the court.

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PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 24 Ont. App. R. 599. (2) 28 O. R. 316.

1898

MACKENZIE v. THE BUILDING & LOAN ASSOCIATION.

*Armour* Q.C. and *Saunders* for the appellant. If the equitable owner of the term had purchased the reversion there might have been a merger, but not where it has been acquired by a second mortgagee, the owner of the term still being a tenant.

Merger is entirely a question of intention. *North of Scotland Mortgage Co.* v. *German* (1). And see *Snow* v. *Boycott* (2) as to the doctrine of merger under the Judicature Act.

As between the first and second mortgagees the acquisition of the reversion is not subject to the mortgage. *Nesbitt* v. *Tredennick* (3); *Aberdeen Town Council* v. *Aberdeen University* (4); *Randall* v. *Russell* (5); *Rawe* v. *Chichester* (6).

The right to purchase in the lease could only be enforced against the original lessors and not their assignees; *Emmett* v. *Quinn* (7); so that the purchase from the assignee was not under the lease. If it was, the usual terms of repayment of money paid out should have been imposed. See *Keech* v. *Sandford* (8); *In Re Lord Ranelagh's Will* (9); *Phillips* v. *Phillips* (10).

*Scott* Q.C. and *Allan Cassels* for the respondents. McKenzie acquired the fee as assignee of the equity of redemption and thus enlarged the estate for the benefit of the mortgagee. *Doe d. Gibbons* v. *Pott* (11); *Doe d. Ogle* v. *Vickers* (12).

In the following cases it was held that a mortgage of a term was a charge upon the fee acquired subsequently. *Moody* v. *Matthews* (13); *Trumper* v. *Trumper* (14); *Leigh* v. *Burnett* (15); *Phillips* v. *Phillips* (10);

(1) 31 U. C. C. P. 349.
(2) 1892, 3 Ch. 110.
(3) 1 Ball & B. 29.
(4) 2 App. Cas. 544.
(5) 3 Mer. 190.
(6) Amb. 715.
(7) 7 Ont. App. R. 306.
(8) 1 White & Tudor L. C. 53.
(9) 26 Ch. D. 590.
(10) 29 Ch. D. 673.
(11) 2 Doug. 709.
(12) 4 A. & E. 782.
(13) 7 Ves. 174.
(14) L. R. 14 Eq. 295.
(15) 29 Ch. D. 231.

and see Coote on Mortgages, 4 ed. p. 268; Fisher on Mortgages, 5 ed. p. 333.

The judgment of the court was delivered by

GWYNNE J.—By an indenture of lease bearing date the first day of July, 1885, James Austin and William Arthurs did demise and let unto one William Snowden Thompson certain lands and tenements situate in the city of Toronto, particularly described in the said indenture, whereof they, the said James Austin and William Arthurs were then seized in fee simple, to have and to hold to the said Thompson, his executors, administrators and assigns, for the term of twenty-one years from the said first of July, and recoverable at the expiration of the said term in the manner in the said indenture of lease provided. The said lessee in the said indenture did thereby for himself, his executors, administrators and assigns, covenant with the said lessors, their heirs, executors, administrators and assigns, to pay rent and taxes and to keep the buildings to be erected thereon insured to an amount not less than five thousand dollars. And the said lessors, for themselves, their heirs, executors, administrators and assigns, did by the said indenture covenant and agree with the said lessee, his executors, administrators and assigns, among other things as follows:

> That the lessee, his executors, administrators and assigns may at any time during the first ten years of the term hereby granted, purchase (and the lessors agree to sell to him or them at any time within the said term of ten years) the fee simple in said lands for fourteen thousand dollars to be paid in cash at time of purchase and ground rent paid to such date.

By an indenture of demise by way of mortgage made upon the 10th day of November, 1885, the said William Snowden Thompson did assign and transfer unto the Building and Loan Association (the plaintiffs in

1898

MACKENZIE v. THE BUILDING & LOAN ASSOCIATION.

Gwynne J.

this action), their successors and assigns, the lands and tenements in the said indenture of lease mentioned, to have and to hold the same together with the said lease and the term thereby granted subject however to redemption upon payment of the sum of six thousand dollars by the instalments and at the times in the said indenture by way of mortgage mentioned, and subject also to the proviso that until default in such payment the mortgagor, his heirs and assigns, should have and retain possession of the said lands and of the rents, issues and profits thereof.

Between the day of the date of the last mentioned indenture and the month of January, eighteen hundred and ninety-one, the said demised premises and the said indenture of lease and the residue of the term thereby granted, and all the estate and interest of the said lessee, his heirs, executors, administrators and assigns, and all the benefit of the covenants therein contained upon the part of the said lessors therein, their heirs, executors, administrators and assigns, to be observed and kept, became by mesne assignment vested in one Charles Joseph Smith, his heirs, executors, administrators and assigns, subject to the said indenture of assignment by way of mortgage to the plaintiffs, and being so vested in the said Charles Joseph Smith, he by an indenture bearing date the 31st day of January, 1891, in consideration of the sum of forty thousand dollars therein acknowledged to have been paid to him by William McKenzie (the above appellant), did grant, bargain, sell and assign unto the said William McKenzie to have and to hold unto him, his executors, administrators and assigns, the tract of land and premises comprised in and demised by the said indenture of lease, together with the said indenture, for the residue of the term thereby granted, and for all other the estate, term, right of renewal and

other the interest of him the said Charles Joseph Smith therein subject to the payment of the rent and the observance of the lessee's covenants and agreements in the said lease reserved and contained, and the said Charles Joseph Smith did thereby for the consideration aforesaid, further assign, transfer and set over unto the said William McKenzie, his heirs, executors, administrators and assigns, the right to purchase the freehold in the said premises in the said indenture of lease contained, and all benefit and advantage to be derived therefrom.

By the said indenture, the said Charles Joseph Smith for himself, his heirs, executors and administrators, covenanted with the said William McKenzie, his executors, administrators and assigns, that he and they *subject to the said rent and the lessee's covenants and agreements in the said lease contained should* enjoy the said demised premises for the residue of the said term by the said lease thereof granted, and any renewal thereof (if any) for their own use and benefit without the let, suit or hindrance of the said Charles Joseph Smith or any other person whomsoever free from all incumbrances whatsover *excepting only the mortgage* made by the said William Snowden Thompson to the said Building & Loan Association. This indenture was duly registered in the registry office of the division in which the demised lands were situate, on the third day of February, 1891, and upon the thirteenth of that month the appellant caused his solicitors, by a letter of that date, to notify the respondents that he had purchased the said leasehold premises whereon they held their mortgage.

In the month of June, 1895, the appellant being and claiming to be owner of the equity of redemption in the said leasehold term and premises, and to be entitled to purchase the reversion in the said premises in fee in

1898

MACKENZIE v. THE BUILDING & LOAN ASSOCIATION.

Gwynne J.

virtue of the assignment to him contained in the said indenture bearing date the 31st day of January, 1891, of the benefit of the covenant in the said indenture of lease to the said Thompson in relation to the purchase of said reversion, caused a deed to be prepared by one A. J. Sinclair, as his solicitor, and to be presented to a Mr. Britton who was then seized of the said reversion in fee for execution; and thereupon the said Mr. Britton executed the said deed so prepared and presented to him. This deed bears date the 21st day of June, 1895, and thereby after reciting therein the said indenture of lease of the 1st of July, 1885, and the privilege thereby granted to the lessee therein and to his heirs, executors, administrators or assigns, to purchase the fee simple in the said lands upon the terms and conditions and within the time therein reserved and contained, and that the said lease and the benefits and all the conditions therein contained had become vested in the said William McKenzie (the now appellant), and that he desired to purchase the fee simple in said lands, the said Mr. Britton did, in consideration of fourteen thousand dollars, then paid by the said McKenzie to him, the said Mr. Britton, grant the said lands and premises unto and to the use of the said William McKenzie, his heirs and assigns for ever.

Now by the terms of the said indenture of the 31st of January, 1891, it is apparent that the equity of redemption in the said term and the whole of the estate and interest of the said Charles J. Smith in the premises so as aforesaid mortgaged to the respondents, did become absolutely vested in the appellant, and that as the assignee of such the estate and interest of the said Charles J. Smith, he became entitled also to the benefit of the covenant in the lease contained in relation to the purchase of the fee simple in the said lands at and for the sum of fourteen thousand dollars, and he

became by the said indenture liable, as such assignee, for the payment (to the ground landlord for the time being) of the rent reserved by the lease of the 1st of July, 1885.

Now, the time within which the right to purchase the fee simple at the price named in the lease must be exercised, being about to expire on the 1st of July, 1895, the position of the appellant in the month of June when he procured the deed above stated to be executed by Mr. Britton was this: the rent which as owner of the equity of redemption he was then by force of the indenture of the 31st of January, 1891, bound to pay to the ground landlord, then being Mr. Britton, was $840 per annum, or 6 per cent upon the $14,000 settled as the price to be paid for the purchase of the fee; when, therefore, the appellant procured the execution by Mr. Britton of the deed of the 21st June, 1895, he was very probably making an advantageous bargain for himself by reason of the depreciation of the interest obtained for the use of moneys. By paying the $14,000 the effect of his operation was that he became thereby for the whole residue of the term granted by the lease relieved from his liability to pay $840 per annum, ground rent.

Shortly after the execution of the deed of the 21st June, 1895, that is to say, upon the 28th of the said month, the gentleman who had acted as solicitor of the appellant in preparing and procuring to be executed by Mr. Britton the deed of the 21st June, 1895, sent in writing to the respondents' manager the following notice:

Take notice that on behalf of the owner of the equity of redemption in the leasehold property known as Nos. 37, 39, 41 and 43 Wellington Street East, Toronto, and more particularly described in a certain mortgage of the said leasehold property made by one W. S. Thompson, to the said Building and Loan Association, that I will, at the expiration of six months from the 30th day of June, 1895, pay off the

1898

MACKENZIE v. THE BUILDING & LOAN ASSOCIATION.

Gwynne J.

principal money remaining unpaid and owing to the said Company on account of the said mortgage together with any accrued interest there may be due thereon. Yours, truly,

A. J. SINCLAIR,
*Solicitor for the said owner.*

Nothing having been done in pursuance of this notice the respondents commenced the present action on the 25th day of February, 1896.

Upon the 30th March, 1896, the appellant wrote to the manager of the respondents informing him that he, the appellant, had become owner of the freehold of the mortgaged property, and demanding payment of $210 ground rent coming due upon the 1st of April under the provisions of the lease to Thompson. This sum the respondents' manager paid under protest and specially without prejudice to their claims in the present action which had then been commenced, and was subsequently proceeded with to judgment. The appellant's defence to the action is that notwithstanding the terms of the indenture of the 31st January, 1891, he is only a second mortgagee of the leasehold term of which the respondents are first mortgagees, and that he is, in his own independent right, seized of the fee simple estate in the mortgaged premises, and as being so seized he is entitled to demand and receive from Smith, and failing him, from the respondents, as mortgagees, and from the subtenants of the said mortgaged premises, to the prejudice of the respondents, as mortgagees, the ground rent reserved in the lease to Thompson during the residue of the term thereby granted, and finally that there is no privity between the appellant and the respondents to give the latter any action against the former. In support of this contention the appellant produced at the trial a letter written by himself to Smith, and another, dated the 6th of February, 1891. This contention does not appear to be made by the desire of nor

in the interest of Smith, who, from anything in evidence, does not appear to claim to have any estate or interest in the said leasehold premises in virtue of anything contained in this letter which is produced from his own possession by the appellant himself, who seeks by it to change and subvert the whole intent of the indenture of the 31st of January, 1891, as expressed therein, and as the evidence shows, it was understood and acted upon by the appellant until the defence set up in this action. The letter, however, was received at the trial and is before us on this appeal. It is as follows :

TORONTO, 6th February, 1891.

Messrs. C. J. SMITH and J. F. COLEMAN, Toronto :

DEAR SIRS,—I beg to say that it is my understanding of our agreement with reference to the $30,000 loan that the several deeds respectively dated the 31st day of January, 189:, and executed by C. J. Smith to me, the particulars whereof are as follows :

1. Deed of Conveyance of lots 9 and 10 on King Street, and lots 11 and 12 on Brock Street, Plan D 253, registered as number 2458R.

2. Deed of Assignment of lease part of the triangular block between Wellington and Front Streets, Toronto, and known as the "Bowes property," registered as number 2459R ;

3. Transfer under the Land Titles Act of the part of the aforesaid triangular block known as the "Watson property" ; are to be considered merely as a mortgage to me upon those properties to secure the sum of $30,000 which I have advanced upon the security of a note dated the 2nd February, 1891, signed by C. J. Smith, and indorsed by J. F. Coleman, payable one year after date for $30,000 with eight per cent interest payable half yearly, and that upon payment of the said note at maturity I am to execute all proper deeds for the reconveyance of these properties as you direct. If the said note is not paid at maturity it is to bear interest at eight per cent per annum until paid, and upon default being made in payment of the said note or the first half year's interest thereon I am to be entitled forthwith to all the rights and remedies of a mortgagee.

(Signed) Yours truly,
WM. McKENZIE.

We agree to the above.

(Signed), C. J. SMITH,
J. F. COLEMAN, *Attorney.*

J. F. COLEMAN.

1898

MACKENZIE v. THE BUILDING & LOAN ASSOCIATION.

Gwynne J.

Mr. Sinclair who prepared the deed for the conveyance to the appellant of the fee simple in the leasehold premises, was called as a witness for the appellant. He stated that he had no instructions from the appellant in relation to the notice of the 28th June, 1895; he said that a short time previously he had gone to see Mr. Gillespie, the respondents' manager, to see if he would take the money due on the mortgage, and he said he would not receive it without six months interest or six months notice, and so that he gave the notice of his own accord without any authority from Mr. McKenzie. Being asked on cross-examination who was the "owner of the equity of redemption," referred to in the notice he said that he himself was, that it had been conveyed to him by Mr. McKenzie for the purpose of endeavouring to effect a loan upon the property and therewith to pay off the respondents' mortgage, and that having failed to effect the loan he had reconveyed the equity of redemption to Mr. McKenzie. By the evidence of this witness, it also appeared that about January, 1892, he had been employed to act as solicitor in the interest of McKenzie, Smith (and one Coleman who also then claimed to have had some interest in the premises) to collect the rents from the tenants of the houses on the demised premises, and after payment thereout of the ground rent, taxes, and the sums coming due on the respondents' mortgage to pay the residue to Mr. McKenzie. It also in like manner appeared that Mr. McKenzie dealt with the other properties mentioned in the letter of the 6th of February, 1891, as the absolute owner of the estate and interest expressed in the deed conveying them to him and that Mr. Sinclair acted as his solicitor in those cases. It is thus apparent that whether Mr. Sinclair had or had not instructions or

authority from Mr. McKenzie in relation to the notice of the 28th June, 1895, he was acting in the interest of the latter and in virtue of the authority vested in him, Mr. Sinclair, by the assignment to him by Mr. McKenzie, of the equity of redemption for the express purpose of enabling a loan to be effected thereby out of which the respondents' mortgage was to be paid. That Mr. McKenzie quite understood himself to be absolute owner of all of Smith's interest in the mortgaged premises is thus apparent; indeed on his examination in this case he admitted that from the time of the execution of that deed he supposed he was owner of the equity of redemption in the mortgaged premises. The learned counsel for the appellant also in his argument before us admitted the intention of the transaction to be, (as he said was a common practice with conveyancers in Toronto) to vest the absolute estate of Smith as expressed in the deed of the 31st January, 1891, in Mr. McKenzie so as to enable him to deal with the property as the owner thereof, and in such manner as should seem to him best to raise funds to be applied in paying off all charges on the property including his own advances.

To that extent it may be admitted without any prejudice to the respondents' claim in this action, that the appellant holds the estate in the term conveyed to him by the indenture of the 31st January, 1891, and also the right to acquire the fee simple upon the terms mentioned in the indenture of lease to Thompson as security for his, the appellant's advances; but whatever may have been the secret understanding between Smith and the appellant as to the intention of the indenture of the 31st January, 1891, it is certain that under that indenture the appellant acquired the only interest he ever had in the leasehold term, and that such interest was as assignee of the term and the

1898

MACKENZIE v. THE BUILDING & LOAN ASSOCIATION.

Gwynne J.

premises subject to the respondents' mortgage, and that thereby he became liable as assignee of the term subject to the respondents' mortgage, to pay the ground rent reserved by the lease. In the discharge of this obligation by the appellant the respondents, as holders of the mortgage, subject to which the appellant became possessed of all Smith's interest in the term, have a very material interest which no secret arrangement between Smith and McKenzie could avail to impair.

Now the appellant having in virtue of such the estate and rights so vested in him by the indenture of the 31st January, 1891, acquired the fee simple in the mortgaged lands and premises the sole material question upon this appeal really is: Can he in the character of owner in fee of the reversion in the leasehold premises, levy from the respondents or from the subtenants of the leasehold premises, the rent reserved in the lease of the term which by the effect of the indenture of the 31st January, 1891, he became himself under the obligation to pay, and thus impair the value of the respondents' mortgage subject to which he became possessed of the term? And the answer we think both upon principle and upon the authority of all the cases is, that he cannot. It was urged by the learned counsel for the appellant that the Court of Appeal for Ontario overlooked a decision of their own in a case of *Emmett* v. *Quinn* (1), and upon the authority of that case, and of *Rawe* v. *Chichester* (2), he contended that the appeal should be allowed. As to the decision of *Emmett* v. *Quinn*, whether well or ill decided we need express no opinion, for we think that, as no doubt the Court of Appeal for Ontario also thought, it has no application in the present case. Neither has *Rawe* v. *Chichester*, and for a like reason.

(1) 7 Ont. App. R. 306. (2) Amb. 715.

The ground of the contention was, that the frame of the covenant in the lease as to the purchase of the reversion in fee was such that the lessors only, personally, and not their assigns, were under any obligation to convey and that therefore Britton was under no obligation to convey the fee to the appellant, and it was contended that therefore Britton is to be regarded as having conveyed under a mistake as to his being under an obligation to do so, and that thus the case comes within the principle of *Rawe* v. *Chichester*, and that the appellant, by reason of this alleged mistake, whether it be of Britton or of the appellant, is now entitled to hold the fee simple in the reversion as a purchase made by himself wholly independently of the assignment to him made by the indenture of the 31st of January, 1891, but the covenant in the lease which is the covenant of the lessors for themselves and their heirs, executors, administrators and assigns, is express that the lessee, his executors, administrators or assigns may at any time during the first ten years of the term purchase the fee simple in the said lands for fourteen thousand dollars. Now, in the deed prepared by the appellant and presented to Mr. Britton for execution, the original indenture of lease and the covenant therein contained, in the form I have just stated (leaving out the words "and the lessors agree to sell",) is quite correctly stated, and the deed further recited that the said lease and the benefits and all the conditions therein contained had become vested in the appellant, and that he desired to purchase the fee simple. Now this recital contains correctly both in point of fact and of law the right in virtue of which the appellant was calling upon Mr. Britton to convey the reversion whereof he was seized as assignee of the original lessors, to him, and he without any objection whatever or suggestion

1898

MACKENSIE v. THE BUILDING & LOAN ASSOCIATION.

Gwynne J.

that he was not bound by the covenant in the lease and in consideration of the payment by the appellant of the price named in that covenant, executed the deed so presented to him and thereby conveyed the fee simple to the appellant. It is impossible under these circumstances to say that there was here any mistake of fact or of law, and if of the latter only, *Rawe* v. *Chichester* has no application. The right in which the appellant was desiring and claiming to have the fee conveyed to him, is very plainly and quite correctly stated, and Mr. Britton, whether under any obligation or not matters not, recognized the appellant's claim and in acknowledgement of it complied with it.

Then, again, the learned counsel contended that *Leigh* v. *Burnett* (1) upon which among other cases the learned Chief Justice Meredith rested his judgment is in favour of, and not adverse to, the contention of the appellant, his contention being that the appellant's position in the present case is precisely analogous to the position in which Mrs. Leigh would have been in that case if the reversion had been conveyed to herself, but in truth the appellant having been the owner of the equity of redemption in the mortgaged premises, and the assignee of the right to purchase the reversion in the terms of the indenture of the 31st January, 1891, and having in that character applied for and obtained the reversion to be conveyed to him he occupies rather, as the learned Chief Justice Meredith held, a position analogous to that held by Newton in *Leigh* v. *Burnett*. The case in fact is simply resolved to this: Can the appellant, who acquired the reversion in virtue of the estate and interest assigned and transferred to him by the indenture of the 31st January, 1891, levy to his own use out of the mortgaged premises to the prejudice of the mortgagees, the ground rent reserved by the lease

(1) 29 Ch. D. 231.

which by force of the terms of the indenture of the 31st of January, 1891, he was himself under an obligation to pay? That he cannot is the effect of the judgment now in appeal, and the like result would have followed whether he purchased the reversion in virtue of the covenant in the lease or otherwise. The appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Kingsmill, Saunders & Torrence.*

Solicitors for the respondents: *Cassels & Standish.*

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## DAVIDSON *et. al.* v. THE CITY OF MONTREAL.

1898
*Feb. 25.
*May 6.

*Municipal corporation—Public market—Licensing traders and hucksters—Obstructing streets and sidewalks—Loss of rents—Damages.*

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) (1) reversing the decision of the Superior Court, District of Montreal, and dismissing with costs, the plaintiff's action for damages for the loss of rent of property in the immediate neighbourhood of a public market through the obstruction of the streets and sidewalks in that vicinity by traders and hawkers licensed by the defendant to occupy the same.

After hearing counsel for both parties the court reserved judgment and, on a subsequent day dismissed the appeal with costs for the reasons given in the court below.

*Appeal dismissed with costs.*

*Rielle* for the appellants.

*Ethier Q.C.* for the respondents.

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) Q. R. 7 Q. B. 1.

1898

*May 4.

*May 9.

LA BANQUE DU PEUPLE (DEFENDANT)..... } APPELLANT;

AND

LOUIS M. TROTTIER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA SITTING IN REVIEW AT MONTREAL.

*Appeal—Jurisdiction—Future rights—Alimentary allowance—R. S. C. c. 135, sec. 29, ss. 2; 54 & 55 V. c. 25, s. 3; 56 V. c. 29, s. 2.*

Actions or proceedings respecting disputes as to mere personal alimentary pensions or allowances do not constitute controversies wherein rights in future may be bound within the meaning of the second sub-section of the twenty-ninth section of "The Supreme and Exchequer Courts Act," as amended, which allows appeals to The Supreme Court of Canada from judgments rendered in the Province of Quebec in cases where the controversy relates to "annual rents or other matters or things where rights in future might be bound." (*Macfarlane* v. *Leclaire*, 15 Moo. P. C. 181, distinguished; *Sauvageau* v. *Gauthier*, L. R. 5 P. C. 494, followed).

APPEAL from the judgment of the Superior Court of Lower Canada, sitting in Review, at Montreal, affirming the judgment of the Superior Court, District of Montreal, which maintained the plaintiff's action with costs.

The bank had granted a pension to a former cashier, A. A. Trottier, as a retiring allowance at the rate of $3,000 per annum for the first five years, and to be continued after that time at the rate of $2,000 per annum, payable monthly, during his lifetime, and paid the same regularly for some years notwithstanding that he was indebted to the bank in a large amount of money. It finally became evident that the financial affairs of the bank were so involved that creditors could not be paid in full, and the directors stopped

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

payment of the pension, retaining the monthly instalments as they became due in compensation of the debt due to the bank. Mr. A. A. Trottier then assigned his claim for pension to one Bousquet, who afterwards assigned it to the plaintiff who brought the action to recover $1,166.69 for seven of the monthly payments alleged to be due up to the time of the suit. The bank set up their claim of over $30,000, against A. A. Trottier, in compensation to the extent of the amount claimed by the plaintiff's action, and upon issues joined, the trial court rendered a decision in favour of the plaintiff, and dismissed the plea set up by the defendant. This judgment was affirmed by the Court of Review, and from this judgment the present appeal is taken.

MOTION by the respondent to quash the appeal for want of jurisdiction on the ground that the case did not involve any matter in controversy amounting to the sum or value of $2,000, and did not come within the exceptions stated in the 29th section of "The Supreme and Exchequer Courts Act."

*Madore* for the motion, cited *Rodier* v. *Lapierre* (1); *O'Dell* v. *Gregory* (2); *Raphael* v. *Maclaren* (3); *Macdonald* v. *Galivan* (4).

*Geoffrion*, Q.C., contra. The plea of compensation sets up a claim for $30,000 which is the amount brought in controversy as a set off against the present and all future claims for pension until that amount may be fully satisfied by compensation. Again, the demand is for an annual *rente*, or pension in the nature of an alimentary allowance, payable by instalments so long as Mr. A. A. Trottier may live, and the decision in this suit will have binding effect upon the right of the bank to set off its debt against any future instal-

(1) 21 Can. S. C. R. 69.
(2) 24 Can. S. C. R. 661.
(3) 27 Can. S. C. R. 319.
(4) 28 Can. S. C. R. 258.

1898

LA BANQUE DU PEUPLE v. TROTTIER.

ments of the pension accruing to their debtor. The appellant's position is supported by the decisions in *Macfarlane* v. *Leclaire* (1); *Sauvageau* v. *Gauthier* (2); *Gilbert* v. *Gilman* (3); *The Citizens' Light and Power Company* v. *Parent* (4).

The judgment of the court was delivered by:

GIROUARD J.—This motion must be granted, and the appeal quashed with costs. The amount claimed by the action is for less than £500 sterling, in fact it is for only $1,166. The appellant alleges that it affects future rights, but the jurisprudence of this court has been laid down in several cases that mere personal alimentary pensions or allowances do not constitute future rights within the meaning of the Supreme Court Act. A decision of the Judicial Committee of the Privy Council, in *Macfarlane* v. *Leclaire* (1), has been quoted by the appellant as binding upon us, and determining this question in its favour as the bank bas an interest in the case exceeding £500 sterling, in fact exceeding $25,000. The bank may have such an interest against A. A. Trottier, but the latter is not in the case. The appellant has no interest against the respondent except to the amount of the plea of compensation in issue, or as alleged in the pleas "jusqu'à due concurrence en compensation à la présente action." The case of *Sauvageau* v. *Gauthier* (2), quoted by the appellant, and likewise decided by the Privy Council, is contrary to his pretention.

*Appeal quashed with costs.*

Solicitors for the appellant: *Geoffrion, Dorion & Allan.*

Solicitors for the respondent: *Madore, Guerin & Perron.*

(1) 15 Moo. P. C. 181.
(2) L. R. 5 P. C. 494; 5 R. L. 602.
(3) 16 Can. S. C. R. 189.
(4) 27 Can. S. C. R. 316.

HER MAJESTY THE QUEEN (DEFENDANT) ..... } APPELLANT;

AND

DAVID H. HENDERSON AND NORMAN B. T. HENDERSON (PLAINTIFFS) ..... } RESPONDENT.

1898

*Feb. 15, 16.

*May 14.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Statute, construction of—Public works—Railways and canals—R. S. C. c. 37, s. 23—Contracts binding on the Crown—Goods sold and delivered on verbal order of Crown officials—Supplies in excess of tender—Errors and omissions in accounts rendered—Findings of fact—Interest—Arts. 1067 & 1077 C. C.—50 & 51 V. c. 16, s. 33.*

The provisions of the twenty-third section of the "Act respecting the Department of Railways and Canals" (R. S. C. ch. 37,) which require all contracts affecting that Department to be signed by the Minister, the Deputy of the Minister or some person specially authorized, and countersigned by the secretary, have reference only to contracts in writing made by that Department. (Gwynne J., *contra.*)

Where goods have been bought by and delivered to officers of the Crown for public works, under orders verbally given by them in the performance of their duties, payment for the same may be recovered from the Crown, there being no statute requiring that all contracts by the Crown should be in writing. (Gwynne and King, JJ., *contra.*)

Where a claim against the Crown arises in the Province of Quebec and there is no contract in writing, the thirty-third section of "The Exchequer Court Act" does not apply, and interest may be recovered against the Crown, according to the practice prevailing in that Province.

APPEAL from the judgment of the Exchequer Court of Canada (1), upon a reference by the Minister of Railways and Canals, in favour of the plaintiffs for the amount of their claim for lumber sold and delivered, with interest and costs.

PRESENT: —Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 6 Ex. C. R. 39.

1898

THE QUEEN v. HENDERSON.

The plaintiffs' claim was for the recovery of lumber sold and delivered to Her Majesty for the construction of the Wellington bridge and the Grand Trunk bridge over the Lachine Canal, at Montreal.

The following statement of the facts of the case, as disclosed at the trial, is taken from the judgment of His Lordship Mr. Justice Taschereau.

On the twenty-sixth of November, 1892, the Government through their officer, Edward Kennedy, Superintendent of the Lachine Canal, invited tenders for the supply of lumber and timber required in the construction of the Wellington Street Bridge across the Lachine Canal at Montreal. The respondents tendered, and, their tender being accepted, they commenced in the month of December, 1892, to supply and deliver lumber and timber to the Government officers in charge of the works. There was no formal contract entered into and nothing further than the tender and acceptance of it took place, so far as any written agreement was concerned.

Shortly after the construction commenced the respondents were requested to furnish and did furnish large quantities of lumber and timber of sizes and kinds differing from those mentioned in the invitation for tenders, and during the month of December, 1892, and the months of January, February, March and April, 1893, they, at the request and upon the orders of the officers in charge of the works, supplied and delivered at the works for the Wellington Bridge and for another bridge in course of construction by the Government in the same locality, called the Grand Trunk Bridge, a quantity of timber and lumber largely in excess of what was originally contemplated when the invitation for tenders was issued. The value of the timber and lumber so supplied and delivered amounted to the sum of $64,427.44. The value of the

approximate quantity which, in the contemplation of the Government, at the time the tender was made, would be required amounted to $14,025.25, so that the quantity of timber and lumber actually supplied and delivered by the respondents, amount to $50,-402.19 in excess of the amount mentioned in the invitation for tenders. This increase in quantity of timber and lumber so delivered and supplied was caused largely by circumstances to which it is unnecessary to refer. Suffice it to say that it is clearly proved that during the whole of the work of construction of these bridges, the officers of the Government in charge of the construction, from day to day sent their orders and requisitions to the respondents for lumber and timber. There was no distinction made by them as to whether the lumber and timber required were within the kinds and quantities of lumber and timber in the original tender, or whether it was of a different kind altogether. The respondents upon all of such requisitions delivered the timber and lumber so ordered by the officers of the Government, and at all times during the continuance of the said works, they supplied all demands made upon them for lumber and timber to be used upon the construction of the said bridges.

At the end of each of the months of December, 1892, and January, February, March and April, 1893, they prepared and furnished detailed accounts of all the lumber and timber supplied and delivered to the officers of the Crown under their orders as aforesaid, and these accounts, amounting in all to the sum of forty-three thousand, eight hundred and sixty-five dollars and six cents, were duly certified and forwarded to the Department of Railways and Canals and paid. The account for lumber and timber supplied and delivered for the month of April, 1893, was

1898

THE QUEEN v. HENDERSON.

likewise duly prepared in detail and duly certified, but the Government refused to pay it, and upon such refusal the respondents obtained from the Minister of Railways and Canals a reference to the Exchequer Court of their claims to, amongst other sums, the amount thereof, namely $16,155.65.

The present appeal is from the judgment of the Exchequer Court, upon the reference, in favour of the plaintiffs for their claim with interest and costs.

*Chrysler Q.C.* for the appellant. No contract has been established binding upon the Crown, under the provisions of R. S. C. ch. 37, secs. 6, 11 and 23. No contract can be implied which would enable subordinate officers and servants of the Crown to bind the Crown indirectly, in cases where they could not do so directly; and the statute applies to a contract whether wholly or partially executed. The appellants rely upon: *Hunt* v. *Wimbledon Local Board* (1); *Young* v. *Mayor of Leamington Spa* (2); *British Insulated Wire Co.* v. *The Prescot Urban District Council* (3); *Waterous Engine Works Co.* v. *The Town of Palmerston* (4); *Wood* v. *The Queen* (5) per Richards C. J. at page 645; *Bernardin* v. *Municipality of North Dufferin* (6).

The Crown cannot be held liable for goods of which no benefit has been received, and it has been shown that a very large quantity of the lumber and timber charged for as delivered on the Government works, was not used in the works, nor required for use there, but was stolen and wasted. It is also clear that the respondents must have been aware of these misappropriations and misfeasances, from the nature of their dealings with the officials in charge of the works.

(1) 4 C. P. D. 48.
(2) 8 App. Cas. 517.
(3) [1895] 2 Q. B. 463.
(4) 21 Can. S. C. R. 556.
(5) 7 Can. S. C. R. 634.
(6) 19 Can. S. C. R. 581.

As to the alleged omissions, for which the sum of $4,219.26 has been allowed, the evidence is wholly insufficient to warrant the opening up of accounts which have been accepted and paid: No sufficient explanation is given. If from the course of dealing a contract may be implied to pay for goods delivered under the same circumstances as those which were paid for by the Crown, and included the sum of $43,862.06, then such implied contract can only apply to goods delivered to and accepted by the officials upon the canal appointed for that purpose and upon accounts rendered to and certified by them. The claimants cannot by verbal testimony surchange and prove omissions in accounts rendered by them as full statements to date, audited and certified by the officers in charge of the work. Even if a contract should or may be implied against the Crown, there cannot be any implied contract to pay for goods not accepted, received or certified for by the agents of the department appointed for that purpose.

As to the right of the claimants to recover interest, the Exchequer Court judge states (1), that the interest was allowed upon the authority of *St. Louis* v. *The Queen* (2), and not because he had formed any decided view that the plaintiffs were entitled to it; and apart from that case, he was not at all sure that the Crown was bound by the practice prevailing in Quebec to allow interest from the service of the writ. The appellant submits that, in any result of the case, interest should not be allowed against the Crown. See *The Queen* v. *MacLean, et al* (3); *In re, Gosman* (4); *Toronto Railway Company* v. *The Queen* (5). The case of *The*

(1) 6 Ex. C. R. at page 49.
(2) 25 Can. S. C. R. 649, at page 665.
(3) Cass. Dig. (2 ed.) 399.
(4) 17 Ch. D. 771; 45 L. T. 267; 50 L. J. Ch. 624.
(5) 25 Can. S. C. R. 24; (1896) A. C. 551.

1898

THE QUEEN v. HENDERSON.

*Exchange Bank of Canada* v. *The Queen* (1) is clearly distinguished.

*Hogg Q.C.* for the respondents, (*Greenshields Q.C.* with him). The learned judge of the court below has found, as a matter of fact, that the lumber and timber claimed by the respondents to have been supplied to the Government of Canada, and for which they bring their action, was actually sold and delivered to the Crown; and that such lumber and timber had been ordered and accepted by the officers and agents of the Crown. There is ample evidence in support of these findings of fact and it is uncontradicted. During the previous months, (December, January, February and March), lumber and timber ordered by the same officers in large quantities, for the purposes of construction of the bridges, were supplied and delivered by the respondents, although the original tender quantities had been during those months largely exceeded, and the government, knowing that the quantities then supplied, were greatly in excess of the original tender, knowing that these quantities were being procured from the respondents upon the orders and requisitions of their officers, knowing that no new tender had been authorized or asked for, raised no objections to the course of dealing between the officers and the respondents, but paid these four monthly accounts, as they were presented, upon the certificates of these officers. The effect of this conduct on the part of the Crown, was to ratify not only the course of dealing for the delivery of the lumber and timber during these previous four months, but to ratify and approve of the whole actions of the officers with the respondents respecting the obtaining and delivering of lumber and timber for the bridges, and the Crown is bound in like manner to pay the present account,

(1) 11 App. Cas. 157.

both for lumber and timber supplied in April and for other material delivered during the five months, but by error omitted from their accounts as rendered. This material was, according to the evidence of the respondents, delivered during the whole period of the dealings between the parties, and ascertained by report of the referee, supported by evidence and confirmed by the judge in the court below. The twenty-third section of the Railways and Canals Act applies only in the case of contracts in writing and is no answer to a claim made for payment for goods actually delivered and accepted and used by the Crown. See *Wood* v. *The Queen* (1).

The respondents were not responsible for the acts and dealings of the government officers and workmen with the lumber and timber after it had been delivered, and any such evidence as that produced by the Crown, as to misappropriations and malfeasances by its own officers can have no effect. The contentions based upon such evidence must fall to the ground.

This matter is governed by the law and practice in force in the Province of Quebec as to interest and we are entitled to have interest from the date of the judicial demand (2) *i. e.*, the filing of the reference in the Exchequer Court.

TASCHEREAU J.—(After stating the facts of the case.) This is an appeal from the judgment of the Exchequer Court of Canada, upon a reference by the Minister of Railways and Canals, of a claim made by the respondents for lumber sold and delivered to the Crown for the construction of bridges over the Lachine canal at Montreal.

The Exchequer Court has found as a matter of fact that the lumber and timber claimed by the respond-

(1) 7 Can. S. C. R. 634. (2) Arts. 1067 and 1077 C. C.

1898

THE QUEEN v. HENDERSON.

Taschereau J.

ents to have been so supplied to the Government, was actually sold and delivered to the Crown, and that such lumber and timber had been ordered and accepted by the officers and agents of the Crown. The evidence is all one way as to this fact.

But the Crown base their principal defence to the respondents' claim on the twenty-third section of the Act respecting the Department of Railways and Canals (1), which enacts that

> No deed, contract, document, or writing relating to any matter under the control or direction of the Minister, shall be binding upon Her Majesty unless it is signed by the Minister, or unless it is signed by the Deputy of the Minister, and countersigned by the secretary of the department, or unless it is signed by some person specially authorized by the Minister, in writing, for that purpose.

We are of opinion with the Exchequer Court, that this enactment has no application. The word "contract" therein, means a written contract. Here the lumber claimed for was delivered under verbal orders from the Crown officers, and the statute does not apply to goods actually sold, delivered and accepted by the officers of the Crown, for the Crown.

The cases of *Hunt* v. *Wimbledon Local Board* (2), and *Young* v. *Mayor of Leamington Spa* (3), have no application. There is no statute here imperatively requiring that all contracts by the Crown should be evidenced by a writing, and in the absence of such a special statute the Crown cannot refuse to pay for materials bought by its officers in the performance of their duties and delivered to them for public works.

If Parliament had intended that no oral contract should be binding on the Crown, it would have been so easy to say so in unambiguous terms that we should not, by a forced construction of language in the section

(1) R. S. C. Ch. 37. (2) 4 C. P. D. 48.
(3) 8 App. Cas. 517.

1897

THE QUEEN v. HENDERSON.

Gwynne J.

accounts were received, approved and duly certified by the said officers for payment by Her Majesty.

7. That the total amount of the accounts for the timber and lumber so delivered as aforesaid was the sum of $67,474.43 on account of which Her Majesty paid and the claimants received the sum of $43,-862.06 leaving a balance due to the claimants of $23,612.37 for which balance with interest thereon Her Majesty is indebted to the claimants.

This claim in so far as it relates to timber and lumber delivered under the written contract of December 9th, 1892, is not disputed. That contract is not questioned. It is admitted, and in fact has been overpaid. It is only as to the amount now claimed by the claimants in excess of the sum of $43,-862.06 which they acknowledge to have received, that the Attorney General of the Dominion resists the present claim. Much of that sum if it had not been paid in the manner hereafter appearing might have been open to the same objection as that which is offered to the portion which is demanded in excess of what has been paid; but having been paid the Dominion Government do not now assert any claim in respect thereof. The defence offered to so much of the claimants demand as has not been paid relates wholly to timber and lumber which the claimants allege that they have supplied and delivered under requisitions which they allege that they received "from the *said* officers," that is to say, "from the proper officers in that behalf"

The Attorney General of the Dominion after setting out the written contract alleges that save as in and by that contract Her Majesty did not purchase from the claimants any timber or lumber, and as to the alleged requisitions in the statement of claim mentioned he specially pleads that

Her Majesty did not authorise the engineer in charge of the work, nor the superintendent thereof nor any other officer of Her Majesty

1898

THE QUEEN v. HENDERSON.

Taschereau J.

A third ground of appeal taken by the Crown is upon the question of interest which the judgment appealed from allows to the respondents upon the amount of the judgment since the date of the reference to the Exchequer Court.

Upon this point also the appeal fails. The law of the province of Quebec rules this case, and according to that law, such interest must be allowed upon a claim of this nature. This is not a case upon a written contract, so that section thirty-three of the Exchequer Court Act does not apply.

GWYNNE J. (dissenting.)—The claimants in their statement of claim allege that on the 9th of December, 1892. Her Majesty acting through the proper officers of the Dominion of Canada in that behalf entered into a written contract with the claimants whereby they agreed to supply certain specific quantities and description of timber at certain specific prices for the construction of a certain public work of the Dominion of Canada called the new Wellington Bridge over the Lachine Canal at Montreal. They then allege that subsequently to the making of the said contract Her Majesty acting through the officers aforesaid commenced the construction of another bridge called the Grand Trunk Railway Bridge over the said Lachine Canal at Montreal. They then allege:

5. That during the construction of the said bridges the claimants received requisitions from the said officers from time to time for the supply and delivery of timber and lumber, and in compliance with said requisitions they supplied and delivered to Her Majesty's said officers during the month of December, 1892, and the months of January, February, March and April, 1893, a large quantity of timber of various kinds and dimensions to wit, 3,613,000 feet board measure.

6. That the claimants from time to time during the construction of the said bridges rendered accounts to Her Majesty's said officers of the timber and lumber so supplied and delivered as aforesaid which

Kennedy's duty as overseer of the work to sign a certificate on each account in a stamped form, "I certify the above account to be correct in all details and particulars." It was also the duty of some subordinate officer under Mr. Kennedy employed to receive and measure the lumber contracted for, as and when delivered, to sign a certificate upon the claimants' accounts presented for payment also in a stamped form as follows: "Received above goods." These certificates in these forms were required for the security of the department and for the information of the Chief Engineer at Ottawa whose approval of each account and his certificate of such approval were necessary in order to obtain payment of the accounts. The perfect accuracy of these certificates was most important as the Chief Engineer acted upon the faith of their accuracy in approving of the accounts and certifying for their payment. At the close of the month of December, 1892, the claimants rendered an account for timber delivered which at the prices named in the contract amounted in the whole to $6,421.66. This account was certified in the respective forms above mentioned, signed by Mr. Parent and Mr. Kennedy, and also by two persons whose names were subscribed to the words "Received above goods."

In the month of January, 1893, the claimants presented an account for lumber delivered in that month to the value in the whole of $7,240.14 which was certified in the same manner and by the same persons. respectively as was the account for December, 1892. The claimants in like manner presented an account for the month of February, 1893, amounting to $14,728.26. This account was certified by Mr. Parent and Mr. Kennedy in the respective forms above mentioned and the words "received above goods" were signed

1898

THE QUEEN v. HENDERSON.

Gwynne J.

as follows:—"C. McGinley, culler"; "Thomas McConnomy, storeman"; "P. Coughlan, clerk and culler." The claimants also presented an account for timber delivered in the month of March, 1893, amounting to $15,472. This account was certified by Mr. Parent and Mr. Kennedy in the respective forms above mentioned, and the certificate for receipt of the goods was signed by Thos. McConnomy, storeman; E. H. Mox, C. McGinley, timber culler. All of these accounts were upon the faith of the *bona fides* and accuracy of the above certificates approved and certified for payment by the Chief Engineer, and accordingly were paid to the amount in the whole of $43,862.06 which is in the statement of claim acknowledged to have been paid. In the month of April, 1893, the claimants presented an account as for goods delivered in that month to the amount of $16,155.65. This account was certified in the above form by Mr. Parent who, however, qualified that certificate by adding the following: "All purchased without requisition, but according to contract, except sawn lumber, charged $30 per M. ft."; it was also certified by Mr. Kennedy in the prescribed form for him to certify in, and the receipt of the goods was signed "C. McGinley, culler." This account the Chief Engineer refused to approve and certify for the reason that he began to think there was something wrong and upon looking into the matter, on his attention having been drawn to it, he did not think such a quantity of timber as was charged for could have been delivered by the claimants or required by the Government, and he formed the opinion that it never could have been measured, and further that more timber had been paid for in the accounts which had been settled than ever could have been required or delivered. The claimants were therefore referred to the Court of Exchequer under an

1898

THE QUEEN v. HENDERSON.

Gwynne J.

order made by the Minister of Railways and Canals in pursuance of the provisions of section 23 of 50 & 51 Vict. ch. 16.

Now the whole of this account for April amounting to $16,155.65 is for lumber alleged to have been delivered in excess of and outside of the contract of December, 1892, $12,642.50 of that amount is for sawn lumber and $1,227.70 for tongued and grooved boards, neither of which articles were called for or covered by that contract. These two sums make $13,870.20. Then as to the other items in the account amounting to $2,285.45 part is for timber of different sizes from those named in the contract of December, but charged for at the prices named in that contract for the sizes there contracted for, and the residue is for similar articles to, but in excess of, the quantities named in the contract of December, 1892, at the prices however named in that contract, in fact fully two-thirds of the accounts which had been paid was for lumber in excess of that which was covered by the contract, and very largely for lumber of a different description from that named in the contract of December, 1892. The claimants were well aware of this. The claimant, Norman B. T. Henderson, who gave evidence on his own behalf, says that the timber covered by that contract amounted to about $13,600, all in excess of that he delivered upon the verbal and written orders of McGinley and others, and the directions of Mr. Kennedy. He said that in the very first account presented he had distinguished the timber coming under the contract from that outside of it, as to which latter he charged prices he considered fair and just, but that Mr. Kennedy refused to certify them unless he should insert prices named in the contract, and he therefore took back his account and prepared it in the shape it is as certified. Now, upon referring to that acccount of

1898

THE QUEEN v. HENDERSON.

Gwynne J.

December, 1892, we find lumber there which is not in the contract at all, namely, sawn lumber, and the charge there inserted for it is $20 per M, that is the highest price named for any lumber covered by the contract, and this item alone amounts to $2,908.63; accordingly in his subsequent accounts for January, February and March, although the fair prices for some of the lumber supplied was less, and for some more than any price named in the contract for the lumber thereby covered the claimants always inserted a price named in the contract. In the April account, however, they charge $30 per M, although in the prior accounts they had for the reason already given charged only $20 per M. It may be as well to give Mr. Henderson's evidence in his own words. He says:

> I might say that in December when we made out the account, first we made out an account for the contract stuff at contract prices, and another account for the stuff for the temporary work at different prices, what we considered then fair prices, that we hadn't a contract for, and when we took it in to Mr. Kennedy he said I can not pass those now because you have altered the prices. We had not agreed on any price—*that we ought to put them in at contract prices and fight the Government afterwards for the other prices.* If I did not do that we could not get our money. We wanted our money pretty bad and we agreed with Mr. Kennedy to make all the stuff out at contract prices in the mean time any way.

Whatever may have been Mr. Kennedy's motive for this arrangement as testified by Mr Henderson, it is obvious that it was very improper and well calculated, as Mr. Henderson must have seen, to conceal from the department the fact that irregular orders, unauthorized by the Minister were being given to the claimants for the supply of lumber for which no contract had been entered into with the minister. When Mr. Parent qualified his certificate by the words,

> all purchased without requisition, but according to the contract, except sawn lumber, charged for at $30 per M."

he must have meant that as regards the whole of this April account no requisition had been given, that is to say that no order had been given by any person having authority so to do, for the lumber charged for in the account, but that the prices charged were contract prices for the lumber there except as to the sawn lumber, and this was not in the contract of December, 1892, at all. It is in evidence that Lavery and Huot, two carpenters employed under the overseer, Mr. Kennedy, had directions from him to order whatever lumber they should require whenever they required it, and that they did so repeatedly but verbally, and through McGinley, and McGinley gives evidence that Mr. Kennedy had directed him to get from the claimants whatever lumber the carpenters might require, and that he did so repeatedly on slips of paper, a number of which have been produced by the claimants, most of them having no date. The form of all will appear save as to date, from that of two subjoined which do bear a date the one of the 1st and the other of the 3rd April, 1893. That of the 1st of April is as follows in pencil:

HENDERSON BROTHERS.
15 pcs. 25 ft. S., 2 sides.
16 " 12 in. thick.
15 " 37 ft. "
For Huot, 1,000 3-in. deals.

C. McG.

And that of the 3rd April as follows:

HENDERSON BROTHERS.

Four loads of boards, good quality. C. McG.

Now, this man McGinley, who thus signed these orders entered the employment of the Government on the 18th January, and left it on the 18th April, 1893. He recognized his signatures under the words, "received above goods" on the accounts for February,

1898

THE QUEEN v. HENDERSON.

Gwynne J.

March and April. When he subscribed these words on the April account he was not in the service of the Government. He never checked the account for the purpose of seeing whether it was correct or not. He signed it because he was asked to do so by an assistant of Mr. Kennedy's. Neither did he check the accounts for February and March which he had also signed; the only account which he ever checked was that of January, which he assisted Mr. Coughlan to check. All of the others he signed merely because he was asked to do so. Mr. Coughlan, whose name is subscribed to the certificate of receipt of goods on the February account says that he never checked that account, and that he signed just because Mr. Kennedy asked him to do so. He was then employed as time keeper. The claimants now in addition to the April account amounting to $16,155.65 claim two other sums, namely, one for $4,219.26, which they allege to be for lumber delivered, but by some error omitted from some or one of the accounts rendered for December, January, February or March, but what are the particular items and in what month omitted they cannot say, and a further sum of $2,077, which they claim as the loss sustained by them by reason of their having in accordance with Mr. Kennedy's suggestion when their first account was submitted to him in December, 1892, charged prices named in the contract for lumber not called for or covered by the contract, and which was of greater value than any named in the contract.

The learned Judge of the Exchequer Court has allowed the first two items less the sum of $478.80 for lumber shown to have been sent back to the claimants, making $19,986·11, with interest at 6 per cent from the first of October, 1896, amounting in the whole to $21,021.18, from which however is to be deducted the sum of $1,024.22 being for that amount allowed

1898

THE QUEEN v. HENDERSON.

Gwynne J.

on a counter claim. The learned judge was of opinion that section 33 of ch. 37 of the Revised Statutes of Canada has no application in the present case for the reasons expressed by the late Sir Wm. B. Richards in the Court of Exchequer in *Wood* v. *The Queen* (1). That case proceeded upon sections 7 and 15 of 31 Vict. ch. 12, which were substantially the same respectively as sections 11 and 23 of ch. 37 R. S. C.

The question there came up on demurrer, and no question arose as to the authority of the person or persons who had employed the suppliant to do the work for which the petition of right was filed. The claim was for services alleged to have been rendered to the Government of the Dominion in preparing plans, models, specifications and designs for the laying out, improvement and establishment of the Parliament Square in the city of Ottawa, and for superintending the work and construction of said improvements. To this claim two pleas were pleaded which were demurred to. In one it was pleaded that no such contract as was required by the 7th section was ever made or entered into with suppliant, and in the other that the employment alleged by the suppliant would have involved the expenditure of a large sum of money and that by section 15 of the Act such expenditure would have required the previous sanction of Parliament, and that no such sanction had been given. The learned Chief Justice allowed the demurrer as to the former of these pleas, and disallowed it as to the latter. As to the former he held that while the plea would have been good if the contract alleged in the petition of right was still executory it did not meet the petition of right which alleged that the contract had been executed; his laguage is:

(1) 7 Can. S. C. R. 634.

1898

THE QUEEN v. HENDERSON.

Gwynne J.

I am of opinion that the contract set out in the suppliant's petition is not binding as such, and under it he would have no right to recover damages for not being allowed to complete the work referred to in his petition. I do not think, however, that the 7th section would prevent the suppliant recovering for the actual value of the work done by him *and accepted by the department.* I see no reason why the law may not imply a contract *to pay for work done in good faith and which the department has received the benefit of.* Suppose instead of work done the contract had been to furnish a quantity of lumber—the lumber had been supplied and worked up by the workmen of the department in finishishing one of the public buildings. Suppose for some reason the department repudiated the verbal contract and refused to be bound by it, could it be said that the property of the suppliant *could be retained and used for the purposes of* the department and he not be paid for it because the statute said the contract on which it was furnished was not deemed binding on the department. I should say not, the contract which is binding is that which arises from the nature of the transaction, having received the benefit of the contractor's property he ought to be paid for it under the new contract which the law implies. * * * If only the seventh section were considered I should *as at present advised* say the suppliant is entitled to recover what the services rendered by him were worth under the implied contract. It may be that on further consideration my views as to the suppliant's right on this point would be less favourable (1).

Now, as it appears to me what the learned Chief Justice intended to convey and has conveyed by this language is that, on demurrer to a plea which impliedly admits that the work sued for had been executed for the department as in the petition of right alleged but not under such a contract as that mentioned in the 7th section of the Act, it must be held that the plea offers no defence to the suppliant's right to recover, under such implied contract what the services rendered by him were worth, but that when the facts came to be considered under the other pleas on the record the learned Chief Justice's opinion as to the suppliant's right to recover might be less favourable. The point adjudicated upon was simply a point of pleading. This language is similar in effect to the pre-

(1) 7 Can. S. C. R. at page 645.

liminary language of Blackburn J., at page 33, in *Thomas* v. *The Queen* (1) the petition of right in that case alleged an executed oral contract for breach of which the suppliant prayed relief. The question arose upon a demurrer to the petition of right and was simply whether a petition of right would lie for breach of contract, or to recover money claimed to be due by way of debt or damages, and such being the point raised by the demurer the learned judge premises his judgment which was the judgment of the court thus:

> We leave it for future discussion to determine who have authority to make contracts on behalf of Her Majesty, and whether the contracts upon which the suppliant proceeds were in fact made by any one on behalf of Her Majesty, and if so made, whether they were made within the scope of that person's authority. On these points we express no opinions.

But the language plainly intimates that even in the case of an alleged executed contract it remains as a material point to be considered whether the person who made the contract had authority to act on behalf of Her Majesty and whether in making the contract he acted within the scope of his authority.

Then upon the demurrer to the other plea in *Wood* v. *The Queen* the learned Chief Justice, while holding that the plea that the expenditure had not been authorized by the legislature, was good, adds the following, plainly because these judgments upon demurrer did not dispose of the suppliant's right to recover upon the whole record, but only disposed of points of pleading. He says:

> I assume the parties desire the opinion of the court on the broad question whether the suppliant can recover, and in the view I take of the 15th section the suppliant can only recover if the work and services rendered come under the exception referred to in that section and in which necessity would also justify the omitting to advertise for tenders under the 20th section.

And again,

(1) L. R. 10 Q. B. 31.

1898

THE QUEEN v. HENDERSON.

Gwynne J.

It was contended on the argument that Parliament has made appropriations for these works and so sanctioned the expenditure. If that be so and the work done was of the kind that might properly be executed by the officers and servants of the department, then I apprehend no contract would be necessary to bind the department for the work done, and so suppliant should recover for work so done, and in my view also for the work actually done if the expenditure was previously sanctioned by Parliment, that, of course, is a matter of fact and must be proved as any other matter of fact.

Now these observations of the late learned Chief Justice were made by him not as a judgment pronounced upon matters before him for judication, for all that was so before him consisted merely of questions of pleading, but as an expression of opinion as to the suppliant's rights upon the facts as stated by him as derived from the pleadings before him on the demurrers and some statements of counsel in argument as to a particular fact. Now, in the petition of right it was alleged and impliedly admitted on the pleas demurred to that it was *by the Government of the Dominion of Canada* the suppliant was employed to do the work which he had done, and for payment for which he was suing, and the opinion of the learned Chief Justice was that for work *so executed* the suppliant was entitled to recover without a contract executed in the form prescribed in the 7th section of the Act. The judgment on the demurrer disallowing the plea and the opinion at the close, as above, rest wholly upon the distinction made between the case of an executory and an executed contract. Now, with the greatest difference for the opinion of the late learned Chief Justice Sir W. B. Richards, for which I have the highest respect, I am unable to concur in this distinction in a case like the present. It is not, in my opinion, warranted by the decided cases. The cases which have arisen in England in respect of claims for work done for the corporations called "Local Boards," and in the Pro-

vince of Ontario in respect of claims against municipal corporations for work done for them without the formality of a contract under the seal of the corporation have no application in the present case. In *Bernardin* v. *Municipality of North Dufferin* (1) I endeavoured to point out the distinction between such cases and *Hunt* v. *Wimbledon Local Board* (2), *Young* v. *The Mayor, etc., of Lemington Spa* (3), and such like cases, namely that, in the former cases, the courts proceeded upon this principle that the right to recover against a corporation for work done for them on a verbal contract or on a *quantum meruit*, was regarded as an exception judicially established from the common law rule that corporations were bound only by instruments executed with their corporate seal, whereas in *Hunt* v. *Wimbledon Local Board* and such like cases they were governed by the expresss provisions of Acts of Parliament to which the courts would recognise no exception. I again drew attention to this subject and expressed the same opinion in *Waterous Engine Works Co.* v. *The Town of Palmerston* (4), and I have seen no reason to change the opinion there expressed. I stated the rule (5) as established by the courts to be

> that where the managing body of a corporation aggregate contracts by parol for the execution of any work in respect of a matter within the purposes for which the corporation was created and the work has been executed in accordance with the contract and accepted as complete it would be a fraud in the corporation to refuse to pay for the work so executed the stipulated price or, in the absence of a stipulated price, the value thereof, and so to repudiate the contract upon the ground that it was not executed with the corporate seal.

Such cases have no application, in my opinion, in cases against Her Majesty as representing the Dominion Government and in the interest of the

(1) 19 Can. S. C. R. 581.
(2) 4 C. P. D. 48.
(3) 8 App. Cas. 517.
(4) 21 Can. S. C. R. 556.
(5) *Bernardin* v. *Mcpty. North Dufferin* [19 S. C. R. at page 611.]

1898

THE QUEEN v. HENDERSON.

Gwynne J.

public. Now *Frend* v. *Dennett* (1), *Hunt* v. *Wimbledon Local Board* (2), and *Young* v. *Mayor etc., of Leamington Spa* (3), and the same case in the House of Lords (4) were all cases of executed contracts, and it was held that the language of the statutes which governed these cases were imperative, and could not, for that reason, be relaxed in any particular by the courts. Now, the clause of the statute under consideration in the present case, viz., sec. 23 of ch. 37, R. S. C., is fully as imperative as the clause of the statute referred to in the above cases. It enacts in the most express, and in my opinion, most unmistakable language that *no* contract which relates to any matter under the control or direction of the minister shall be binding on Her Majesty *unless* it is signed by the Minister, etc., as in the section is stated. The expression

> no contract relating etc., etc., shall be binding on Her Majesty, unless, etc., etc.,

is precisely equivalent to

> *every* contract relating, etc., in order to be binding on Her Majesty *shall be* signed by the Minister, etc., etc., etc.

It is, however, contended, upon grounds which appear to be hypercritical in the extreme, that the words "no contract" in the twenty-third section of the Dominion statute (5) are to be read as if the expression used had been

> no contract *in writing* relating etc., etc., shall be binding, etc., etc., unless, etc., etc.

This introduction of words, not used in the Act, which would have the effect of qualifying in a most material manner the plain ordinary and natural meaning of the language which has been used is rested upon the fact that the word "contract" is used in the same

(1) 4 C. B. N. S. 576.
(2) 4 C. P. D. 48.
(3) 8 Q. B. D. 579.
(4) 8 App. Cas. 517.
(5) R. S. C. Ch. 37.

sentence and in connection with the words "deed, "document" and "writing." which are all written instruments, and it is argued that therefore the words "no contract, etc.," and it must be read as if the expression used had been "no written contract," etc., and that thus parol contracts are by implication excepted from the section, and that being so excepted they are valid. But if valid they would be equally so to maintain a suit for executory as for executed contracts, and so the distinction drawn in *Wood* v. *The Queen* (1) between executory and executed contracts would be unneccssary and irrelevant. If the section could be read as containing the words "no written contract, etc., etc., etc., a matter which is sufficiently provided for in the words "no deed, document or writing," then it must be admitted that the section contains a very emphatic pleonasm—a defect in composition not lightly to be attributed to an Act of Parliament.

The only object and effect of reading the section as if it contained the words "no written contract," etc., etc., is to support the argument that parol contracts are excepted from the operation of the section; but it cannot be questioned that the words "no deed, document, writing," etc., as used in the section, admit grammatically of no exception whatever. *Every* "deed," *every* "document," and *every* "writing," "relating to," etc., in order to be binding upon Her Majesty must be signed as required in the section. So precisely in like manner the words "no contract," etc., admit grammatically of no exception, and so *every* contract relating to, etc., etc., in order to be binding on Her Majesty, must be signed as required by the section. It is true no doubt that the contract to be signed as required by the section must be in writing, and in that sense it may be admitted that it is to written contracts only that the section applies, namely, as the



(1) 7 Can. S. C. R. 634.

1898

THE QUEEN v. HENDERSON.

Gwynne J.

only ones which can by signature as required be made valid and binding upon Her Majesty. This is very different from reading the section, as if the words used were "no written contract relating to, etc., shall be binding, etc., unless, etc, etc.," and then construing those words as making parol contracts relating to matters under the control and direction of the minister quite valid and binding by implication. For my part I find it impossible to put any such construction upon the section, or any other than this, that *no* contract shall be valid unless signed, etc., and therefore, that no valid parol contract can be made relating to matters under the control and direction of the Minister. There is not, in my opinion, under the constitution of the Dominion of Canada, any mode by which authority can be conferred upon any individual to bind Her Majesty by a parol contract having the effect of imposing a burden upon the public funds of the Dominion other than by an Act of Parliament. It is the duty of everyone who deals with persons who affect to bind Her Majesty as representing the Dominion Government by contract relating to the public service to assure himself of the power and authority of such person to enter into the proposed contract. Nor is there any hardship in this, for everyone runs the risk of the person with whom he enters into a contract having power and authority in law to enter into the particular contract; and if he enters into a contract with a person who affects to bind another, he must be content to depend upon the responsibility of him with whom he contracts, if it should turn out that he had no authority to bind the person whom he affected to bind. The vast importance of the question involved in the present case must be my excuse for having dealt with it at such length. The looseness, the irregularities, not to say the mal-

feasance of some of the subordinate employees of the Government disclosed in the present case, in which the Plaintiffs seem to have taken part as appearing by their own acknowledgment of the arrangement made by them with Mr. Kennedy in December, 1892, as to the mode of presenting their monthly accounts until a more favourable time for fighting the Government should arise, seem to point to the necessity of having a final adjudication of two very important questions, namely, 1st: Whether in view of the provisions of chapter 37, R.S.C., any *implied* contract can arise from any, and if any, from what circumstances, whereby the public funds of the Dominion can be burthened by proceedings against Her Majesty as representing the Dominion Government, and 2ndly: Whether any parol contract entered into by any person, and if so, by whom, relating to matters under the control or direction of the Minister can be binding upon Her Majesty as representing the Dominion Government. In my judgement chapter 37, R.S.C., was framed as it has been with the view, in so far as the Department of Railways and Canals is concerned, of preventing the public funds of the Dominion being affected, by such loose, improper and unauthorized proceedings as have been disclosed in the present case, and that if this appeal should fail, the object of the Statute would be frustrated. I have not drawn attention to the fact, although it appears, I think, to have been abundantly established in evidence that fully nine hundred thousand feet of lumber have been charged for by the claimants more than have been used or required by the Government works. As to that quantity the Government have derived no benefit, and the whole of the present demand of the claimants in money value covers less than the 900,000 feet. There is, therefore, this element wanting which

1898

THE QUEEN v. HENDERSON.

Gwynne J.

was in *Wood* v. *The Queen* (1) upon which the learned Chief Justice there laid so much weight. However, the points with which I have dealt seem to me to involve matters of such importance as to make it unnecessary to dwell upon this latter, which is one of such minor consideration. I am of opinion that the appeal should be allowed with costs, and that the claim of the claimants in the Exchequer Court should be dismissed with costs, and that the judgment in favour of Her Majesty upon the counter claim should be affirmed.

SEDGEWICK J.—I am of opinion that the appeal should be dismissed with costs for the reasons stated in the judgment of His Lordship Mr. Justice Taschereau.

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

GIROUARD J.—I concur in the judgment dismissing the appeal with costs for the reasons stated by His Lordship Mr. Justice Taschereau.

*Appeal dismissed with costs.*

Solicitors for the Appellant: *Chrysler & Bethune.*

Solicitors for the Respondents: *O'Connor, Hogg & Magee.*

(1) 7 Can. S. C. R. 634.

JAMES B. KLOCK, *et al.* (DEFENDANTS)..APPELLANTS; 1898

AND *Feb. 25.

ARCHIBALD LINDSAY (PLAINTIFF)....RESPONDENT. *May 14.

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ARCHIBALD LINDSAY (PLAINTIFF).....APPELLANT;

AND

JAMES B. KLOCK, *et al.* (DEFENDANTS)..RESPONDENTS.

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

*Landlord and tenant—Loss by fire—Negligence—Legal presumption—Rebuttal of—Onus of proof—Agreement, construction of—Covenant to return premises in good order—Art.* 1629 *C. C.*

A steam sawmill was totally destroyed by fire, during the term of the lease, whilst in the possession of and being occupied by the lessees. The lease contained a covenant by the lessees "to return the mill to the lessor at the close of the season in as good order as could be expected considering wear and tear of the mill and machinery." The lessees, in defence to the lessor's action for damages, adduced evidence to show that necessary and usual precautions had been taken for the safety of the premises, a night-watchman kept there making regular rounds, that buckets filled with water were kept ready and force-pumps provided for use in the event of fire, and they submitted that as the origin of the fire was mysterious and unknown it should be assumed to have occurred through natural and fortuitous causes for which they were not responsible. It appeared however that the night-watchman had been absent from the part of the mill where the fire was first discovered for a much longer time than was necessary or usual for the making of his rounds, that during his absence the furnaces were left burning without superintendence, that sawdust had been allowed to accumulate for some time in a heated spot close to the furnace where the fire was actually discovered, that on discovering the fire the watchman failed to make use of the water-buckets to quench the incipient flames but lost time in an

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PRESENT:—Taschereau, Gwynne, Sedgewick King and Girouard JJ.

1898

KLOCK v. LINDSAY.

LINDSAY v. KLOCK.

attempt to raise additional steam pressure to start the force pumps before giving the alarm.

*Held*, that the lessees had not shown any lawful justification for their failure to return the mill according to the terms of the covenant; that the presumption established by article 1629 of the Civil Code against the lessees has not been rebutted, and that the evidence showed culpable negligence on the part of the lessees which rendered them civilly responsible for the loss by fire of the leased premises. *Murphy* v. *Labbé* (27 Can. S. C. R. 126), approved and followed.

APPEAL by the defendants from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), (1) which reversed the judgment of the Superior Court, District of Ottawa (2), dismissing the plaintiff's action, and ordered a judgment to be entered in favour of the plaintiff for $10,000 damages and costs; and CROSS-APPEAL by the plaintiff to have the assessment of the damages under the same judgment increased.

The defendants leased a steam sawmill at Aylmer, Que., from the plaintiff, for the milling season of 1896, a written memorandum of lease being signed by both parties, containing the covenant recited in the head note. The mill was destroyed during the month of May, 1896, during the night time, by a fire which originated in some unknown and mysterious manner in a heap of sawdust which had accumulated near the furnaces, in which a slow fire was kept up during the night to facilitate getting up steam for starting the machinery in the morning. Fire buckets filled with water were kept on the premises in convenient positions and force pumps provided, to be worked by steam, in the event of fire. A night-watchman also was employed by the lessees, his duty being to make periodical rounds of the mill premises and lumber yard and attend to the furnaces while the mill was shut down for the night. From the evidence it appeared that after the night-watchman

(1) Q. R. 7 Q. B. 9. (2) Q. R. 7 Q. B. 10.

attended to the furnaces at a quarter past eleven on the night of the accident, he had not returned to them until the discovery of the fire about three and a half hours later, and that there was no person left in charge of the furnaces during the time the watchman was making his rounds, which usually occupied about an hour and a half. On discovering the fire the watchman stated that he began to "fire up" for the purpose of increasing the steam pressure from 20 lbs., then showing on the gauge, to the 40 lbs. pressure necessary to work the force pumps, but that as the fire spread rapidly he raised the alarm. He stated that he began to call "fire" about ten or fifteen minutes after he first saw the flame. Another witness, who saw the fire from some distance soon after it started, stated that it could have been extinguished then by throwing a pail of water upon it, but this was not done In the trial court Mr. Justice Gill, dismissed the plaintiff's action with costs, but on appeal this judgment was reversed and damages awarded to the plaintiff with costs.

*J. M. McDougall Q.C.* and *Lafleur* for the defendants, appellants and respondents on the cross-appeal.

*Geoffrion Q.C.* and *Henry Aylen* for the plaintiff, respondent and appellant on the cross-appeal.

TASCHEREAU J.—The lease in question contains a covenant "that the said Klock & Co. shall return mill to said Lindsay at close of season in as good order as can be expected considering usual wear and tear of mill and machinery." Klock & Co. have failed, without any lawful justification, to so return the mill as they had covenanted to do. They are therefore liable. I would dismiss the appeal with costs.

As to the cross-appeal on the amount of damages, we do not see anything in the record which would

1898

KLOCK v. LINDSAY.

LINDSAY v. KLOCK.

justify us in interfering with the judgment of the Court of Appeal.

GWYNNE J. concurred in the judgment dismissing the appeal with costs for the reasons stated by His Lordship Mr. Justice Girouard, and was also of opinion that the cross-appeal should be dismissed with costs.

SEDGEWICK and KING JJ. were of opinion that the appeal and cross-appeal should both be dismissed with costs for the reasons stated in the judgments reported.

GIROUARD J.—The respondent, proprietor of a saw-mill in Aylmer, Que., demands from the appellants the sum of $20,000, being the value of the mill machinery and other accessories, which were destroyed by fire on the 29th of May, 1896, while they were in the possession of the appellants as his lessees. The action was dismissed by the Superior Court (Gill, J.), the defendants having, in the opinion of the learned judge, rebutted the presumption of law created by article 1629 of the Civil Code, but this judgment was unanimously reversed in appeal, (Lacoste, C. J., and Bossé, Blanchet, Hall and Würtéle, JJ.,) and the defendants were condemned to pay the sum of ten thousand dollars. Hence the present appeal by the defendants, and also a cross-appeal by the plaintiff who asks for an increase of the amount awarded.

The rules of law governing a case like this have been laid down by this court in *Murphy* v. *Labbé*, (1) and we have nothing more to say on the subject, and we simply refer to that decision.

(1) 27 Can. S.C.R. 126.

As to the facts, we entirely agree with the Court of Appeal and fully concur in the elaborate review of the evidence made by Mr. Justice Bossé, and have no hesitation in adopting his conclusions :—

Le fait d'avoir laissé dans ces conditions et sans surveillance, pendant un si long temps les fourneaux allumés constitue une grave imprudence. Un bon père de famille n'aurait pas agi ainsi. Le bran de scie accumulé entre le fourneau et la cloison et que l'on n'enlevait jamais avait dû sêcher à la chaleur du fourneau et constituait un danger sérieux. En fait c'est là que le feu a originé. Cette négligence n'est pas celle d'un bon père de famille.

Le fait de ne pas jeter sur ce commencement de flamme l'eau des sceaux qu'il avait sous la main, et de perdre un temps précieux dans une tentative déraisonnable pour obtenir une pression de vapeur additionnelle, quand il lui en fallait au moins 40 lbs., pour faire fonctionner la pompe, est une faute grave du préposé dont le proposant est respon. sable. Et de tout ceci, il résulte que, loin d'avoir repoussé la présomption de faute établie par notre texte, les défendeurs ont montré qu'ils avaient commis trois fautes distinctes qui, en dehors de cette disposition de notre code, suffiraient pour engager leur résponsabilité. (1.)

We are therefore of opinion that the judgment appealed from should be affirmed, and that the appeal of the appellants should be dismissed with costs, and likewise that the cross-appeal of the respondent should be dismissed with costs against him.

*Appeal and cross-appeal dismissed with costs.*

Solicitor for the defendants, appellants and respondents on cross-appeal : *J. M. McDougall.*

Solicitor for the plaintiff, respondent and appellant on cross-appeal : *Henry Aylen.*

(1) Q. R. 7 Q. B. at page 15.

1898

*Feb. 26.

*May 14.

THE CITY OF MONTREAL (PLAINTIFF) ..... APPELLANT;

AND

JOHN MULCAIR, *et al.* (DEFENDANTS)..RESPONDENTS.

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

*Municipal corporation—Highway—Encroachment upon street—Negligence—Nuisance—Obstruction of show-window—Municipal officers—Action for damages—Misfeasance during prior ownership—Non-feasance—Statutable duty.*

An action does not lie against a municipal corporation for damages in respect of mere non-feasance, unless there has been a breach of some duty imposed by law upon the corporation. *The Municipality of Pictou* v. *Geldert* (1893) A. C. 524 and *The Municipal Council of Sydney* v. *Bourke* (1895) A. C. 433, followed.

An action does not lie against a municipal corporation by the proprietor of lands for damages in respect thereof, through the mistake or misfeasance of the corporation or its officers, alleged to have occurred prior to the acquisition of his title thereto.

A municipal corporation is not civilly responsible for acts of its officers or servants other than those done within the scope of their authority as such.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, (appeal side), reversing the judgment of the Superior Court, District of Montreal, in so far as it had dismissed the defendants' incidental demand with costs, and maintaining the said incidental demand as to the sum of $251.52, with costs in compensation and set off against the amount recovered by the plaintiff in the original action, and reserving defendants' recourse for such further damages as might accrue from time to time, from the continuance of the nuisance complained of.

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PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1898

THE CITY OF MONTREAL v. MULCAIR.

The plaintiff brought an action for the recovery of special assessments for the widening of a portion of Notre Dame street in the city of Montreal, and to charge the defendants' lands for payment of the same, and the defendants, by an incidental demand, claimed damages against the city for negligence and misfeasance in permitting a nuisance to be created, to the injury of the defendants' property, by knowingly allowing a building on the adjoining land to be constructed so as to project about ten or twelve inches beyond the homologated street line and obstruct the view of a show-window in the defendants' building subsequently constructed upon the proper street line. It was alleged that an official from the city surveyor's office had pointed out the line incorrectly at the time the adjoining building was in process of construction, several months prior to the purchase of lands in question by the defendants, and it appeared that defendants had been refused permission by the civic officers, to erect their front wall upon the same line and thus an angle was made where the buildings adjoined, causing the obstruction complained of. The material facts proved in evidence are mentioned in the judgment reported. The judge in the trial court found a verdict for the plaintiff for $863.48 with interest and costs, and dismissed the defendant's incidental demand with costs, for the following reasons:—"Considérant que la projection provient du fait que la maison sur le lot No. 1791 a été construite durant l'année qui a précédé la démolition générale des maisons sur la rue Notre-Dame, pour l'élargissement de la dite rue, et qu'une erreur paraît avoir été commise alors au sujet de l'alignement; que cette projection de 8 à 9 pouces est insignifiante, si l'on prend en considération la hauteur et la largeur de la bâtisse, l'élévation et la grandeur

1898

THE CITY OF MONTREAL v. MULCAIR.

des vitrines, et qu'elle ne peut causer aucun dommage appréciable à la propriété, soit comme maison de commerce, soit comme résidence." In the Court of Queen's Bench the former part of this judgment (maintaining plaintiff's action,) was affirmed and the present appeal is asserted only as to the reversal of the decision upon the incidental demand in the court below, and the reservation as to further actions for similar damages based on an annual indemnity for loss of rent or depreciation of the property.

*Coyle Q.C.* and *Ethier Q.C.* for the appellant. On this appeal the only questions for the consideration of the court are:—1st. Is the appellant responsible for the encroachment complained of? 2ndly. If so, have the respondents proved any damage for which the appellant can be responsible? and 3rdly. Is the basis of damages allowed, *i.e.*, an annual indemnity for loss of rent or depreciation of property, correct?

There has been no act proved to have been done by the plaintiff, or for which plaintiff can be held civilly responsible, by which the lands can have suffered since the defendants purchased the lands in question. No public nuisance is proved to have existed. The mistake charged against the plaintiff is alleged to have been committed whilst the lands belonged to other persons and is consequently *res inter alios acta.* In any case unliquidated damages cannot be set off against actually ascertained amounts due for taxes on land. Art. 1188 C. C.

The opinions of the respondents' witnesses on the question of possible damage are in direct conflict with the views of the witnesses for the appellants, who are fully as intelligent and competent and the evidence being of equal weight, damages should not be granted against appellants, the presumption being in their favour. The respondents have failed to prove any

actual damage suffered to their property or to their business. The evidence of the witnesses for the respondents appears to be based on mere generalities and the witnesses have little or no experience in valuing properties, whilst the evidence for the appellant is based on facts and figures and given by men of many years experience in the business, and whose ability and impartiality cannot be questioned. There is no evidence to shew any actual loss in the respondents' business that can be attributed to the projection of the building. This trifling projection of 8 or 9 inches in the front is no more than the depth of the pilasters which decorate the fronts of a large proportion of similar business buildings, and the contention that the respondents have suffered damages from it is wholly unfounded. The basis of valuing the damages in the Court of Queen's Bench is unjust and erroneous, and of a nature to allow speculative damages. The loss of rent allowed is a species of perpetual charge or insurance to guarantee to the respondents the same rental every year whether the property be well or badly administered, or whether there may or may not be general business depression. The indemnity allowed is *ultra petita*, not having been asked for in the pleadings. If damages are to be allowed, the proper basis for calculation is the value of the immovable itself. The appellants contend that the judgment of the Court of Queen's Bench should be reversed as to the incidental demand exclusively, and the Superior Court judgment restored in its entirety.

*Lafleur* and *Sicotte* for the respondents. The plaintiff neglected the duty imposed under the city by-laws and also gave an incorrect line, and tolerated the encroachments which resulted from this negligence and mistake. The plaintiff was bound to have caused the projecting wall to be demolished

1898

THE CITY OF MONTREAL v. MULCAIR.

and to abate the nuisance. The defendants have the right to demand the abatement of the nuisance and to claim damages in consequence. See *Pettis* v. *Johnson* (1); *State of Indiana* v. *Berdetta* (2); and cases cited in 1 Am. & Eng. Enc. of Law, (2 ed.) at page 235 under the heading "Abutting Owners" and 2 Dillon "Municipal Corporations," pars. 731, 732.

Damages of this nature may be opposed in the present case in compensation because they result and flow from the same cause as the action, which asks for the assessment resulting from the expropriation, and the damages result also from the same expropriation and alteration of the street line. See *Davidson* v. *DeGagné* (3).

The judgment for damages is a finding of fact with which this court ought not to interfere; *Demers* v. *Montreal Steam Laundry Co.* (4). As to the amount of damages awarded no gross error has been committed and they have not been based upon false principles of law: *Levi* v. *Reed* (5); *Cossette* v. *Dun et al.* (6); *Gingras* v. *Desilets* (7).

The judgment of the court was delivered by:

GWYNNE J.—This is an action for the recovery from the defendants as now being the owners of a lot in the City of Montreal, known as lot no. 1790, on Notre Dame Street, in St. Anne's Ward, certain instalments of an assessment imposed and charged upon that lot of land by by-laws of the City of Montreal, passed in the year 1890 for the widening of Notre Dame Street before ever the defendants acquired an interest in lot 1790. To this action the defendants have pleaded the same matter by way of defence to the action and by way of incidental demand. The matter so pleaded

(1) 56 Ind. 139.
(2) 38 Am. Rep. 117; 73 Ind. 185.
(3) 20 R. L. 304.
(4) 27 Can. S. C. R. 537.
(5) 6 Can. S. C. R. 482.
(6) 18 Can. S. C. R. 222.
(7) Cass. Dig. (2 ed.) 212.

has been held to offer no defence to the action and it is only with the incidental demand that we have to deal. The material facts upon which the incidental demand is based are these: The owners of lot number 1791 on Notre Dame Street, which lies to the east of and adjoining to the lot 1790, in the summer of the year 1890 erected a house upon their lot 1791 the foundation of which encroached across the homologated line of the street into the street for the distance of twelve and three quarters ($12\frac{3}{4}$) inches. Upon this foundation from the level of the street columns were constructed upon which the front wall was built, which columns extend only 8 to 9 inches into the street. On the 17th November, 1890, the defendants acquired the lot 1790 by purchase, and in the summer of 1891 they proceeded to erect a house upon the front of their lot on Notre Dame Street. It was then found that the house erected in the previous year upon lot 1791, before ever the defendants had acquired any interest in lot 1790, encroached upon the street to the extent above mentioned, and the defendants applied to the city officials for leave to erect their house upon a line in continuation of the line upon which the house on lot 1791 had been built. Neither any official of the city nor the city corporation itself had any power or authority whatever to authorise any encroachment across the homologated line of the street, and the defendants being so informed by the city officials proceeded to build their house along such homologated line. To this action, which was commenced in the month of August, 1892, the defendants on the 3rd of December, 1892, file this incidental demand which is for $5,000 damages alleged to be sustained by them by reason of the encroachment upon the street of the building erected on lot 1791 which, as is alleged, has made the defendants building on lot 1790, less suitable

1898

THE CITY OF MONTREAL v. MULCAIR.

Gwynne J.

for their trade and has diminished its value. The damage alleged is that the projection of the building on lot 1791 for the distance of from 8 to 9 inches into the street prevents persons coming from the east along the same side of the street from seeing the defendants' show-window as soon as, but for the above encroachment, they could, and that thereby the defendants' trade is damaged and their house lessened in value to the defendants' damage of $5,000. The learned judge who rendered judgment in the case in the Superior Court, according to his appreciation of the evidence, was of opinion that this projection of the adjacent building beyond the homologated line of the street was insignificant and did not cause any appreciable damage to the defendants and he therefore dismissed the incidental demand and rendered judgment for the plaintiff in the action for the whole of their demand.

If this case turned wholly upon the question whether the projection spoken of causes actionable damage to the defendants I should entirely concur with the judgment of the learned judge of the Superior Court. It is true that in the evidence taken at the *enquête* there were not wanting expert valuators produced by the defendants who, on their examination in chief, singularly concurred in estimating the defendants' damage caused by the projection at $300 per annum, but none of them gave any satisfactory explanation of their mode of arrival at this estimate; one, indeed, whose estimate however only reached $250 per annum, gave his reasons very confidently which may be taken to be the reasons of all. One of these gentlemen, while he admits that there are no data to go upon, nevertheless thinks that the loss occasioned to the defendants by their show windows being obstructed by the 9 inch projection *would probably* be from $300 to $400 per annum. Another gentleman, *while he can-*

*not say there is any loss upon rental*, nevertheless thinks the defendants loss to amount to from $300 to $400 per annum, because he thinks a show window is a good mode of advertising and the view of the show-window is obstructed by the 9 inch projection to persons coming up the same side of the street from the east. A third, who in like manner estimates the defendants damage at $300 per annum, gives no reason for his opinion further than that a prominent window is of great value for the business of merchant tailors doing business for cash. A fourth, who also estimates defendants' loss at $300 per annum, says that *he speaks only from information*, that he has been informed that the projection spoken of would to persons in the business of the defendants, that is merchant tailors, make a difference of $300 per annum in the rent. The fifth, who alone gives his reasons, a Mr. Rielle, says:

> The effect of the projection is that *the defendants door* cannot be seen by persons moving west on that side of the street until they are practically opposite the door itself, and as a consequence many a one *may pass their door* without seeing it, *and in the event of the adjoining store being occupied for the same kind of business* the defendants window could easily be taken for the show-window of the adjoining building.

It is not then, in the opinion of this witness, the view of the show-window which is obstructed, but a door which is at the angle of defendants building immediately contiguous to the projection. "It is difficult," he says, to estimate with precision "the damage resulting from such a condition of things," and he accordingly proceeds to solve the difficulty, "from two points of view" thus:—

> First, a certain number of people, transient customers, will undoubtedly pass the defendants' door without seeing it *and will consequently* make their purchases elsewhere. *Assuming* one such case to happen daily, and an average loss of seventy-five cents or a dollar in each, *we have a yearly loss of two hundred and fifty dollars*, say four

1898

THE CITY OF MONTREAL v. MULCAIR.

Gwynne J.

thousand dollars at five per cent; *or assuming again* that the sale o one suit of clothes per week is lost on which five dollars would be netted, we have $250 per annum of loss.

Again he says:

One simple remedy would be to take down the front of defendants' building and set it up again in a line corresponding with the projecting building. The cost of such an operation would in my opinion represent the measure of damage suffered by the defendants and I estimate it as follows:

| | |
|---|---|
| His estimate then is for pulling down and re-erecting the front wall on the new line, etc. | $3,250 |
| Loss of rent of two stores, say..... | 1,200 |
| Loss of business during operation, say..... | 1,250 |
| | $5,700 |

and he concludes thus:—

I take the ground that the only real way to decide the problem is to take down the front of the building and *re-erect* it on the line of the adjoining property, and that is my estimate of such an undertaking—five thousand seven hundred dollars including loss of rent and loss of business.

This witnesses estimate which is founded wholly upon assumptions, amounts to this, that *assuming* the daily or weekly loss to be as *assumed*, the yearly loss would amount to $250, and the only way in the opinion of this witness to compensate such loss is to estimate the cost of pulling down the defendants' building and to re-erect it on a line with the building on lot no. 1791 and by so extending the encroachment on the street to transfer to the adjoining neighbour the damage of which the defendants complain as being caused to them by the nine-inch projection on lot 1791.

The defendants also called two of their salesmen whose mode of estimating the damage alleged to be caused by the projection is no less singular. They undertook to prove the damage by comparison of their sales in different years. It is necessary here to premise that the defendants' building was completed in

February, 1892, and that in December of that year, after ten months' occupation, they profess to have discovered the damage of which they complain in their incidental demand. The building was erected so as to have in it two shops capable of being used separately with domiciles above. In February, 1892, the defendants entered into occupation of the shop in the half of the building next adjoining lot 1791, the other or westerly half in which was constructed the show window spoken of as being so good as an advertising medium they did not occupy that year. Now the sales in the year commencing in February, 1892, amounted to $20,797.82; in the year 1893, to $25,609.15. During this year they occupied both shops and had the benefit of the show window in the westerly shop. In the year 1894 they let this shop, retaining in their own occupation the shop next adjoining lot no. 1791, and which they had occupied in 1892; this diminution of $4,811.33 from the sales of the previous year they attribute to their not having had the benefit of the window in the westerly shop which they had had in the previous year. The tenant of that shop had the benefit of the window in it. Then in 1895 their sales in the shop which they had occupied in 1892 and 1894 amounted to $17,466, and the conclusion sought to be drawn from this evidence is that the amount of the sales in 1895 being $4,811.33 less than the amount of the sales in 1894, and $3,321.76 less than the amount of the sale in 1892, the first year of occupation, is attributable to the 9-inch projection complained of which was in existence, and had the same operation during the whole period for which the sales are given.

The plaintiff also called several witnesses, all of whom unanimously concur that the projection complained of is absolutely innocuous to the defendants,

1898

THE CITY OF MONTREAL v. MULCAIR.

Gwynne J.

that it does not in any respect diminish the value of defendants' building whether for sale or rental or use for purposes of trade; they say that such projections, in one form or other, as columns, pilasters, porticos and such like are quite common in the city of Montreal and nobody thinks of complaining of them as damaging to an adjoining building, and in the opinion of some of the witnesses not one person in ten thousand would think of complaining of the projection in the present case. Some of the witnesses who have passed the place hundreds of times never in point of fact noticed the projection until their attention was called to it for the purposes of the present suit. All of those witnesses give their reasons for the conclusion in which they all concur as to the projection being innocuous to the defendants in an intelligent and clear manner and one, by a plan which he has made, and lines drawn thereon from several points to the defendants' shop, seems to demonstrate almost the correctness of that conclusion. In short, comparing the evidence given on the part of the plaintiff with that given on the part of the defendants who present this incidental demand, the former so appears to carry conviction with it, and the latter to be so imaginative, speculative, assumptive and illusive, that for my part I find it impossible to arrive at any other conclusion than that arrived at by the learned judge who rendered judgment in the case in the Superior Court.

But the case in my opinion does not rest solely upon a question as to whether or not the defendants have in point of fact sustained damage to any, and if any, to what amount occasioned by the projection into the street which is complained of. An action of this nature cannot be sustained unless it is alleged in the pleadings and proved in evidence that the corporation have committed a breach of some duty alleged to have

been owed by them to the party complaining from which breach of duty the damage complained of has arisen. The incidental demand in the present case does not allege any breach of any duty alleged to have been due by the corporation to the incidental plaintiffs. It does not allege the committal by the corporation of any public nuisance for damage arising from which the defendants as parties specially injured were entitled to sue. It alleges no act of misfeasance whatever by the corporation as giving a right to the defendants to present their incidental demand. It does not allege either any single act of non-feasance by the corporation of any duty owed to the public which is contended to have given to the defendants ground in law for presenting their incidental demand. That the non-feasance of any such duty would not give any cause of action to an individual injured thereby unless an action should be expressly given by statute, [*see* the judgments of the Privy Council in *Municipality of Pictou* v. *Geldert* (1), and *Municipal Council of Sydney* v. *Bourke* (2),] must be taken to be conclusive; and there is no such statute in the present case. The allegation in the incidental demand is simply to the effect that the incidental plaintiffs are suffering damage by the decrease in value of their property by the city of Montreal *allowing* the proprietors of lot No. 1791 to build beyond the homologated line of Notre Dame street *or* not obliging them to build in a straight line, *and allowing* them to hide the incidental plaintiffs' place of business. There is not a *single act* alleged whereby the corporation of the city of Montreal professed to allow the owners of lot 1791 to encroach upon the street when erecting their building. The corporation had no power whatever to allow any such encroachment. If they had

(1) [1893] A. C. 524. (2) [1895] A. C. 433.

1898

THE CITY OF MONTREAL v. MULCAIR.

Gynwne J.

assumed to do so such action on their part would have been simply inoperative and void, and would not in the slightest degree have interfered with the defendants' right themselves to indict the encroachment as a nuisance, or to bring an action against the persons maintaining the erection in the street for the damage alleged to be thereby caused to them. The construction of the incidental demand as pleaded, and the only construction which can be put upon the expression therein "in allowing" etc., must be, and the sole foundation upon which the incidental demand is based is, a contention that the plaintiff is liable to an action at the suit of the defendants for damages suffered by them and occasioned by the owners of lot 1791 having wrongfully erected their building so as to encroach upon the public street, and so as to do to the defendants the damage complained of. No cause of action which is maintainable at law against the corporation is involved in such a statement of facts. There is no allegation that the corporation is given by any Act of Parliament power to abate the nuisance complained of *propriâ manu*, or otherwise than by the same process of law as is open to the defendants who, if they really suffered the damage of which they complain, had a substantial motive to act themselves, and as already observed, upon the authority of the Privy Council in the cases above referred to, neglect of the corporation to take action to abate the nuisance and so to remove the cause of damage would not give a cause of action to the defendants to recover the damages alleged to be attributable to the nuisance unless such action be expressly given by statute.

The Court of Queen's Bench in appeal have reversed the judgment of the Superior Court and have given judgment against the plaintiff upon the incidental demand for the sum of $250 per annum, the precise

amount of the annual damage occasioned by the encroachment as estimated by the witness Rielle for the reasons given by him as already stated. This judgment proceeds upon the ground therein alleged that the line upon which the building upon lot 1791 was erected in 1891 was given by the corporation and that the persons who erected that building were bound to conform to the line so given. But there is not any allegation in the incidental demand that the corporation did give to the owners of lot 1791 the line upon which they constructed their building. There is no issue raising such a point, and consequently no evidence was admissible for the purpose of establishing the existence of a fact not alleged, and as to the existence of which there was not any issue joined to be tried. With submission I find it difficult to see how a mistake, if one was made, by the corporation in giving the line in 1891 to the owners of lot 1791 can be invoked by the defendants who at that time had no interest whatever in the lot 1790, upon which in 1892 they erected the building alleged to be damaged, the mistake, if made, was wholly *res inter alios acta*, and if the fact of the mistake having been made by the corporation was a fact necessary to be established in order to support the incidental demand, the corporation of the City of Montreal surely have a right to insist that the facts necessary to be established to enable the defendants to recover should be alleged upon the record. Such a mistake, if made, may have given to the owners of lot 1791 a cause of action against the corporation for any damage occasioned to them by the mistake, but how the defendants can avail themselves of such a mistake as giving to them a cause of action against the corporation in the absence of any statute to that effect I fail to see ; no such cause of action is expanded upon the record.

1898

THE CITY OF MONTREAL. v MULCAIR.

Gwynne J.

If ever the question of the liability of the corporation should arise between them and the owners of lot 1791 it will be necessary to consider whether a mistake in the line of a street can be established to have been made and given by the corporation otherwise than by the production of a *procès-verbal* mentioned in sec. 12 of by-law no. 3 of the consolidated by-laws of the corporation which enacts that it shall be the duty of the City Surveyor.

> when required by any person wishing to build on any street or public place in the city to establish, by a survey, the line of such street or place in the city *and to draw up a procès-verbal of the same a copy of which shall be delivered to the proprietor* or person requiring such alignment on payment of a sum of two dollars to be accounted for to the City Treasurer.

It is, in my opinion, only by force of this by-law, that the corporation assumed any obligation to give to a proprietor of a lot abutting on a street the boundary line of his lot upon the street. There is no such obligation imposed by the common law, nor is it suggested that there is any Act of Parliament which imposes such an obligation; neither does there seem to be any good reason why an owner of a lot should not himself incur the responsibility of ascertaining the boundary lines of his own land which is situate upon a street; that he can do so is apparent on the by-law, for by it the corporation is only called into action by a requisition of the person desiring to build on his land. There is an homologated plan of the line of the streets which is accessable to everyone, and any surveyor or civil engineer employed by the lot owner is as competent to determine the line with reference to the homologated plan as is the City Surveyor, but by the above by-law, and by that alone, the city corporation have assumed the obligation as therein stated, and such being the mode by which the obligation is incurred, it will have to be considered and determined

1898

THE CITY OF MONTREAL. v. MULCAIR.

Gwynne J.

whether or not it is not by the by-law that the city must be judged upon a question arising as to the fulfilment of the obligation; in other words whether it is not only by a *procès-verbal* given as directed by the by-law, that the act of the City Surveyor, or of his subordinates, can be held to be the act of the corporation. It is a matter of grave importance to municipal corporations like the city of Montreal that acts of their servants should not be deemed to be acts of the corporation unless they are done within the scope of the authority conferred upon the servant doing the act, and as a mode is prescribed by the by-law, (by which alone the obligation is assumed), to be followed for the purpose of procuring the corporation to give to a proprietor the line of his lot where it abuts upon a street in the city, that that mode alone should be pursued in order to make the act of the servant the act of the corporation. The defendants have always had, and still have the right if they are damaged in the manner alleged, to bring their action against the person who erected and maintains the building which does the damage alleged. I have already said that in my opinion the incidental demand as pleaded did not warrant the reception of any evidence for the purpose of establishing a fact not alleged, namely, that the city corporation gave to the owners of lot 1791, as the homologated line of the street, the line upon which they erected their building, but evidence with that view was offered by the defendants and taken down at the *enquête*, and, as the judgment now in appeal has proceeded upon that evidence, I must say that in my opinion it was wholly insufficient for the purpose for which it was adduced, even if it had been admissable as upon a point put in issue in the case. The evidence was that of the mason who was employed to erect the building by the owners of lot

1898

THE CITY OF MONTREAL. v. MULCAIR.

Gwynne J.

no. 1791. He said that a person, whom he did not know but who, he supposed, came from the office of the City Surveyor, made certain marks upon the old side-walk and upon the old building which was about to be removed for widening Notre Dame street there, and that this person told witness that the homologated line of the street was 21 feet 6 inches, to the best of the witness's recollection, from those marks, and that he, the witness, measured such distance, and so himself determined the site of the line of the street, and so *non constat* but that the error was committed by the witness himself, for no error appears in the line of the street at either side of the building erected on lot 1791. Now this evidence does not disclose any act whatever which can be said to have constituted a breach of any duty which the corporation owed to the defendants, nor can the act of the person who made the marks spoken of by the witness, even assuming him to have been a subordinate in the City Surveyor's office, be said to have been the act of the corporation upon the true construction of the by-law which seems to me to have been framed so as to prevent the corporation being affected by any such loose act open to the confliction in evidence incident to oral testimony, and held responsible for it as an act of the corporation, even though committed by one of their servants.

For all of the above reasons I am of opinion that the appeal should be allowed with costs, and the judgment of the Superior court restored.

*Appeal allowed with costs.*

Solicitors for the appellant: *Roy & Ethier.*

Solicitors for the respondents: *Sicotte, Barnard & Macdonald.*

ELIZA MILLER AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE HAMILTON POLICE BENEFIT FUND AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

1898

*Mar. 5.

*May 14.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Benefit association—Rules—Construction—Suspension of payment—53 V. c. 39 (Ont.).*

In 1889 the Police Force of Hamilton established a Benefit Fund to provide for a gratuity to any member resigning or being incapacitated from length of service or injury, and to the family of any member dying in the service. Each member of the force contributed a percentage of his pay for the purposes of the fund, and one of the rules provided as follows: "No money to be drawn from the fund for any purpose whatever until it reach the sum of eight thousand ($8,000) dollars" * * *

*Held*, that in case of a member of the force dying before the fund reached the said sum the gratuity to his family was merely suspended and was payable as soon as that amount was realized.

APPEAL from the decision of the Court of Appeal for Ontario reversing the judgment of the Divisional Court in favour of the plaintiffs.

This was an action brought on the 27th March, 1895, by the widow and children of George Miller, deceased, against the Hamilton Police Benefit Fund, a society incorporated by that name under the Benevolent Society's Act, R. S. O. (1887) ch. 172, as amended by 53 Vict. ch. 39, sec. 9, and A. D. Stewart, John Muir and G. F. Jelfs, the Hamilton Police Commissioners. The relief sought is the payment of the proportion of the share of a certain benefit fund to which it is alleged that the plaintiffs have become entitled as wife and children

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1898

MILLER v. THE HAMILTON POLICE BENEFIT FUND.

respectively of the deceased. In the alternative it is asked that the incorporation of the defendants may be "cancelled" and the benefit fund distributed among those who may be found to be beneficiaries under the direction of the court.

The deceased, George Miller, became a member of the Hamilton police force about the month of September, 1869, and so continued until the time of his death on the 25th October, 1891. In September, 1890, when the salaries of the members of the force were about to be increased, it was resolved by the Commissioners that a Police Benefit Fund should be established for the purpose of providing pensions, gratuities, etc., and in case of long service, illness, death, etc., and on the 21st October the members of the force, including the deceased Miller, signed the following declaration:

"We, the undersigned members of the Police Force of the city of Hamilton, in consideration of our salaries being increased by the Board of Police Commissioners, do hereby agree to allow three per cent of our salaries to be retained monthly by the City Treasurer, for the purpose of forming a Police Benefit Fund."

The city corporation were the paymasters of the force. Rules and regulations for the management of the fund were adopted by the committee of management in October, 1890, and approved by the Commissioners on the 8th December, 1890, though the fund appears to have been maintained in the manner contemplated from the time of its institution in the previous year. The rules of the society in force at Miller's death, and necessary to be considered, are:—

RULE 2. "The object of this fund shall be to grant gratuities and pensions for long service in the force, and to assist members of the force who may be disabled in the actual execution of their duty, or incapacitated from duty by long sickness, and to make

provision for old age, and for families in case of death."

RULE 3. "The Police Benefit Fund shall be under the management and control of a committee subject to the approval of the Board of Commissioners, which shall be called the Benefit Fund Committee."

RULE 12. "Every application for a pension gratuity or aid, must come before the committee when the whole circumstances of the case will be fully gone into, and a report sent in for the sanction of the Board of Police Commissioners, and in case of differences between the committee and the commissioners, the committee shall be heard in person by the commissioners, and if possible concurrence arrived at, but in the case of failure to concur, the judgment or decision of the Police Commissioners shall be final."

RULE 15. "The Board of Police Commissioners to contribute all moneys at their disposal now or hereafter which may be legitimately applied to the fund."

RULE 16. "All the members of the force to contribute 3 per cent of the gross amount of their pay monthly towards the fund."

RULE 17. "The percentage to be deducted on the pay sheets in like manner as any other stoppage, and to be paid over monthly in a lump sum to the treasurer of the fund."

RULE 18. "The Chief Constable shall be treasurer of the fund, but no money shall be paid out of the said fund unless ordered by the committee and sanctioned by the chairman of the Board of Police Commissioners."

RULE 23. "In estimating the length of service, members who were on the force previous to the 1st of January, 1890, are entitled respectively to reckon two-thirds of the period of their service anterior to the above date."

1898

MILLER v. THE HAMILTON POLICE BENEFIT FUND.

RULE 24. "Old scale, which shall only apply to members who have joined the force before the 1st of January, 1890,"—and by sub-section 9 of Rule 24, it is provided as follows:

IX. Any member dying in the service, his widow, child or children, shall receive an allowance according to the following scale:

| | |
|---|---|
| 1 years' service | $250 00 |
| 2 years' service | 300 00 |
| 3 years' service | 350 00 |
| 4 years' service | 400 00 |
| 5 years' service | 450 00 |

6 years' service, and upwards, one and one-half month's pay for each year's service, but in the event of a member dying unmarried and without issue, his heirs shall receive an allowance granted in such cases on a report of the committee, and sanction or approval of the Police Commissioners."

[That part of the rule relating to the "New Scale" applies only to members joining the force from and after the 1st January, 1890.]

RULE 25. "No money is to be drawn from the fund for any purpose whatever until it reaches the sum of eight thousand (8,000) dollars, unless in certain cases, such as members disabled in the execution of their duty, or in case of death, to be considered and reported on by the committee and sanctioned by the Board of Police Commissioners as aforesaid."

The plaintiffs say that the number of years' service of Mr. George Miller in respect of which they are entitled to receive allowance and payment, is two-thirds of his period of service, prior to the 1st January, 1890, viz., thirteen and a half years, and subsequent thereto the full period until his death, one and five-sixth years; the amount of such allowance estimated under rule 24, clause 9, being at the rate of one and a half months

pay for each year's service, in all $1,294.27. This sum they claim to be legally entitled to under the rules and regulations of the society.

The defendants, on the other hand, contended

(1) That the granting of the allowance is not as of right but depends, under rule 12, upon the report of the Committee and sanction of the Police Commissioners, authorizing it after consideration of the whole circumstances of each particular case:

(2) That the amount of the fund at the death of George Miller having been no more than $2,485, the only sum to which the plaintiffs could under any circumstances be entitled, was that reported on by the committee and sanctioned by the Police Commissioners under rule 25, viz., $175.

The defendants also contended that the fund was illegally constituted, the provisions of the Ontario Benevolent Societies Act, R. S. O. (1887) ch, 172 not having been complied with.

The trial judge, Mr. Justice Rose, held that plaintiffs were only entitled to the sum awarded by the Police Commissioners under rule 12, namely, $175, and gave judgment for that amount. The Divisional Court held them entitled to the allowance according to the scale in rule 24, and that payment of this amount was only supended while the fund was under $8,000. It also held that the fund was properly constituted, not being affected by the Act relating to Benevolent Societies, or by the Ontario Insurance Act.

In the Court of Appeal the judgment of the Divisional Court was reversed and that of the trial judge restored. From this judgment the plaintiffs appealed to this court.

*Watson Q.C.* for the appellants.

*Teetzel Q.C.* for the respondents.

1898

MILLER
v.
THE HAMILTON POLICE BENEFIT FUND.

Sedgewick J.

The judgment of the court was delivered by

SEDGEWICK J.—We are of opinion that this appeal should be allowed and the judgment of the Divisional Court restored. We have been unable to come to the conclusion that the rules governing the fund in question provide that there shall be no liability whether prospective or *in presenti* against the fund in case of death, etc., until the fund reached $8,000. Rule 25 indicates that there should be a postponement only of payment. No matter what the intention of the founders of the fund may have been, and there are strong reasons to suppose that their intentions were, as is claimed by the respondents, that intention has in no way been manifested in the rules themselves, and we do not feel it proper to read between the lines or import words into them giving them a construction of which they are not susceptible.

The question of the construction of the Ontario Insurance Act as amended by 53 Victoria, Ch. 39, was disposed of at the argument. We do not think that there is anything in the statute which affects the right of the appellants to payment out of the fund. The appeal is allowed with costs, and the appellants will be entitled to their costs in all the courts below.

*Appeal allowed with costs.*

Solicitor for the appellants: *Thomas C. Haslett.*

Solicitors for the respondents: *Teetzel & Harrison.*

JAMES T. BAIN (PLAINTIFF).....APPELLANT; 1898

AND *Mar. 11.
*May 14.

ANDERSON & CO., AND THE ANDERSON FURNITURE COMPANY (DEFENDANTS).....} RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Master and servant—Contract of hiring—Duration of service—Evidence—Dismissal—Notice—Appeal—Assuming jurisdiction.*

Where no time is limited for the duration of a contract of hiring and service, whether or not the hiring is to be considered as one for a year is a question of fact to be decided upon the circumstances of the case.

A business having been sold the foreman, who was engaged for a year, was retained in his position by the purchaser. On the expiration of his term of service no change was made, and he continued for a month longer at the same salary, but was then informed that if he desired to remain his salary would be considerably reduced. Having refused to accept the reduced salary he was dismissed, and brought an action for damages claiming that his retention for the month was a re-engagement for another year on the same terms.

*Held*, affirming the judgment of the Court of Appeal (24 Ont. App. R. 296) which reversed that of Meredith C. J. at the trial (27 O. R. 369) that as it appeared that the foreman knew that the business before the sale had been losing money and could not be kept going without reductions of expenses and salaries, as he had been informed that the contracts with the employees had not been assumed by the purchaser and as upon his own evidence there was no hiring for any definite period but merely a temporary arrangement, until the purchaser should have time to consider the changes to be made, the foreman had no claim for damages, and his action was rightly dismissed.

Where the jurisdiction of the Supreme Court of Canada to entertain an appeal is doubtful the Court may assume jurisdiction when it has been decided that the appeal on the merits must be dismissed. *Great Western Railway Company of Canada* v. *Brai* (1 Moo. P. C. N. S. 101) followed.

PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1898

BAIN. v. ANDERSON & Co.

By 60 and 61 V. c. 34 s. 1 s.s. (*c*), no appeal lies from judgments of the Court of Appeal for Ontario unless the amount in controversy *in the appeal* exceeds $1,000, and by subsec. (*f*), in case of difference, it is the amount demanded, and not that recovered which determines the amount in controversy.

*Held*, per Taschereau J., that to reconcile these two subsections, paragraph (*f*) should probably be read as if it meant the amount demanded upon the appeal. To read it as meaning the amount demanded in the action, which is the construction the court has put upon R. S. C. c. 135 s. 29 relating to appeals from the Province of Quebec, would seem to be contrary to the intention of Parliament. *Laberge* v. *The Equitable Life Assurance Society* (24 Can. S.C.R. 59) distinguished.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of Meredith C. J. at the trial (2) in favour of the plaintiff.

The facts of the case are sufficiently stated in the above head-note.

*Gibbons Q.C.*, for the appellant.

*Osler*, *Q.C.*, and *S. H. Blake*, *Q.C.*, for the respondents.

The judgment of the court was delivered by

TASCHEREAU J.—Objection to our jurisdiction in this case was taken by the respondent *in limine*, on the ground that the amount demanded does not exceed the sum of $1,000 as required by 60 and 61 V. ch. 34 (D). The amount claimed by the action exceeds $1,000, but the amount awarded to the plaintiff by the court of first instance is only $408. Upon appeal by the defendants, the Court of Appeal dismissed the action *in toto*, and now upon this appeal by the plaintiff, all he claims is that the original judgment in his favour for $408 be restored. And that being so, the respondent argued that as the amount demanded does not exceed $1,000, the case is not appealable under paragraph "*f*," of section 1 of said statute, the amount de-

(1) 24 Ont. App. R. 296. (2) 27 O. R. 369.

manded, in that section, meaning as he contended, the amount demanded upon the appeal.

We held that under the ruling in *Laberge* v. *The Equitable Life Assurance Society* (1), it is the amount demanded originally by the action, not the amount demanded upon the appeal, that governs where the right to appeal is dependent upon the amount in dispute, and the case proceeded upon the merits. As no reference has been made to paragraph "*c*" of the same section of the statute, it was taken for granted that the enactments in *pari materia*, as to Quebec appeals, were the same as those now existing by the said statute for the Ontario appeals, but since, upon reference to the statutes, I find that for the Quebec appeals, it is the *amount in controversy* that governs, whilst for the Ontario appeals it is the amount in controversy *in the appeal*. So that to reconcile paragraphs "*c*" and "*f*" of section 1 of this statute, 60 & 61 V. c. 34, we should perhaps read paragraph "*f*" as if it meant the amount demanded upon the appeal. However, as we are to dismiss the appeal upon the merits, it is unnecessary in this case to rehear the parties on this question of jurisdiction, or to further consider it. And what I say of it now is a mere expression of my personal opinion upon the question, as at present advised. I may add, again speaking for myself, that it clearly appears by the preamble of this last Dominion statute, that the intention of Parliament was to confirm the Ontario Acts on the subject. Now, these Acts (2) clearly restrict the right of appeal to cases where the amount in controversy *in the appeal* exceeds $1,000. So that to apply the ruling in *Laberge* v. *The Equitable Life Assurance Society* to Ontario appeals would seem to be contrary to the intention of Parliament.

(1) 24 Can. S. C. R. 59.

(2) R. S. O. [1887] Ch. 42. sec. 2, and 60 Vict. Ch. 14, sec. 1.

1898

BAIN.
v.
ANDERSON & Co.

Taschereau J.

On the merits, assuming that we have jurisdiction, (*The Great Western Railway Company of Canada* v. *Braid* (1),) we are of opinion the appeal should be dismissed.

The learned judge who tried the case found that the appellant had been dismissed without reasonable notice, and was entitled to damages (2). The Court of Appeal, however, held that upon the evidence there was no definite engagement of appellant, but merely a temporary employment, and dismissed his action. It cannot at the present day be contended that, as a rule of law, where no time is limited for the duration of the contract of hiring and service, the hiring has to be considered as a hiring for a year. The question is one of fact, or inference from facts, the determination of which depends upon the circumstances of each case. Here, we think, with the Court of Appeal; first, that it was to appellant's knowledge that the Hay Company's business had before May, 1895 been a losing concern, which it was impossible to keep going without reductions of expenses and salaries; secondly, that on the 18th May, in the only interview between Anderson and appellant that took place, there was upon appellant's own evidence no hiring for any definite period, but merely a temporary arrangement until Anderson should have time to consider the changes to be made after the new organization was completed. Appellant was expressly told by the foreman that Hay's contracts with his employees had not been assumed by Anderson, and he had to admit in his examination that he anticipated there would be changes. On the 22nd of August, they notified him that his salary thereafter would be reduced to $600 if he desired to remain in the service of the new company. Now, under all the circumstances, this is

(1) 1 Moo. P. C. N. S. 101. (2) 27 O. R. 369.

1898

BAIN.
v.
ANDERSON & Co.

Taschereau J.

nothing but the notice he must have expected every morning since the first of the month. There is nothing in the evidence which justified him in thinking that he would not be subject to the reductions to be made in the salaries. I feel certain that if on the 18th of May or at any time afterwards, he had told Anderson that he did not intend to remain in the service of the new company if not paid $1,500 a year, as he had been by the old company, Anderson would have immediately told him he could not be re-engaged.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Gibbons, Mulkern & Harper.*

Solicitors for the respondents: *Finkle & Mullen.*

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BYRON BOWEN OSTROM (PLAINTIFF) AND ALEXANDER BEATTY (MADE A PARTY APPELLANT BY ORDER OF COURT) } APPELLANTS;

AND

EPHRAIM G. SILLS AND JOHN SILLS, TRADING AS SILLS BROS., (DEFENDANTS) } RESPONDENTS.

1898

*Mar. 14, 15.
*May 14.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Adjoining proprietors of land—Different levels—Injury by surface water—Watercourse—Easement.*

O. and S. were adjoining proprietors of land in the village of Frankford, Ont., that of O. being situate on a higher level than the other. In 1875 improvements were made to a drain discharging upon the premises of S., and a culvert was made connecting with it. In 1887, S. erected a building on his land and cut off the wall of the culvert which projected over the line of the street, which resulted in the flow of water through it being stopped and backed up on the land of O., who brought an action against S. for the damage caused thereby.

*Held*, that S. having a right to cut off the part of the culvert which projected over his land was not liable to O. for the damage so caused, the remedy of the latter, if he had any, being against the municipality for not properly maintaining the drain.

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard, JJ.

1898

OSTROM v. SILLS.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Chancery Division in favour of the plaintiff.

The facts of the case are thus stated by Mr. Justice Moss in the Court of Appeal.

The locus of this litigation is the unincorporated village of Frankford, situate in the township of Sidney, in the county of Hastings, at the confluence of the River Trent and its tributary Cole Creek. It is not shown when the farm lots on which the village is situate were first laid out in streets and building lots, but in some of the conveyances put in there is a reference to a plan of part of the village made in 1837, by one G. S. Clapp, P.L.S., and to a plan of the village made by one J. D. Evans, P.L.S. The evidence shows this latter plan to have been made in 1870. The plaintiff and defendants are the proprietors of adjoining parcels of land, fronting on the south side of a highway called Mill Street, and extending south to the waters of Cole Creek. The plaintiff's premises have a frontage of 20 feet on Mill Street, and are wholly covered by a building used by him as a chemist's shop and dwelling. At a distance of 68 feet from the N. E. corner of plaintiff's building is Trent Street, a highway running north and south and intersecting Cole Creek, at a distance of 43 feet from the corner of Mill and Trent streets. Immediately to the west of the plaintiff's buildings are the premises of the defendants. They consist of a considerable parcel of land with a frontage of about 166 feet on Mill Street, on which are now erected two buildings, one a storehouse or warehouse, the other a grist mill. When the plaintiff acquired this property,(in the year 1872),the defendant's land was vacant though there had been on the westerly

(1) 24 Ont. App. R. 526.

portion a grist mill which had been burned down. When the defendants purchased there was a covered ditch or drain crossing Mill Street from the north side, and discharging upon the defendant's premises at a place to the east of the site of the old grist mill. It conducted water, which was collected on the north side of Mill Street by means of ditches and drains constructed by the municipality and land owners, across the highway and discharged it upon the premises now owned by the defendants over which it flowed to Cole Creek. The covered drain was constructed of floats or logs placed atop of one another forming a box or pipe about 18 inches wide and 8 or 10 inches in height, covered over by planks on which were put earth and gravel to the level of the highway. It had been placed there probably twenty or more years before. There had been on the ground at this place a shallow depression into which the surface water from the surrounding lands flowed. This depression extended from north of the highway across it and on to the lands now owned by the defendants and the construction of the box drain was the work of the township authorities, done for the purpose of improving the highway by gathering the waters into a convenient conduit and levelling the highway. By these means the waters were concentrated and brought to defendants' lands in increased volume, and discharged with increased force. The land sloped gradually from the south side of Mill Street to Cole Creek, and the water coming through the covered drain cut away the earth and formed a sloping course, along which it was found convenient for persons in vehicles to drive down to Cole Creek, and there ford the stream. In 1875, considerable alterations and improvements were put upon the drain by the township authorities. It was thought to be of insufficient capacity to carry

1898

OSTROM v. SILLS.

away all the water collected on the north side of Mill Street. It was too near the surface and was liable to freeze up in cold weather. The bottom of a ditch running along the north side of Mill Street from the west, which took and conveyed surface waters from lands to the north of the street and west of where the box drain crossed the highway, had become worn to a level below that of the bottom of the box drain. To remedy these defects a wider and deeper excavation was made. A trench more than 2½ feet wide was cut down to the rock. The sides were built up with loose stones to a height of about 20 inches and the top was covered with 2 inch planks, upon which was put earth to the level of the crown of the highway, thus producing a culvert 2½ feet wide by about 20 inches high with its bottom something more than 4 feet beneath the surface of the highway. It connected with the ditch or drain on the north side of Mill Street and extended beyond the south limits of the highway for a distance of 12 or 15 feet into and upon the defendants' premises. The discharge from its mouth was into the same place as the discharge from the box drain and the water from it found its way to Cole Creek in the same direction and along the same course as formerly, but the quantity of the discharge was apparently materially increased and the effect of its action was to cut a much more defined channel from the mouth of the culvert through the defendant's premises to the creek; and if there was a servitude in respect of the former drain it was largely increased by the new culvert. The water formerly brought to and discharged through the box drain and thereafter through this culvert was chiefly surface water collected by means of drains and ditches and conducted to a ditch or drain constructed by the municipality of Sidney along the north side of Mill Street, which at

one time conducted water from west of King Street but for the past fifteen or more years only from a point to the east of the east side of King Street. At one time there was an occasional accession of water from an overflow, in times of freshet, of a pond situate on the corner of Albert and Scott Streets some distance to the north and west of the corner of King and Mill Streets, but this was cut off about the year 1890, by a drain constructed by the municipality. There was also an occasional overflow from a spring situate some distance to the north of Mill Street, nearly on a line with the point where the culvert crosses Mill Street, but about the year 1884 this also was cut off and the water drained to the Trent river. One Chapman who owns a parcel of land on the north side of Mill Street directly opposite the defendants' premises and through whose premises was the natural depression above spoken of, put down a drain from his premises and cellar about the year 1868 and thereby conducted to the drain on the north side of Mill Street, the waters collected by means of his drain. But these and nearly all the other waters that flowed through the culvert were waters cast upon the surface of the ground in the shape of either rain or melted snow, and the quantity consequently varied very considerably, there being sometimes a very considerable volume, while at others, and for the most part, the discharge was comparatively small and intermittent.

This was the state of things when in 1887 the defendants commenced the erection of the building in respect of which the controversy has arisen and which is generally spoken of in the evidence as the storehouse or warehouse. It is a brick structure upon a stone foundation, its eastern wall coming within a few inches of the western wall of the plaintiff's building and extending south to Cole Creek. The south wall

1898

OSTROM v. SILLS.

extends to the west about thirty-four feet. The eastern wall extends northward from the south wall to within about ten feet of the south line of Mill street. It is then turned to the east a distance of about ten feet and is then turned to the north, about ten feet, to the south line of Mill street. The north or front wall extends easterly along or slightly over the street limit to the west wall. There is thus formed at the north-west corner on the building what is spoken of as an "L" about ten feet square. There is left between the warehouse and the grist mill an alleyway about ten feet wide. The culvert comes upon the defendants' premises near the corner formed by the west wall of the "L." In excavating for the foundation of the warehouse the defendants cut away the planks covering the culvert and removed its stone wall for some distance and built the foundation wall across its course from the rock upwards to some distance above the level of the street, but did not move the culvert back to the line of the street and its point of discharge was still upon the defendants' premises. The superstructure was completed in 1888, and then the defendants, in order, as they say, to protect their foundation wall from the waters coming through the culvert and to conduct them to Cole Creek, removed the stone walls of the culvert to the line of the street and made an excavation in a diagonal line from the corner of the "L" fronting on Mill street to the lower corner on the alleyway and placed a barrier of planks across the base of the "L" from the rock to above the level of the street. The space behind this barrier and between it and the foundation wall was filled in with earth and gravel. The space in front was not filled in, but on the contrary the defendants say they caused a cutting to be made from the drain to the alleyway so as to conduct the water coming from the culvert to the

alleyway, and enable it to flow down into the creek. Whether this provision for carrying off the water would have been sufficient if it had continued is not known, for before long the space in front of the barrier began to be filled up with earth, stones, ashes and other debris thrown or collected there without the action or concert of the defendants, so that in less than a year the mouth of the culvert was completely covered and stopped up, and the space became filled almost, if not wholly, to the level of the ground. The effect of this was to entirely stop the flow of water from the culvert. In 1890, upon occasion of heavy rains, water began to come into the plaintiff's cellar through the walls at the north-west corner of his building, more particularly in the west wall, and this continued from time to time up to the time of the commencement of this action on the 6th of September, 1892.

The Divisional Court held that the plaintiff was entitled to damages and reversed the judgment of the trial judge who dismissed the action. The Court of Appeal reversed the judgment of the Divisional Court and restored that of Falconbridge J., at the trial. The plaintiff then appealed to this court.

After the appeal was lodged in the Supreme Court, it having been made to appear that the plaintiff had become insolvent an order of a judge in chambers added his assignee, Alexander Beatty, to the cause as an appellant.

*C. J. Holman* and *Porter* for the appellants. The plaintiff having suffered damages through the act of the defendant in obstructing the watercourse he is entitled to recover though not a reparian proprietor. *Hurdman* v. *North Eastern Railway Co.* (1); *Whalley*

(1) 3 C. P. D. 168.

1898

OSTROM v. SILLS.

v. *Lancashire and Yorkshire Railway Company* (1); *Conniff* v. *The City and County of San Francisco* (2).

A dedication of the watercourse to the public may be inferred. *Mann* v. *Brodie* (3); *Harrison* v. *Harrison* (4); *Turner* v. *Walsh* (5).

The judgment may be reversed on the facts even against the concurrent findings of two courts. *North British and Mercantile Insurance Co.* v. *Tourville* (6); and see *Ryan* v. *Ryan* (7).

*Clute Q.C.* and *Williams* for the respondents. The principles applicable to public waters do not extend to the flow of mere surface water. *Rawstron* v. *Taylor* (8); *McGillivray* v. *Millin* (9); *Murray* v. *Dawson* (10).

This case is not within the rule laid down in *Rylands* v *Fletcher* (11).

The evidence will not support the contention that there was a dedication. See *Glover* v. *Coleman* (12).

The judgment of the court was delivered by:

GWYNNE J.—Mr. Justice Moss has in his able judgment so fully stated the facts of the case that it is unnecessary to repeat them.

It is sufficient to say that whatever may have been the condition fifty or sixty years ago of the premises where the culvert in question across Mill Street in the village of Frankford is situate, that is to say, whether there was then anything which could be called a natural watercourse, it is unnecessary to inquire, for it is clear upon the evidence that for nearly twenty years before the defendants in 1888 completed their building which is complained of, and perhaps ever since the

(1) 13 Q. B. D. 131.
(2) 67 Cal. 45.
(3) 10 App. Cas. 378.
(4) 4 Russ. & Geld. 338.
(5) 6 App. Cas. 636.
(6) 25 Can. S. C. R. 177.
(7) 5 Can. S. C. R. 387.
(8) 11 Ex. 369.
(9) 27 U. C. Q. B. 62.
(10) 19 U. C. C. P. 314.
(11) L. R. 3 H. L. 330.
(12) L. R. 10 C. P. 108.

village municipality came into existence the only waters passing through the culvert in question were the waters brought down from a drain constructed by Mr. Chapman upon his lot on the north side of Mill street about thirty feet distant from the mouth of the culvert and the rain and melting snow fallen on the street and land in the vicinity of a ditch along the north side of Mill street from Chapman's drain to the culvert. These waters were discharged through the culvert on the defendants' land, and what the defendants have done which is complained of is that in 1888 they completed the erection of a building of stone and brick on their own land on the south side of Mill street, the north wall of which is distant ten feet from the southern limit of the street, and they have cut off the walls of the culvert which projected over the line of the street whereby the waters passing through the culvert soak partly through the street and partly through the ten feet of defendants' land between their building and the street, and so possibly have done some damage to the plaintiff. But the defendants in so erecting their building and cutting off that part of the culvert which projected over their land, have only exercised their right, and if the plaintiff has been damnified thereby, his remedy is not against the defendants, but rather against the municipality who maintain the drain in an insufficient condition.

The appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants: *E. Guss Porter.*

Solicitors for the respondent: *Clute & Williams.*

1898

*May 20.

ROBERT G. FISHER (DEFENDANT).....APPELLANT;

AND

AGNES E. E. FISHER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Appeal—Special leave*—60 & 61 V. (*D.*) *c.* 34, *s.* 1 (*e*)—*Benevolent Society—Certificate of Insurance.*

An action in which less than the sum or value of one thousand dollars is in controversy and wherein the decision involves questions as to the construction of the conditions indorsed upon a benevolent society's certificate of insurance and as to the application of the statute securing the benefit of life insurance to wives and children to such certificates is not a matter of such public importance as would justify an order by the court granting special leave to appeal under the provisions subsection (*e*) of the first section of the statute 60 & 61 V. c. 34

APPEAL from the judgment of the Court of Appeal for Ontario (1), reversing the decision of Mr. Justice Street in the High Court of Justice for Ontario (2), which dismissed the plaintiff's action with costs.

MOTION on behalf of the defendant for special leave to appeal under the provisions of subsection (*e*) of 60 & 61 Vict. ch. 34.

By the first section of the statute above mentioned appeals are allowed to the Supreme Court of Canada from judgments of the Court of Appeal for Ontario, in the following cases only, that is to say,—

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* PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and King JJ.

(1) 25 Ont. App. R. 108. (2) 28 O. R. 459.

"(*a*) Where the title to real estate or some interest therein is in question;

(*b*) Where the validity of a patent is affected;

(*c*) Where the matter in controversy in the appeal exceeds the sum or value of one thousand dollars, exclusive of costs;

(*d*) Where the matter in question relates to the taking of an annual or other rent, custom or other duty or fee, or a like demand of a general or public nature affecting future rights;

(*e*) In other cases where the special leave of the Court of Appeal for Ontario or of the Supreme Court of Canada to appeal to such last mentioned court is granted."

The action was brought to recover $835 received upon a policy or certificate of insurance on the life of the plaintiff's deceased husband which had been paid to and was retained and claimed by the defendant as the personal representative of the insured. In the trial court the action was dismissed but, on appeal, this decision was reversed and a judgment for $901.65 and costs, (which were afterwards taxed at $382.65,) was ordered to be entered in favour of the plaintiff.

The application by the deceased to the society for the certificate stated that the insurance money was to be paid to the applicant's wife, and the certificate, as issued and accepted, provided that the money should, at his death, be paid to the deceased's wife, or such other beneficiary as he might in his lifetime designate in writing indorsed on the certificate and, in default of such designation, to his legal personal representatives.

In dismissing the action in the trial court, Mr. Justice Street was of the opinion that, in the absence of special indorsements designating beneficiaries under such certificates, the insurance moneys belonged to

1898

FISHER v. FISHER.

the legal personal representatives of the insured, whilst the majority of the judges in the Court of Appeal, (Osler J. A. dissenting), held that the certificate came within the Act to secure to wives and children the benefit of life assurance (1), and that the widow was entitled to recover the amount of her claim.

*Walter Barwick* for the motion.

*Chrysler Q.C.* contra.

After hearing counsel upon the motion and without calling upon opposing counsel, the court was unanimously of opinion that, under the circumstances disclosed, it did not appear that the questions at issue in the case were of sufficient public importance to justify the court in making an order granting special leave to appeal.

*Motion dismissed with costs.*

Solicitors for the appellant: *Fraser & Fraser.*

Solicitors for the respondent: *McWhinney, Ridley & Co.*

(1) R. S. O. [1887] ch. 136.

THOMAS JOHN JERMYN (DEFENDANT) ..... } APPELLANT; 1898 *May 20.

AND

RICHARD TEW (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Appeal—Jurisdiction—Matter in controversy—Interest of second mortgagee —Surplus on sale of mortgaged lands*–60 & 61 *V. c.* 34, *s.* 1 (*D*).—*Statute, construction of—Practice.*

While an action to set aside a sscond mortgage on lands for $2,200 was pending, the mortgaged lands were sold under a prior mortgage, and the first mortgagee, after satisfying his own claims, paid the whole surplus of the proceeds of the sale amounting to $270 to the defendant as subsequent incumbrancers.

Judgment was afterwards rendered declaring the second mortgage void, and ordering the defendant to pay to the plaintiff, as assignee for the benefit of creditors, the amount of $270 so received by him thereunder, and this judgment was affirmed on appeal.

Upon an application to allow an appeal bond on further appeal to the Supreme Court of Canada, objections were taken for want of jurisdiction under the clauses of the Act 60 & 61 Vict. ch. 34 but they were overruled by a judge of the Court of Appeal for Ontario, who held that an interest in real estate was in question and the appeal was accordingly proceeded with and the appeal case and factums printed and delivered. On motion to quash for want of jurisdiction when the appeal was called for hearing ;

*Held*, that the case did not involve a question of title to real estate or any interest therein but was merely a controversy in relation to an amount less than the sum or value of one thousand dollars and that the Act 60 & 61 Vict. ch. 34, prohibited an appeal to the Supreme Court of Canada.

APPEAL from the judgment of the Court of Appeal for Ontario which affirmed the decision of the High Court of Justice maintaining the plaintiff's action with costs.

PRESENT :—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

32

1898

JERMYN
v.
TEW.

The plaintiff, as assignee for the benefit of creditors of the estate of a firm of insolvent traders, brought an action to set aside a second mortgage for $2,200 on the lands of a member of the insolvent firm, on the ground that it had been given to secure an undue preference and was fraudulent and void as against the creditors in general of the insolvents. It appeared that, while the action was pending and before trial, the mortgaged lands had been sold, by virtue of the powers in a prior mortgage, for a sum sufficient to satisfy all claims thereunder, and that the surplus proceeds, amounting to $270, had been paid over by the first mortgagee to the defendant. At the trial His Lordship the Chancellor of Ontario made an order setting aside the second mortgage, and directing the defendant to pay the plaintiff the amount of such surplus proceeds so received by him in virtue thereof. On appeal the Court of Appeal for Ontario were equally divided, (Burton C. J. and Maclennan J. being of opinion that the appeal should be allowed, and Osler and Moss JJ. being for dismissal,) and accordingly the Chancellor's decision stood affirmed. The defendant then proceeded to appeal to the Supreme Court of Canada, and on objections on the ground of want of jurisdiction being taken to the allowance of the appeal bond, Maclennan J. held that a title to real estate or some interest therein was brought in question in the case, and that, consequently an appeal would lie under 60 & 61 Vict. (D.) ch. 34, s. 1 (*a*). The appeal was accordingly proceeded with, the case and factums printed and delivered, and the appeal inscribed for hearing in the usual course. Upon the appeal being called in the Supreme Court of Canada, a motion on behalf of the respondent was made to quash the appeal for want of jurisdiction on the ground that the matters in controversy did not come

within the exceptions mentioned in the first section of the statute, 60 & 61 Vict. ch. 34 (D).

The provisions of the Act affecting the appeal are as follows:

1. No appeal shall lie to the Supreme Court of Canada from any judgment of the Court of Apppeal for Ontario, except in the following cases:—

(*a*) Where the title to real estate or some interest therein is in question;

(*c*) Where the matter in controversy in the appeal exceeds the sum or value of one thousand dollars, exclusive of costs;

(*f*) Whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded, not that recovered, if they are different.

*Wallace Nesbitt*, (*Clarke* with him), for the motion. The action was originally only to set aside a mortgage and the result was that the assignee for the benefit of creditors was declared entitled to $270, the whole remaining surplus, proceeds of the sale of the lands, unabsorbed by the prior mortgage under which the mortgaged lands had been sold. Even although the second mortgage was collateral security for $2,200 that amount is not in dispute. The prior mortgage absorbed all proceeds from the lands sold, except the $270 which is now the only subject in controversy. The assignee cannot possibly get at the land and cannot possibly recover, in any case, anything but this surplus of $270, and the controversy is reduced practically to a question as to costs. His Lordship Chancellor Boyd, recognising this, allowed costs only upon the lower scale, although it afterwards turned out that he was not authorised to make this reduction, and the judgment of the court actually gave full costs.

1898

JERMYN v. TEW.

*Hamilton Cassels*, contra. Subsection (*a*) of section 1 of the Act governs this appeal. The action was to set aside a second mortgage of lands as fraudulent, which raised a question of title to lands. There was a question of the respondent's title to some interest in real estate and to test its validity. Subsection (*c*) protects the appellant's right when it depends on the amount in dispute, and in this case we ascertain the matter in controversy and the amount in dispute by reading the prayer demanding that the mortgage on the land for $2,200 be declared fraudulent and set aside. Subsection (*f*) makes it clear that the demand was intended to be the test.

After hearing the above arguments the court delivered judgment holding that as no sum was demanded by the action only a matter of $270 in money was in controversy on the appeal and that no title to real estate or any interest therein was in question. The appeal was quashed with costs as upon a motion to quash.

*Appeal quashed with costs.*

Solicitors for the appellant: *Cassels, Cassels & Brock.*

*Solicitors for the respondent*: *Beatty, Blackstock, Nesbitt, Chadwick & Riddell.*

PHILIP HEIMINCK (PLAINTIFF).....APPELLANT;

AND

THE MUNICIPALITY OF THE TOWN OF EDMONTON (DEFENDANT).....RESPONDENT.

1897
*Nov. 4,5,6.
1898
June 14.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

*Municipal Corporation—Highways—Old trails in Rupert's Land—Substituted roadway—Necessary way—R. S. C. c. 50, s. 108—Reservation in Crown Grant—Dedication — User—Estoppel—Assessment of lands claimed as highway—Evidence.*

The user of old travelled roads or trails over the waste lands of the Crown in the North-west Territories of Canada, prior to the Dominion Government Survey thereof does not give rise to a presumption that the lands over which they passed were dedicated as public highways.

The land over which an old travelled trail had formerly passed, leading to the Hudson Bay Trading Post at Edmonton, N.W.T., had been enclosed by the owner, divided into town lots and assessed and taxed as private property by the municipality, and a new street substituted therefor as shewn upon registered plans of subdivision and laid out upon the ground had been adopted as a boundary in the descriptions of lands abutting thereon in the grants thereof by Letters Patent from the Crown.

*Held*, reversing the decision of the Supreme Court of the North-west Territories, that under the circumstances there could be no presumption of dedication of the lands over which the old trail passed as a public highway, either by the Crown or by the private owner, notwithstanding long user of the same by settlers in that district prior to the Dominion Government Survey of the Edmonton Settlement.

APPEAL from the judgment of the Supreme Court of the North-west Territories, sitting *en banc*, which affirmed the judgment of the trial court dismissing the plaintiff's action with costs.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1898

HEIMINCK v. THE MUNICIPALITY OF THE TOWN OF EDMONTON.

The plaintiff's action was for trespass by the municipality and breaking down his fences enclosing lands in the Town of Edmonton. The municipality claimed part of these lands as a public highway by reservation and dedication in the patent from the Crown and by long user. The case was tried in the Supreme Court for the North-west Territories, District of Northern Alberta, before Scott J., who dismissed the plaintiff's action with costs and this decision was affirmed by the full court, sitting *en banc*, Rouleau J. dissenting.

The circumstances under which the controversy arose and the matters in issue in the case are stated in the judgment reported.

*McCaul Q.C.* for the appellant. The appellant's title is unquestioned, unless the *locus in quo* is a public highway by express reservation in the Crown grant or by dedication, as the claim by prescription has been abandoned by the respondent, and claim by estoppel does not appear on the face of the pleadings.

All the judges of the court below are agreed that the respondent could not succeed upon the ground of reservation. Their lordships have found it impossible to say that the reservation in the patent—" the public road or trail crossing the said lot"—has reference to the particular trail to which the respondent endeavours to assign the words. As to the question of dedication, the trial judge, (Scott J.), held that the evidence was not sufficient to establish a dedication. Upon appeal, Richardson J., feeling bound by *Turner* v. *Walsh* (1) decided that from user alone there was sufficient evidence of dedication; Wetmore J., was of opinion that there was no sufficient evidence of dedication by reason merely of user alone, but that such user coupled with the reservation in the patent and some

(1) 6 App. Cas. 636.

supposed admissions of the appellant in connection with certain expropriation proceedings, showed a sufficient intention on the part of the appellant (and his vendor, David McDougall, the patentee), to dedicate; while Rouleau J. held that there was no evidence of dedication. The trial judge dismissed the action on the ground of estoppel by representations; upon appeal Richardson J. and Wetmore J. gave no decided opinion, while Rouleau J. thought that the doctrine of estoppel had no application whatsoever. Therefore, although the judgments are largely in favour of the appellant, yet because of alleged admissions of the appellant at the expropriation proceedings, the judgment in appeal went against him.

The respondent contended that, in addition to Jasper Avenue, there exists a highway, part of an old irregular and straggling trail (which had been used as a public road prior to the Dominion Government survey in 1882) still surviving, though only as to a small portion, the rest having been obliterated by lots, streets and buildings. Now the grantee from the Crown did not and could not claim through the squatters who had occupied the land prior to the survey; *Farmer* v. *Livingstone* (1); *The Trustees, Executors and Agency Company* v. *Short* (2); and the trial judge expressly held that prior to patent, (in 1887,) he had "no right or title to occupation,"and "was not in a position to prevent" any user of the property as a trail.

The "reservation" in the patent is in these words: "Reserving thereout the public road or trail one chain in width crossing the said lot." There were, at the date of the patent, "crossing the said lot," not only the roadway which the respondent claims to have been the trail or road reserved but also, towards the north,

(1) 5 Can. S. C. R. 221. (2) 13 App. Cas. 793.

1898

HEIMINCK v. THE MUNICIPALITY OF THE TOWN OF EDMONTON.

a well-travelled road which answered the description in the patent and also Jasper Avenue, the main street of the village or town, which had been cleared and was the principal travelled road in 1887. It is altogether probable that it was to Jasper Avenue that the patent referred, but if not, the next most probable road was the northerly one. It is certain, therefore, that the roadway in question is not that referred to in the patent as the "public road or trail." In this all the judges agree.

The whole question of dedication is a question of fact; *Belford* v. *Haynes* (1); *Beveridge* v. *Creelman et al.* (2) at page 37; depending on the assent or intention of the owner, which "must be clearly proved before the court will take away a man's land from him," *Rae* v. *Trim* (3) per Blake, V.C., at p. 379. It was a question for the trial judge, (Scott J.) who distinctly held that there was no evidence of any intention to dedicate on the part of the patentee. While the fee was in the Crown, user cannot be relied upon as evidence of dedication because that user was without the knowledge of the Crown, and *Nullum tempus occurrit regi*. *Harper* v. *Charlesworth* (4); *Reg.* v. *Plunkett* (5); *Dunlop* v. *The Township of York* (6); *The Queen* v. *Moss* (7). Although there was a certain amount of travel over the lands in question the route was not of any considerable importance and in no sense a main-road or trail. It was merely one of innumerable local trails which arise in every waste territory, according to the convenience of straggling squatters. The western prairie, far from being a "trackless" plain, as so often described, was, and is, crossed and re-crossed by tracks and trails, in every conceivable

(1) 7 U. C. Q. B. 464.
(2) 42 U. C. Q. B. 29.
(3) 27 Gr. 374.
(4) 4 B. & C. 574.
(5) 21 U. C. Q. B. 536.
(6) 16 Gr. 216.
(7) 26 Can. S. C. R. 322.

direction. The main trail—the principal artery of travel—crossed the north end of the lot in question. One of the witnesses speaks of the roadway now in dispute as a mere footpath in 1882 and in fact it was a mere trespass road or short-cut, used until the main thoroughfare, (Jasper Avenue), was cleared and opened, and it has been completely obliterated both upon the east and west of the *locus in quo*, blocked, closed up, and built upon. The patentee in making his plan, three months after obtaining his patent, showed a distinct refusal to dedicate the property, and instead thereof dedicated, or rather, as he believes, conformed to the patent, in showing, upon his plan, Jasper Avenue, as the road reserved across his property and the respondent, since incorporation in 1892, assessed the owner of the property in question and collected taxes thereon for the years 1892, 1893, 1894, 1895 and 1896, up to the time of the trespass complained of. See Dillon "Municipal Corporations," (4 ed.) par. 564, *note* p. 659. There never was any *animus dedicandi*; *Poole* v. *Huskinson* (1); Elliott on Roads and Streets, p. 120.

*Beck Q.C.* for the respondent. The respondent submits that the southerly trail is that intended to be reserved in the Crown patent. The Government plan shows the southerly trail to be a continuous one through the Village settlement, and a necessary highway affording the settlers access to the surveyed road allowances running north and south on each side of the village, while the northerly trail, so far as the map shows, stops short, no doubt because it was not clearly defined on the ground. The patents for lands in the vicinity, except that for lot 10, contain reservations of a trail, and describe the adjoining lands by express reference to the Government map which shows no

(1) 11 M. & W. 827.

1898

HEIMINCK v. THE MUNICIPALITY OF THE TOWN OF EDMONTON.

continuous trail over them except the southerly trail. The omission of the reservation in the patent for lot 10 is clearly explained by the fact that prior to the issue of that patent the plan of subdivision had been registered giving a public highway over it, approximately corresponding with the southerly trail there. The plan of subdivision of the Hudson Bay Company's Reserve completed before the Dominion Government survey clearly shows which trail the company—one of the public interested in both trails—considered to be the more important, showing as it does the southerly, but not the northerly trail. User by the public has been shown since 1852, and evidence of intention to dedicate on the part of McDougall, the patentee, is clear in view of his legal rights as an occupant, and of his assumed rights recognized by the Crown. His conduct is clearly sufficient to establish a dedication as against both himself and the Crown. *Reg.* v. *East Mark* (1); *Reg.* v. *Petrie* (2); Elliott on Roads and Streets, pp. 100, 124, 125; *Turner* v. *Walsh* (3). The reservation in the patent, and the conduct of McDougall in connection with the arbitration on recent expropriation proceedings, even if not amounting to estoppel, are both strong additional circumstances in support of the dedication.

As to estoppel, (even assuming there was waiver by not pleading it), the trial judge in dealing with the facts was at liberty to find either according to the facts or according to the estoppel if they led to different conclusions. *Vooght* v. *Winch* (4); *Trevivian* v. *Lawrence* (5). The plaintiff is estopped. David McDougall was a party to the arbitration proceedings, and the plaintiff was his agent and at the same time the nominal owner

(1) 11 Q. B. 877.
(2) 4 E. & B. 737.
(3) 6 App. Cas. 636; 50 L. J. P. C. 55.
(4) 2 B. & Ald. 662.
(5) 1 Salk. 276; 3 Salk. 151; Ld. Raym. 1036, 1048; 6 Mod. 256.

of the land in question, in trust for McDougall, subject to his own beneficial interest. McDougall raised the issue of the trail in question being a legally existing one or not, and the plaintiff gave evidence to show that there was a trail and that, therefore, a proposed extension of another street would be not only valueless to him but an injury. The appellant took the benefit of the arbitrators' finding on this point. In a question of estoppel, an award is equivalent to a judgment. Bigelow on Estoppel (5 ed.) p. 58; Russell on Arbitration (7 ed.) pp. 514, 555; *Whitehead* v. *Tattersall* (1); *Gueret* v. *Audouy* (2). The familiar cases of "standing by" are instances of this kind of estoppel. *Ramsden* v. *Dyson* (3) at pages 142 and 160; *Gregg* v. *Wells* (4); *Coles* v. *Bank of England* (5). Also under quasi-estoppel, Bigelow, pp. 673, 683-4-5-7; *Birmingham* v. *Kirwan* (6) at page 449.

There is no estoppel against the defendants. They were quite right in assessing the property. The right of way over it does not change its ownership, though it no doubt lessened its value, and a large part of the parcel assessed is unaffected by the right of way. The assessment and collection of taxes would in no case amount to an estoppel, except in proceedings relating directly thereto. At all events, there could be no estoppel in the circumstances under which this land was assessed. There has been no abandonment so far as this portion of the trail is concerned, for nothing more is shown than that the two buildings have been allowed to be built so as to encroach on the trail, but not so as in any degree to restrict the travel. Jasper avenue and Main street was not dedicated by registration of a plan of

(1) 1 A. & E. 491.
(2) 62 L. J. Q. B. 633.
(3) L. R 1 H. L. 129.
(4) 10 A. & E. 90; 8 L. J. (N. S.) Q. B. 193.
(5) 10 A. & E. 437; 9 L. J. (N. S.) Q. B. 36.
(6) 2 Sch. & Lef. 444.

1898

HEIMINCK v. THE MUNICIPALITY OF THE TOWN OF EDMONTON.

subdivision until after the issue of the patent. It was bush until 1885, when only the timber on it was cut. It was not brushed or cleared up till 1890 or 1891, and not graded until 1892. In order to establish an abandonment, it is necessary not only to show the opening of a new way which will answer the purpose of the old one, but also to show an entire and absolute disuse of the old road. Elliott. p. 658 et seq.

The judgment of the court was delivered by :

GWYNNE J.—This is an action instituted in February, 1895, by the plaintiff against the Town of Edmonton, incorporated as a municipality by an ordinance of the North-west Territories in the month of January, 1892, for breaking and entering a close of the plaintiff, situate at the north-east angle of that part of river lot no. 8, in the Edmonton Settlement, which lies south of Jasper avenue, as it crosses the said lot, and for breaking down and destroying a fence of the plaintiff there being. The close in question consists of two small town lots fronting on the south side of said Jasper avenue for which the plaintiff's predecessors in title were assessed and taxed by the municipality defendants every year until the year 1895, when the plaintiff, being in possession, was assessed and taxed therefor. The defendant, notwithstanding the assessment of the said town lots, now pleads as a defence to the present action that at the time of committing the grievances complained of by the plaintiff the *locus in quo* was and for a long time had been a public highway within the limits of the municipality, and in support of such contention, it is alleged and pleaded ; 1st. That the *locus in quo* forms part of river lot no. 8, in the Edmonton Settlement, and that the patent from the Crown for the said lot expressly reserves the said highway for the public use ; and, 2ndly. That the highway was dedi-

cated by the Crown and by the patentee as is evidenced by long user.

Prior to the year 1882, when first these lands called river lots in the Edmonton District were surveyed and given boundaries by the Crown there was a trail across what is now river lot 10, and other lands east of it, in a devious, irregular route and without any defined limits, and westerly across what is now river lot no. 8, in a diagonal direction from the place where it entered upon the river lot 8, to where the western limit of the said lot, which is the eastern limit of the river lot 6, reaches a steep bank overhanging the Saskatchewan River, and thence along the top of such steep bank, across river lot 6, to the Hudson Bay Company's Reserve, which lies immediately west of the river lot 6, and so to a Trading Post of the Hudson Bay Company in such Reserve. This trail the settlers on the Edmonton Settlement, close to the river, had been in the habit of using for convenience of access to the Hudson Bay Company's said Trading Post.

In the year 1892 the present defendant brought an action against two persons named Brown and Curry, in which the contention of the present defendant was that Jasper avenue as laid across river lot 10 by the person who afterwards became patentee from the Crown of the greater part of that lot was adopted and dedicated by the Crown and confirmed by the letters patent for the several parts of the said river lot and was substituted for the old trail as it crossed said river lot 10, which upon the opening of Jasper avenue, which was eighty feet in width, became absolutely obliterated and extinguished in so far as lot 10 is concerned. In that contention the present defendant finally succeeded by the judgment of this court delivered upon the 1st May, 1894, and in that judgment will appear how the Dominion Government acted in

1898

HEIMINCK v. THE MUNICIPALITY OF THE TOWN OF EDMONTON.

Gwynne J.

so adopting Jasper avenue as a substitute for the old trail on river lot 10. The judgment was unfortunately mislaid and therefore not reported, but has recently been discovered and can now be reported (1).

In the present action the defendant as part of its case proved, by admission of the opposite party but still as part of the defendant's case, that letters patent from the Crown were issued upon the 30th September, 1887, a month after the issue of the letters patent for lot 10, which has been in like manner proved in the present case, granting said river lot 8 to one David Macdougall the purchaser thereof, in fee "reserving thereout the "public road or trail, one chain in width, crossing the

(1) The judgment referred to by Mr. Justice Gwynne is as follows:—

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

JOHN BROWN AND DUNCAN STEEL CURRY (*Defendants*) ..... } APPELLANTS;

AND

THE MUNICIPALITY OF THE TOWN OF EDMONTON (*Plaintiff* ..... } RESPONDENT.

*Highways—Old trails in Rupert's Land—Substitution of new way——Dedication of highway.*

A statement of the case is given by His Lordship Mr. Justice Gwynne in the following judgment.

*Ferguson Q.C.* for the appellants.
*Latchford* for the respondent.

PRESENT:—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

Counsel having been heard on behalf on both parties on the seventeenth of March, 1894, judgment was reserved and on the first of May, 1894, the judgment of the court was delivered by:

GWYNNE J.—This is an appeal against the judgment of the Supreme Court of the North-west Territories (1), dismissing an appeal by the defendants against the judgment of Mr. Justice Rouleau, in an action instituted against them by the Municipality of the Town of Edmonton, whereby the defendants were adjudged to remove a log building erected and maintained by them upon land in the town of Edmonton claimed by the plaintiffs in the action to be, and by the judgment declared and adjudged to be, part of a public street in the said town of Edmonton, called Jasper avenue.

Prior to the year 1881, one Colin Fraser was in possession of a portion of unsurveyed lands of the Crown, now within the limits

(1) 1 *N. W. T. Rep. Part* 4, *p.* 39.

said lot." The defendant has thus established the issues entered on the record in favour of the plaintiff unless the *locus in quo* should be established to be, as pleaded, a public highway.

David McDougall, the patentee of this river lot 8, upon acquiring his title under the said letters patent immediately extended Jasper Avenue across his lot to a greater width than it has across lot 10, as appears by the registered plan produced, and upon either side of it he laid out building lots, those upon the south side numbering from the western to the eastern limit of the lot where are situated the lots constituting the *locus in quo*. The old trail ran diagonally across land

of the Town of Edmonton; his possession was that of a mere squatter, without title, but making claim to be recognised by the Crown under the provisions of the Dominion Lands Act as an actual settler upon such land. It appears that seven other persons were in like manner and at the same time in possession of other lands adjoining the land of which the said Colin Fraser was so in possession. On the 9th of February, 1881, the said Colin Fraser by an agreement in writing signed by him, agreed to sell to one James McDonald "all the right and interest of him the said Colin Fraser, in that part of his claim situate on the east side of his ploughing," and fronting on the main travelled road, which is described in the agreement as follows: "Beginning at a point three feet east from my ploughing, and extending eastward along the main travelled road fifty (50) feet; thence northward parallel with the ploughing aforesaid one hundred (100) feet; thence westward to within three (3) feet of the ploughing aforesaid fifty feet; thence southward to the main road one hundred feet." And the said Colin Fraser thereby agreed to furnish to the said James McDonald a clear deed of the above described lots "as soon as the government surveys thereof are made." Upon the same 9th February James McDonald transferred all his interest in the said piece of land to the defendants, Brown & Curry.

The main travelled road mentioned in the above description, the northern limit of which was made the southern limit of the piece of land above described, had then no defined width or boundaries, nor could it have any legally defined limits, as indeed appears from the very terms of the agreement, until the Government surveys should be made. The only road which then was there, was a "trail" which, as is alleged in the defendants' statement of defence, ran along what constitutes the centre line of what is now called Jasper avenue. At or about the same time as Colin Fraser agreed to sell

1898

HEIMINCK v. THE MUNICIPALITY OF THE TOWN OF EDMONTON.

Gwynne J.

now comprised within the limits of four of these lots, all of which have been continuously assessed and taxed by the municipality ever since its incorporation to the patentee or persons claiming title under him. Thus in so far as in him lay the patentee declared his clear intention to close forever and he in point of fact so closed up the old trail at its very entry into the lot 8, and he substituted therefor Jasper Avenue which he dedicated as a public highway across his lot. It also appeared that the patentee of river lot 6 in like manner extended Jasper Avenue across his lot to the Hudson Bay Company's Reserve.

all his interest in the above described piece of land to James McDonald, he in like manner agreed to sell all his interest in several other pieces of the land of which he was so as aforesaid in possession, to persons respectively named Oliver, Kelly, Sanderson and Lorby, Hogarth and Lauder, and his interest in all the residue of the said land of which he was so in possession to one Samuel Pritchard. In the year 1882 one Deane, a Dominion Land Surveyor, was employed by the Dominion Government to make a survey of what is called the Edmonton Settlement in the North-west Territory. Upon that survey he laid down on a plan the several pieces of land of which the said Colin Fraser and the six other persons in possession of lands adjoining the land of which he was so possessed, and in such plan the name of S. Pritchard is entered as the person in possession of the whole lot, which is on the plan numbered as river lot no. 10 of the Edmonton Settlement survey. This plan was, upon the 26th May, 1883, approved and confirmed under the provisions of the Dominion Lands Act in that behalf.

Upon this plan there is laid down with dotted lines the northern and southern limits of the road across the said river lot No. 10 and the other neighbouring lots. The surveyor's notes of survey have not been produced showing the width of the road intended to be designated by such dotted lines, but the plan is made upon a scale of twenty chains to an inch, and by the application of such a scale to the space between the dotted lines inclusive of the dots, it appears to exceed one chain. Now prior to the 1st of January, 1883, Pritchard had a survey and plan made for him of the whole of the said river lot no. 10, but divided into town lots wherein were represented the several pieces thereof which had been agreed to be sold by Fraser to divers persons as well as several other lots wherein the names of other persons were entered, presumably persons to whom Pritchard himself had agreed to sell such pieces. On this plan Jasper avenue is laid down as being of the width of eighty feet, and another street

The whole question then at the trial was: 1st. Whether the public road or trail reserved in and by the said letters patent to David McDougall was the trail which formerly crossed where is now the *locus in quo* in the present action; and 2nd. Whether a dedication by the Crown or the patentee could be presumed from the user which appeared in evidence. These questions underwent a thorough investigation during a trial which extended over seven days and at its close the learned trial judge upon the 17th December, 1895, reserved his judgment which was delivered by him on the 24th June, 1896, and thereby he found

called Fraser avenue extending northerly through the lot from Jasper avenue. Upon the plan the name of Brown is entered upon a lot designated on the plan as being fifty feet in width, abutting on the northerly limit of Jasper avenue, and extending in a northerly direction 100 feet the south-westerly angle of which lot is placed as being 119 feet easterly from the south-easterly angle of the street called Fraser avenue, that is from the intersection of the easterly limit of Fraser avenue with the northern limit of Jasper avenue. This survey and the plan thereof were made by Geo. A. Simpson, a Deputy Land Surveyor, as and for a "subdivision of river lot no. 10." "Pritchard estate," and it is called "Plan A," "Edmonton," and was registered upon the 15th of March, 1886, under the provisions of the Northwest Territories Registration of Titles Ordinance, 1884, as appears by a copy certified by the registrar. Up to this time no patent had issued for any part of the said river lot no. 10, but on or about the 25th January, 1886, the before named Oliver, Kelly, Sanderson and Lorby, Colin Fraser, Hogarth and Lauder and the defendants, Brown and Curry signed under their respective hands and seals, a petition to the Minister of the Interior wherein, alleging themselves to be severally entitled to different portions of river lot number 10 in Edmonton according to the Dominion Government survey, which different portions compose in the whole the lands embraced in an accompanying description and shewn on an accompanying plan, they requested and consented that letters patent should issue for the whole of the lands so embraced in such description, and plan, to John Brown, of Edmonton, in the District of Alberta, in the Northwest Territories of Canada, Merchant, as trustee, and they requested that the patent should be forwarded to Mr. Robert Strachan, Edmonton, Solicitor.

Upon the 27th January, 1886, Mr. Strachan forwarded this petition to the minister with statutory declarations made by Colin Fraser and James McDonald respectively, in the former of which Fraser declared that the above

1898

HEIMINCK v. THE MUNICIPALITY OF THE TOWN OF EDMONTON.

Gwynne J.

and adjudged as to the above issues joined upon the record; 1st. That the highway or public road reserved by the said letters patent was not the trail which had crossed river lot 8, at the place where the *locus in quo* in the present action is, but that a public road or trail which crossed the northerly part of the said river lot 8, and which was the great thoroughfare from a very early period between the east and west for all the traffic of the Hudson Bay Company who had the monopoly of the trade of the country, and by which road the great majority of persons passing backwards and forwards into and through the Settlement travelled,

named parties were all the persons who were applying for patent to issue to John Brown, that he had not sold any of the said lands for which the patent was so applied for to any person, that any other sales he had made were entirely distinct from the lands described in a description accompanying his declaration, that the piece described as his own was a piece he had previously sold to, but afterwards purchased from James McDonald, who in his declaration confirmed this latter statement, and also declared that the lot marked on the accompanying plan "J. Brown" was purchased by him from Fraser and subsequently sold to John Brown and D. S. Curry, and he also declared that the description accompanying the declaration did not in any way encroach upon the lands of the Rev. Samuel Pritchard. This petition and the plan, descriptions and declarations accompanying the same, together with the letter of Mr. Strachan of the 27th January were received in the Department of the Interior on the 11th February, 1886, and in reply thereto a letter from the department to Mr. Strachan was addressed and sent upon the 16th March, 1886, wherein Mr. Strachan upon behalf of the petitioners was informed that "before any further consideration could be given to the matter of the petition a tracing of a plan to be prepared as thereinafter stated, must be filed in the department, and that upon the receipt of such tracing the question as to the propriety of issuing patents direct to the several parties who purchased parts of the lot in question from Mr. Colin Fraser for their respective portions thereof, will be further considered." The directions given for further preparation of the required plan were as follows: "1st. It must show river lot 10 as it is shown on a plan of the survey of the Edmonton Settlement made by Mr. Deane, a Dominion Land Surveyor. 2ndly. It must be prepared by a Dominion Land Surveyor on a scale of one chain to an inch and be certified in the usual manner by such surveyor; 3rdly. It must have indorsed on it a certificate of the registrar of the district to the effect that it is

was the public road reserved by the letters patent. He also found and adjudged, 2ndly. That the evidence was insufficient to justify the finding of a dedication by the Crown, and that there was nothing in the act or conduct of the patentee McDougall *prior to the arbitration* (next mentioned), from which a dedication could be implied. He thus found that from the time of the issue of the letters patent to McDougall up to the time of the arbitration taking place, at any rate the patentee and those claiming under him were absolutely seized in fee of the land over which the old trail had passed free from any claim whatever of the public to such

a record in his office; 4thly. The tracing to be filed in this department must be certified by the said registrar to be a true and correct copy of the above mentioned plan."

In accordance with these directions, Mr. Strachan on behalf of the petitioners had a plan prepared by Geo. A. Simpson, the Dominion Land Surveyor, who in 1882 had surveyed and made the plan for Mr. Pritchard. This plan which bears date the 18th of August, 1886, and is designed "A. 1," and was duly certified by the said Geo. A. Simpson and registered in the registry office on the 28th August, 1886, was forwarded to the Department of the Interior, and upon it were marked the boundaries of the several lots which had been sold by Colin Fraser to all others than to Pritchard. The lot so as aforesaid sold to J. McDonald and by him transferred to the defendants, Brown & Curry, was designated by the letter "P," and the dimensions, location and boundaries thereof were laid down precisely in the same manner as the lot whereon the name of "J. Brown" was laid down on the plan prepared by the same surveyor for Mr. Pritchard in 1882, and the said street called Jasper avenue was laid down as being eighty feet wide. After receipt of this plan by the Department of the Interior, a letter was addressed and sent by the department to Mr. Strachan informing him that the tracing of lot no. 10 in the Edmonton settlement referred to in the above letter of the 16th March, 1886, had been duly received, and that patents for the several portions of the lot were then in course of preparation in favour of the respective owners as shown on the tracing in question with the exception of that for lot "P" in favour of John Brown and D. S. Curry, which was stayed pending the receipt by the department of information giving Mr. D. S. Curry's Christian name in full. This information having been supplied, the said lot designated by the letter "P" was granted, by letters patent dated the 22nd day of April, 1887, to the defendants John Brown and Duncan Steel Curry, their heirs and assigns as tenants in com-

1898

HEIMINCK v. THE MUNICIPALITY OF THE TOWN OF EDMONTON.

Gwynne J.

land as being dedicated to the use of the public as a highway and for this reason he justified the assessment of the *locus in quo* up to and including the year 1894 as the property of the patentee and his assigns, and so liable to be assessed, but as to the assessment to the plaintiff in the year 1895, he could not see, he said, how that assessment could effect the matter in question. But the assessment of that year, equally as the assessments of the preceding years was, as was the plaintiff's contention, quite proper, and all for the same reason, namely, that the lots so assessed were the absolute property of the patentee and those claiming

mon by the following description: "All that parcel or tract of land situate, lying and being in the Edmonton Settlement in the Northwest Territories, in our Dominion of Canada, and being composed of lot lettered "P" as shown on a plan of the subdivision of a portion of the lot numbered 10 in the Edmonton Settlement aforesaid filed in the Department of the Interior signed by George A. Simpson, Dominion Land Surveyor, dated the 18th day of August, 1886, and registered in the registry office for the Edmonton District on the 28th day of August, 1886, the said lot numbered 10 in the Edmonton Settlement being shown on a plan of the said settlement signed by Andrew Russell for the Surveyor General of Dominion Lands, and dated 25th May, 1883." Letters patent to the other petitioners granted upon and in accordance with the designation and description of their several portions as the same appeared upon the said plan, under the designation of lots lettered respectively "A," "F," "P," "R," "S," "T," "V," and, upon the 31st day of August, 1887, letters patent were granted to Mr. Pritchard of all that portion of said river lot no. 10 coming within the following description: "All that parcel or tract of land situate, etc., etc., in the Edmonton Settlement, etc., etc., being composed of river lot number 10, in the Edmonton Settlement aforesaid, as shewn upon a plan of the said settlement, signed by A. Russell for the Surveyor General of Dominion Lands, dated 25th May, 1883, and of record in the Department of the Interior, containing by admeasurement eighty-one acres, more or less, saving and excepting thereout the following portions particularly described as follows:—"1st. A portion containing eight and seven-tenths acres abutting on the most northerly limit of said river lot number ten (particularly describing it by metes and bounds)"; "2ndly. The portions or lots indicated and specified by the letters "A," "F," "V," "P," "R," "S," "T," etc., etc.. shewn on a plan of a portion of the said river lot number 10,

under him, and did not nor did any part of them constitute land dedicated to the public use as a highway, as now claimed by the defendants. The weight of this evidence as relied upon by the plaintiff, was that it was clearly in rebuttal of any dedication to be presumed from user.

Now as to this arbitration so referred to by the learned judge it appears that copies of the award made thereat, and of a paper purporting to be the evidence given by the plaintiff thereat, and of the by-law for the expropriation of the piece of land therein mentioned, under which the arbitration took place, none

Edmonton Settlement, of record in the Department of the Interior, signed by Geo. A. Simpson, D.L S., and duly certified to be a correct copy of a plan of part of lot numbered 10, registered in the registry office in and for the Registration District of Edmonton, in the Provisional District of Alberta, in the Northwest Territories, at two o'clock, p.m., on the 28th day of August, A.D. 1886, and signed by George Roy, Registrar."

Now the piece of land designated above by the letter "A" is that which on the above plan A, made by Geo. A. Simpson in 1882 for Mr. Pritchard, and of a portion of which the plan "A," which is the one mentioned in the above letters patent, is a facsimile, is designated as belonging to Mr. Oliver above mentioned; that marked letter "F," is the lot which on the Pritchard plan is marked as belonging to Hogarth; that marked "V," is the lot numbered 40 on the Pritchard plan; that marked with the letter "P" is the one marked in the Pritchard plan as belonging to J. Brown, (the plaintiff of that name); that marked with the letter "R" is that upon which the name of Sanderson is entered in the Pritchard plan; that marked with the letter "S" is the lot upon which in the Pritchard plan the name of Kelly is entered, and that marked with the letter "T" is part of the piece upon which, in the Pritchard plan, is entered the name of Lauder, all of which persons were the petitioners in 1886 for letters patent to be granted to them. Now of these pieces of land the lot "P," as above granted to the defendants, and the lots designated by the letters "R," "S," and "V," abut for their southerly boundaries upon the northern limit of the street called Jasper avenue, as shewn on the Pritchard plan and the plan mentioned in the letters patent, in accordance with which plan the lots were granted; and the pieces marked respectively with the letters "A" and "F" are lots the northern boundaries of which abut upon the southerly limit of the said Jasper avenue,

1898

HEIMINCK v. THE MUNICIPALITY OF THE TOWN OF EDMONTON.

Gwynne J.

of which in any manner bear upon or relate to the matters in issue on the record, became to be filed as exhibits in the cause in some way or other not explained in the record before us; at what stage of the trial or for what purpose they were so filed nowhere appears. The plaintiff's counsel appears to have regarded the documents as wholly irrelevant; the defendant's counsel does not appear upon the record before us to have alluded to them during the trial nor at any time except at the close of his argument, after the trial he alludes to them thus:

The answer is an estoppel because plaintiff shews that he then had an interest in the property in question and upon the arbitration he claimed that the trail existed.

as shewn on said plans. It is obvious therefore that the space marked upon the plan as Jasper avenue in accordance with which plan alone the lots abutting on that street are granted, was dedicated by the Crown as and for a street or public highway, to no part of which can the plaintiffs or any other persons, grantees of lots abutting upon the street, assert any claim whatever. The fact that the terms of the letters patent to Pritchard are such as to convey to him the whole of the river lot 10, except the excepted parts, can make no difference, for even though it should be held that the soil of what is designated as Jasper avenue on the plan in accordance with which his letters patent were granted, passed to him by his said letters patent, it could only so pass as subject to the public easement of being used as a street and public highway which being situate within the Municipality of the Town of Edmonton, is subject to the jurisdiction of the said municipality by ch. 8 of the Revised Ordinances of the Territories, and having such jurisdiction, the municipality, there can be no doubt, are entitled to maintain the present suit. The appeal must therefore be dismissed with costs.

The case of *Fisher* v. *Prowse* (1), relied upon by the defendants was a case very different from the present. The question there was whether a cellar flat of the defendants' house which although being in the footwalk of a public street had existed in the same condition as far back as living memory went, was unlawful, and so subjected the defendant for maintaining it to liability for injury sustained therefrom by a person using the footwalk, and it was held that it must be presumed that an erection made so far back was lawfully erected and that the dedication was made subsequently and subject to the right to maintain

(1) 2 B. & S. 770.

It is singular, to say the least, that having, as is said here, an interest in the property in question he should be insisting upon the existence of a state of things which would utterly destroy his interest. However, in the argument before us this construction of the plaintiff's evidence is utterly repudiated and denied to be sound, what he actually did being said to be, that he gave evidence for the information of the arbitrators as to what could be done with the lot remaining not yet laid out if the trail was a public highway and what if it were not; and it is utterly repudiated that he said anything which could be reasonably construed into insisting that the trail is a public highway, or with intention to get the arbitrators to regard it as such. To have done so would certainly have been utterly inconsistent with his duty to the owner of the land and could not be binding on him. The learned judge read all these papers and formed the opinion that the evidence thereby appearing to have been given by the plaintiff *leads to the conclusion that he was contending* that the trail in question

the erection. In the present case there is no pretence of the defendants having ever had any right as against the Crown to erect and maintain the log house which obstructs the public street in front of the lot "P" granted by the Crown to them, for about one-third of its width. The defendants obtained their letters patent for their lot "P," having its boundaries precisely as shown in Pritchard's plan "A," made in 1882, and precisely as the defendants had in 1886 petitioned that it should be granted. They obtained the only title they have to their lot according to a plan which shows the southerly limit of the piece of land granted to them to be the northerly limit of a piece in front of their lot of 80 feet in width dedicated by the Crown as and for a public street. To hold that in such case it is to be presumed that the dedication by the Crown was subject to the right of the defendants to maintain an obstruction which when erected by them was so erected without any right whatever in law, would be, in my opnion, a perversion of common sense.

*Appeal dismissed with costs.*

Solicitors for the Appellants:
*S. S. & H. C. Taylor.*

Solicitors for the Respondents:
*Beck & McNamara.*

1898

HEIMINCK v. THE MUNICIPALITY OF THE TOWN OF EDMONTON.

Gwynne J.

was a public highway and he thought that if the arbitrators had not found it to be a public highway they would not have awarded so much as they did. As to this observation it may be said that the suggestion is merely a surmise of the learned judge for, from the award, the arbitrators would seem to have attached little weight to the evidence of the plaintiff which certainly would seem to have been rather extravagant, for the value attached by him to the piece expropriated was $2,583.75, while the arbitrators allowed only $325. Again the learned judge says that he thinks that the representations of the plaintiff which the learned judge had spoken of as *leading to the conclusion* that the plaintiff was contending that the trail was a public highway were made with intent that the arbitrators should act upon such representations, but what these representations were is nowhere stated, although the conclusion which they are construed as leading to, is stated, and such being the assumed intent of the plaintiff in making the representations whatever they were, the learned judge was of opinion that upon the ground of good faith alone the patentee McDougall and the plaintiff should be estopped from denying that the trail in question is a public highway.

I do not propose to inquire whether the opinions of the learned judge are well founded or not, for although he expressed the opinion, he concluded (as there were no pleadings on the record to raise the question involved) *by merely directing that the defendant municipality might, if so advised, amend its defence in such manner as to raise a question as to estoppel*, but nevertheless, while so directing and notwithstanding the material issue joined or the record which he had found in the plaintiff's favour he ordered judgment in the action to be entered for the defentants and in accordance with such order a rule has issued out of the court dismiss-

ing the plaintiff's action with costs. From this rule the plaintiff appealed to the full court, and from the judgment of that court therein the appeal to this court has been taken.

The full court consisted of three judges, namely: Justices Richardson, Rouleau and Wetmore. All concurred with the learned trial judge that the trail in question was not that which was reserved as a public road by the letters patent. As to the residue, Mr. Justice Richardson was of opinion that dedication by user was established, resting his judgment upon the authority of *Turner* v. *Walsh* (1), and for that reason he was of opinion that the appeal should be dismissed. Mr. Justice Wetmore entertained such great doubts as to the applicability of the doctrine of estoppel that he declined to pass judgment upon that point and leaving all question upon that point out of consideration he was of opinion that from the plaintiff's conduct at the arbitration *coupled with* the previous user a *dedication* of the trail as a public road might and ought to be presumed upon the authority of *Turner* v. *Walsh* (1). He regarded as he said the conduct of the plaintiff at the arbitration as being equivalent to McDougall himself appearing and saying: "I am owner of this land and I concede that this is a way; I concede that it must be presumed that there has been a grant of this trail as a way," and so he held that there was established a dedication of the way by user and consent of parties.

So to construe what took place at the arbitration involves an *assumption* first, that the plaintiff had any authority to bind McDougall by any concession relating to his lands; and secondly, that such authority extended to making in his name a concession which, assuming it to have been made, would be in direct

(1) 6 App. Cas. 636.

1898

HEIMINCK v. THE MUNICIPALITY OF THE TOWN OF EDMONTON.

Gwynne J.

contradiction and reversal of McDougall's manifest intention and conduct in closing up the trail, in dedicating Jasper Avenue in its stead and laying out town lots on the trail itself where closed, disposing of them to others, some of whom built upon them and who, as well as he himself, have ever since the incorporation of the defendant as a municipality, paid to the defendant the taxes which the defendant assessed upon those town lots.

Mr. Justice Rouleau was of opinion that the learned trial judge was quite right in all his findings upon the issues upon the record, but that his opinion as to applicability of the doctrine of estoppel to the case was erroneous; and while doubting the applicability of the doctrine of *Turner* v. *Walsh* (1) to the case of user of a way over the waste lands of the Crown in the Territories before ever a survey was made of them by the Crown he showed very clearly, as we think, that even upon the authority of *Turner* v. *Walsh* (1) any presumption arising from user, if any did arise upon the evidence in the present case, was completely rebutted; and he was of opinion that judgment should be entered in the action for the plaintiff with ($40) forty dollars damages and his costs of the action and of his appeal. In this judgment we entirely concur and all that we wish to add to it is that while we cannot concur with the learned trial judge in the opinion he formed as to the construction of the plaintiff's conduct and evidence upon the arbitration, still no conduct of his or evidence given by him could, from anything appearing in the case, have the effect of divesting McDougall or his assigns of any estate or interest in their or any of their real estate, or could constitute a dedication by McDougall of any part of his real estate as a public highway to the

(1) 6 App. Cas. 636.

1898

HEIMINCK v. THE MUNICIPALITY OF THE TOWN OF EDMONTON.

Gwynne J.

public use. We are of opinion therefore that the learned trial judge should have rendered judgment for the plaintiff upon the issues found in his favour after a protracted trial of seven days.

This appeal must therefore be allowed with costs and judgment be ordered to be entered for the plaintiff in the action for $40 damages as stated in Mr. Justice Rouleau's judgment with all costs.

*Appeal allowed with costs.*

Solicitors for the appellant: *McCaul & Short.*

Solicitors for the respondent: *Beck & Emery.*

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ADDRA JANE MULCAHY AND PATRICK J. MULCAHY (PLAINTIFFS) ..... APPELLANTS;

1897

*Nov. 9.

AND

1898

DONALD ARCHIBALD (DEFENDANT) ..RESPONDENT.

*June 14.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Debtor and creditor—Transfer of property—Delaying or defeating creditors*—13 *Eliz. c.* 5.

A transfer of property to a creditor for valuable consideration, even with intent to prevent its being seized under execution at the suit of another creditor, and to delay the latter in his remedies or defeat them altogether, is not void under 13 Eliz. c. 5, if the transfer is made to secure an existing debt and the transferee does not, either directly or indirectly, make himself an instrument for the purpose of subsequently benefiting the transferor.

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

This is an action brought by Addra Jane Mulcahy, a married woman, and Patrick J. Mulcahy, her hus-

PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

(1) 30 N. S. Rep. 121.

1898

MULCAHY v. ARCHIBALD.

band, against the defendant Donald Archibald, high sheriff of the county of Halifax, on the 2nd day of March, 1896, to recover 550 barrels of frozen herring, in bulk, which were seized by the said defendant on board the schooner "Ocean Belle," which said vessel was owned by the said Addra Jane Mulcahy, and for damages for detaining the same and for refusing to deliver up the same to the said plaintiffs on demand. On the 3rd day of March, 1896, an order to replevy the said goods was issued under order XLV, of the rules of the Supreme Court, 1884.

The defendant levied upon the said 550 barrels of frozen herring, on the 2nd day of March, 1897, under an execution issued on a judgment recovered by Narcisse Blais, as plaintiff, against Michael B. Wrayton, as defendant, on the 19th day of December, A.D. 1896; and the defendant claims that at the date of the said levy the said herring were the property of the said Wrayton.

The said schooner "Ocean Belle" was conveyed to the female plaintiff in 1891, by George E. Forsyth, for the sum of $800, of which $400 was paid by her in cash on July 11th, 1891, and the balance of $400 was secured by a mortgage of the said schooner for that amount, made by the female plaintiff to the said Forsyth, and a promissory note for $400 made by the female plaintiff and the said Wrayton in favour of the said Forsyth, dated July 7th, 1891, which was subsequently paid and satisfied by the female plaintiff.

The schooner "Foaming Billow" was purchased by the said plaintiff under similar circumstances in 1892.

The said Wrayton was master of the schooner "Ocean Belle" and managed both vessels on his own account with the assistance of advances made by said plaintiff until December, 1895, at which date the said

Wrayton owed the said plaintiff upwards of $4,000 for advances, etc.

The schooner "Ocean Belle" arrived in Halifax, from a trading voyage on or about November 12th, 1895, with a cargo of fish consigned by said Wrayton to Billman, Chisholm & Co., which cargo was sold to Eisenhaur & Co., for $2,804.19. About one-third of this cargo had been purchased by said Wrayton, from said Blais, to whom Wrayton gave in payment for the same a bill of exchange drawn by him upon Billman, Chisholm & Co, for $925.50, dated October 19th, 1895, payable ten days after sight.

At that time (November 1895,) the said Wrayton owed the firm of Billman, Chisholm & Co., for goods, supplied for these trading voyages, the sum of $2,357.57; of which $1,260.32 was secured by promissory notes made by Wrayton and indorsed by the said plaintiff to the said firm. Billman, Chisholm & Co., as consignees of the cargo, demanded the proceeds of the sale of the cargo from Eisenhaur & Co., in settlement of their account, and a dispute arising they refused to accept Wrayton's said draft on them in favour of Blais for $925.50. Pending the adjustment of this dispute Eisenhaur & Co., paid the proceeds of the sale of the cargo to the Halifax Banking Company.

The dispute between Wrayton & Billman, Chisholm & Co , in which the female plaintiff was interested as an indorser of Wrayton's notes and as a creditor of Wrayton's, was settled by an agreement signed by the parties and by which Billman, Chisholm & Co., received payment of their claims in full, leaving a balance of $416.62 which was ultimately paid over to Wrayton and out of which he paid $275 for wages due to seamen.

At the time of the above settlement it was agreed between the plaintiff and Captain Wrayton that she

1898

MULCAHY v. ARCHIBALD.

was to take over, on account of what Wrayton owed her, the trading stores remaining on board the two schooners, and also the trading stores then in possession of Billman, Chisholm & Co., referred to in this agreement, and thereupon she fitted out the schooner "Ocean Belle" by her agents, Thomas Forhan & Co., for a trading voyage to Newfoundland in December, 1895, for which purchases to the amount of $610.23 were made and paid for by her. She subsequently employed Wrayton as master for said voyage on wages at the rate of $50 per month.

Wrayton proceeded on the said voyage, and purchased with these goods 550 barrels of frozen herring in bulk, for which a bill of lading was made to the said plaintiff or her assigns, dated at Burin, Newfoundland, February 19th, 1896, and forwarded by mail to her at Halifax.

In the meantime the said bill of exchange in favour of the said Blais, dated October 19th, 1895, having been protested by reason of the refusal of Billman, Chisholm & Co. to accept it, Blais recovered judgment on December 19th, 1895, against Wrayton, in the Supreme Court, for the amount due thereon and costs at that suit, which was not defended.

On the arrival of the schooner "Ocean Belle" at Halifax, on March 2nd, 1896, the said herring were seized by the defendant under execution issued on the said judgment, and the same day the plaintiff commenced this action.

This action was tried without a jury before Mr. Justice Meagher, who on January, 2nd, 1897, delivered judgment, in favour of the plaintiff, and decided that "the sole question is whether the goods levied upon were the property of Wrayton or of the plaintiff," and that the said goods were the property of the plaintiff, inasmuch as "the voyages (*i.e.* the December

voyages) were undertaken by Wrayton as plaintiff's agent," and that "he (Wrayton) ceased to act as principal and undertook to hold the goods (*i.e.* the goods on board the 'Ocean Belle,' prior to the commencement of the voyage) as her agent," that is, as agent of the female plaintiff.

On appeal to the Supreme Court of Nova Scotia, judgment was delivered by Graham J., and Townshend J., reversing the judgment of the trial judge, on the ground that the transfer from Wrayton to the female plaintiff of the goods on board the schooner "Ocean Belle" in November, 1895, was void under the statute of 13 Elizabeth, ch. 5; and that therefore the herring purchased in Newfoundland in February, 1895, with the proceeds of those goods and of the other goods purchased by the female plaintiff and placed on board the schooner "Ocean Belle" at the commencement of the December voyage, were the property of Wrayton, and not the property of female plaintiff.

From this judgment the plaintiff asserts this appeal.

*Harris Q.C.* for the appellants. It is not disputed that plaintiff gave value for the goods and even if they were transferred with intent to defeat the execution of Blais the transfer would not be void under the statute of Elizabeth. See *Middleton* v. *Pollock. Ex parte Elliott* (1)

It is well established in Nova Scotia that replevin of goods taken in execution will lie against a sheriff. *Ring* v. *Brenan* (2); *McGregor* v. *Patterson* (3) per Bliss J. at page 226; *Freeman* v. *Harrington* (4).

*McInnis* for the respondent. Goods in the custody of the law cannot be replevied. *George* v. *Chambers* (5); *Calcutt* v. *Ruttan* (6).

(1) 2 Ch. D. 104.
(2) James Rep. 20.
(3) 1 Old. 211.
(4) 1 Old. 352.
(5) 11 M. & W. 149.
(6) 13 U. C. Q. B. 146.

1898

MULCAHY v. ARCHIBALD.

In *Carty* v. *Bonnett* (1) the Supreme Court of Nova Scotia so held.

The learned counsel argued on the other point that the transaction was only a scheme to defraud the defendant and was void under 13 Eliz. ch. 5.

*Harris Q.C.* in reply. *Carty* v. *Bonnett* (1) was decided under a special statute which has since been repealed.

The judgment of the court was delivered by:

SEDGEWICK J.—On the 19th of December, 1895, one Narcisse Blais obtained judgment in the Supreme Court of Nova Scotia against one Michael B. Wrayton, a brother of the present appellant, and under an execution issued upon that judgment the defendant as such sheriff levied upon 550 barrels of frozen herring which were then on board the schooner "Ocean Belle," the property of the appellant, whereupon she, claiming the herring, brought this action to recover the goods so levied upon, the question to be determined being whether they at the time of the levy were the property of Wrayton or the property of the present appellant. The learned trial judge, Mr. Justice Meagher, gave judgment in favour of the plaintiff, holding that there was a real transaction between Wrayton and his sister, and that no matter what the motive of Wrayton himself was in reference to one or more of certain other creditors the transfer to his sister having been in security for or in payment of a *bonâ fide* antecedent debt the transaction was not within the statute 13 Eliz. ch. 5. Upon appeal to the Supreme Court of Nova Scotia the judgment of the trial judge was reversed, and it was held that the transaction in question was void as a fraud by Wrayton against his creditors.

(1) 3 Russ. & Ches. 293.

1898

MULCAHY v. ARCHIBALD.

Sedgewick J.

We are of opinion that the judgment of Mr. Justice Meagher should be restored. There is little question as to the salient features of this case. At the time of the transaction impeached Wrayton owed the plaintiff upwards of $4,000. The goods which were transferred to her by Wrayton from the proceeds of which the goods levied upon were bought were transferred to her on account of this indebtedness. No doubt it was the intention on the part of Wrayton to prevent this seizure under the judgment which he expected Blais would very soon recover against him and for the very purpose of securing his sister at the expense of Blais and with intent either to delay him in his remedies or to defeat them altogether. The statute of Elizabeth, while making void transfers, the object of which is to defeat or delay creditors, does not make void but expressly protects them in the interest of transferees who have given valuable consideration therefor, and it has been decided over and over again that knowledge on the part of such a transferee of the motive or design of the transferor is not conclusive of bad faith or will not preclude him from obtaining the benefit of his security. So long as there is an existing debt and the transfer to him is made for the purpose of securing that debt and he does not either directly or indirectly make himself an instrument for the purpose of subsequently benefiting the transferor, he is protected and the transaction cannot be held void. As Jessel M. R. said in *Middleton* v. *Pollock* (1) at page 108:

> It has been decided, if decision were wanted, that a payment is *bonâ fide* within the meaning of the statute of Elizabeth, although the man who made the payment was insolvent at the time to his own knowledge, and even although the creditors who accepted the money knew it. * * * The meaning of the statute is that the debtor must not retain a benefit for himself.

(1) 2 Ch. D. 104.

1898

MULCAHY v. ARCHIBALD.

Sedgewick J.

And that proposition was a mere re-affirmance of such previous decisions as *Holbird* v. *Anderson et al* (1); *Pickstock* v. *Lyster* (2); *Wood* v. *Dixie* (3). Reference was made in Mr. Justice Townshend's opinion in the Court of Appeal to the case of *Thompson* v. *Webster* (4); but I am unable to see the applicability of that case to the present one. The transaction impeached in that case was held to be valid, but it seems to me clear that the learned Vice-Chancellor Kindersley in the observations which he made to which reference is had was referring, not to transfers for valuable consideration but to voluntary debts. On the whole we are of opinion that the appeal should be allowed, the usual rule as to costs prevailing.

*Appeal allowed with costs.*

Solicitors for the appellants: *Harris, Henry & Cahon.*

Solicitors for the respondent: *Drysdale & McInnis.*

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(1) 5 T. R. 235.
(2) 3 M. & S. 371.
(3) 7 Q. B. 892; 9 Jur. 798.
(4) 4 Drew. 628.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA ..... } APPELLANT;

AND

AMABLE COUPAL.....RESPONDENT.

1898
*Feb. 28.
*June 14.

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

*Railways—Eminent domain — Expropriation of lands — Arbitration— Evidence—Findings of fact—Duty of Appellate Court—51 V. c. 29 (D).*

On an arbitration in a matter of the expropriation of land under the provisions of "The Railway Act" the majority of the arbitrators appeared to have made their computation of the amount of the indemnity awarded to the owner of the land by taking an average of the different estimates made on behalf of both parties according to the evidence before them.

*Held*, reversing the decision of the Court of Queen's Bench and restoring the judgment of the Superior Court (Taschereau and Girouard JJ., dissenting), that the award was properly set aside on the appeal to the Superior Court, as the arbitrators appeared to have proceeded upon a wrong principle in the estimation of the indemnity thereby awarded.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side, which restored an award made by the arbitrators in a matter of the expropriation of lands under "The Railway Act," and reversed the judgment of the Superior Court, District of Iberville, on an appeal from the award, reducing the amount of the indemnity allowed by the arbitrators.

The majority of the arbitrators awarded the respondent $5,000 as indemnity for a portion of his farm, which the appellant had expropriated under the provisions of "The Railway Act" (1), the arbitrator named by the railway company dissenting. On an

PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 51 Vict. ch. 29 (D.)

1898

THE GRAND TRUNK RAILWAY COMPANY v. COUPAL.

appeal taken by the company to the Superior Court, district of Iberville, under the 161st section of "The Railway Act," this award was reformed by reducing the amount of the indemnity to $2,000, but on a further appeal by the present respondent the Court of Queen's Bench, appeal side, reversed the decision of the Superior Court and restored the award of the arbitrators with costs against the company, now appellant.

The property expropriated, about four and a half arpents in extent, consisted chiefly of a hill of sand or gravel covered by a considerable depth of arable soil, situated a few arpents from the respondent's dwelling-house, surrounded by respondent's remaining land, and is said to have been much the best and most profitable part of his farm. The appellant's object in expropriating it appeared to be for the use of the sand and gravel, which went down to a level considerably lower than the remainder of the respondent's property. Appellant offered $661.50 for the property, which was refused, and arbitrators were appointed under the provisions of "The Railway Act," one by each party and a third by the court. Appellant having immediate need of the gravel, took possession of the property, under section 112 of the Railway Act, without awaiting the award of the arbitrators.

The arbitrators appeared to be all competent persons of great experience in matters of expropriation, and in addition to having a number of witnesses examined on each side they personally visited and examined the property in question. The owner's arbitrator came to the conclusion that the indemnity should be $11,500, but afterwards agreed to an award of $5,000 as suggested by the third arbitrator, Mr. J. B. Resther, who had prepared a tabulated statement in support of his conclusions, by which it appeared that he had calculated the average valuation placed on the land by the

witnesses examined on behalf of the owner, and in the same manner taken the average valuation as shown by the company's witnesses, and the ascertained mean average by adding the sums thus ascertained together and dividing the result in half. At the end of the statement he added the following:—

"RECAPITULATION."

| | | | |
|---|---|---|---|
| Moyenne de la preuve sur la valeur d'un arpent du coteau Coupal. | | | |
| 4½ arpents expropriés, y compris la lisière de terrain perdue le long de la clôture de la Compagnie..... | $ 591 68 | $2662 56 | |
| N. B.—Dommages et inconvénients @... | | 773 50 | |
| | | | $3436 06 |
| Moyenne de la preuve sur les dommages de toute la terre par le fait de l'expropriation du coteau. | | | |
| 111 arpents, la terre avant l'expropriation valait $62.64 l'arpent et après elle ne vaudra que $36.00, soit une différence de..... | $ 26 64 | $2957 04 | |
| N.B.—Dommages et inconvénients..... | | 773 50 | |
| | | | 3730 54 |
| Moyenne de la preuve sur les revenus d'un arpent de patates. | | | |
| 4½ arpents expropriés, sur lesquels un arpent semé en patates a donnè en moyenne 198 minots à 62c, $22.76 capitalisé à 6 p.c. soit..... | $ 2046 | 9207 00 | |
| N.B.—Dommages et inconvénients..... | | 773 50 | |
| | | | 9980 50 |
| Valeur de la propriété par le gravier, etc. | | | |
| 48090 vgs. cubes de graviers dans le coteau de 553 x 293'-6" x 8'0" d'épaisseur ..... | 10c. | 4809 00 | |
| 16030 vgs. cubes de terre sur la crête du susdit à 2'.8" d'épaisseur..... | 5c. | 801 50 | |
| | | | 5610 50 |
| Total ..... | | | $22757 60 |
| Moyenne totale ..... | | | $ 5689 40 |

Accordé $5000 00.

1898

THE GRAND TRUNK RAILWAY COMPANY v. COUPAL.

Etat préparé par le tiers arbitre J. B. Resther au soutien de sa sentence et appuyé sur le témoignage de Télesphore Rielle établissant la valeur marchande en gravier à raison de dix centins le voyage ou six dollars par cent voyages. Chaque verge contenant trois voyages, le calcul du tiers arbitre étant fait à raison de dix centins par verge, et par conséquent endessous de la valeur donnée par Rielle.

J. B. RESTHER,

*Tiers arbitre.*

On appeal, the Superior Court reduced the award on the ground that the award was excessive and it was restored by the Court of Queen's Bench on the ground that it was not contrary to but supported by the evidence, and that owing to the qualifications presumably possessed by arbitrators, their visit to the premises and the means of informing themselves to which the railway Act (1) allows them to resort, their award ought not to be disturbed by the courts, except in cases of fraud, partiality or flagrant error.

*Lafleur* for the appellant. In the Court of Queen's Bench, Mr. Justice Ouimet refers to *The Montreal and Ottawa Railway Co.* v. *Bertrand* (2), *Lemoine* v. *The Mayor etc. of the City of Montreal* (3), and *Mussen et al.* v. *Canada Atlantic Railway Co.* (4), decided by the Supreme Court and the Privy Council, but those decisions do not go as far as the learned judges assume. Even where there are no irregularities, negligence nor partiality on the part of the arbitrators there might be error and injustice in their award and it is the duty of the Superior Court, sitting in appeal, to examine whether the arbitrators have rightly appreciated the evidence and to reform their award if it finds that they have not done so. See *The Atlantic and North-west Railway Co.* v. *Wood et al.* (5) at page 263.

(1) 51 V. c. 29, s. 112.
(2) Q. R. 2 Q. B. 203.
(3) 23 Can. S. C. R 390.
(4) 17 Legal News, 179.
(5) [1895] A. C. 257.

The valuation made by the owner's arbitrator was $11,500 for the 4½ arpents of farm land taken; this is sufficiently absurd and excessive to show that no credit can be given to his decision, which he afterwards consented to reduce by more than half. If we refer to the statement of the third arbitrator, Resther, accepted by the owner's arbitrator, we see that he has in no way used his judgment in the appreciation of the evidence. He puts in different columns the witnesses' different valuations of the land, damages and revenues, making the average of such valuation by taking every figure at its full face value without any appreciation whatever as to the ground of valuation of the witnesses. Even if all the figures were correct, and they are not, it is certainly not a fair and legal mode of appreciating the evidence.

*Lafontaine* for the respondent. This question is wholly one of fact—the valuation of land. Two of the arbitrators, whose character and qualifications cannot be and are not disputed, have agreed on a valuation, and their estimate has been confirmed by five out of the six judges who have already considered it. In such cases, this court has always declined to interfere. See *Lemoine* v. *The Mayor, etc. of the City of Montreal* (1), and cases there cited by Taschereau J.

TASCHEREAU J.—I would dismiss this appeal. The Court of Queen's Bench rightly held that the arbitrators' award should not be interfered with. The evidence is contradictory. It always is in such cases, more so than in others, perhaps. But how can an appellate tribunal be sure that any view it may itself have is more correct than the arbitrators' views, who

(1) 23 Can. S. C. R. 390.

1898

THE GRAND TRUNK RAILWAY COMPANY v. COUPAL.

Taschereau J.

have been on the spot, are men of experience, personally cognizant of the subject matter, and who have heard the witnesses *viva voce?* For my part I would hesitate before holding that they came to a wrong conclusion. Such is the jurisprudence. *Lemoine* v. *The Mayor etc. of the City of Montreal* (1); *Mussen et al.* v. *Canada Atlantic Railway Company* (2); *Canada Atlantic Railway Company* v. *Norris* (3); *Atlantic and North-West Railway Company* v. *Wood et al* (4).

This is nothing else but an appeal upon a question of fact, and we could not allow the appeal without ignoring the principles laid down by the Privy Council on the matter.

GWYNNE J.—I agree that the appeal should be allowed, for the reasons stated in the judgment of His Lordship Mr. Justice Sedgewick.

SEDGEWICK J.—I am of opinion that the judgment appealed from must be reversed and the judgment of the Superior Court restored.

The award of the arbitrators was arrived at by a method of computation which cannot under any circumstances be supported. The arbitrator, Resther, has shown beyond any question how the amount was arrived at. He put forward four different ways or methods by which a conclusion might be arrived at as to the amount to which the claimant was entitled. First, by taking the average estimation of the lands and adding the damages making a total of $3,436.06, and if that were a correct method that should have been the amount of the award. Secondly, he took the average of the damages to the whole farm, that is,

(1) 23 Can. S. C. R. 390.
(2) 17 Legal News, 179.
(3) Q. R. 2 Q. B. 222.
(4) [1895] A. C. 257; Q. R. 2 Q. B. 335.

what the farm was worth before the expropriation and what it was worth after the expropriation, being $2,957.04, to which he adds $773 additional. That was another way suggested for getting to a right conclusion. Thirdly, he takes the average of the value of the land expropriated calculated on the revenue thereof per arpent, which he puts at $2,046 per arpent, making upon that basis the damages amount to $9,980.50. Finally, he estimates the alleged value of the gravel in the land expropriated, and upon that basis arrives at the sum of $5,610·50. He then takes the four different amounts arrived at as above, and makes an average of them which gives the sum of $5,689.40, and he determines upon the amount of the award upon the result of that average, less odd figures. I am at a loss to see how an award arrived at by such a method so absurd and contradictory, can be supported. In fact it seems to be admitted on both sides and by the courts below that the award was an irregular one. His second method of computation would seem to approximate nearer to legal principles, but even that method was clearly vicious, because it was attended by a process of averages, giving to the evidence of each witness on each side the same value, adding up the amounts respectively sworn to by them all and arriving at the amount by dividing the total by the number of the witnesses. I cannot conceive how any award come to by any such process can be supported. The award therefore was necessarily set aside, and it thereupon became the duty of the court hearing the appeal under section 161, subsec. 2, of the Railway Act to decide the amount of damages upon the evidence taken before the arbitrators as in the case of original jurisdiction. Now, I entirely agree with what the learned Mr. Justice Ouimet in the Court of Queen's Bench says in regard to the respect which is to

1898

THE GRAND TRUNK RAILWAY COMPANY v. COUPAL.

Sedgewick J.

be paid to the award under the Railway Act following as he does what had been previously laid down in the case *Mussen* v. *The Canada Atlantic Railway Company* before the Judicial Committee of the Privy Council (1) but it appears to me that the defects in this award are infinitely more gross than in any of the cases to which our attention has been drawn. The Superior Court having properly, in my view, set aside the award were called upon under the statute to properly perform the duties which the arbitrators had most signally failed to perform, and to decide from the evidence taken before the arbitrators what in their judgment was fair and right. That court has performed its duty in my view most liberally for the claimant, and its findings should not, I think, have been interfered with by the appellate tribunal.

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

KING J. concurred in the opinion expressed by His Lordship Mr. Justice Sedgewick.

GIROUARD J.—I do not feel disposed to interfere with the award of the arbitrators. No charge of partiality, dishonesty or misconduct is made against them or either of them. Their proceedings are regular. The arbitrator, Resther, perhaps, proceeded upon an erroneous principle of valuation when he arrived at his conclusion, although I am not prepared to say so; he took the average of the figures sworn to by all the witnesses, *pro* and *con*; but this proceeding cannot be fatal to the award, if not clearly against the evidence. In the first place, I do not consider that the evidence shows that that conclusion was clearly wrong. In

(1) 17 Legal News 179.

the second place, the arbitrators visited the premises and as they were experts, they might have acquired and undoubtedly did acquire, the knowledge of certain material facts which are not before us, and which permitted them to control the figures of the witnesses and decide that their average would be a fair indemnity to the proprietor, and for that reason the award of the arbitrators should have more force than the verdict of a jury. In *Venning* v. *Steadman* (1), this court held that it would not set aside a verdict and grant a new trial upon the ground of excessive damages except when the damages assessed are "unreasonably large" or "clearly too large." According to the rule laid down also by this court in several cases, the appellate courts should not interfere with the award of arbitrators, unless the sum awarded is so grossly and scandalously exaggerated as to shock one's sense of justice. The fact that it has received the unanimous sanction of five judges sitting in appeal in high authority that this is not one of those cases; and as I appreciate the evidence, I entirely agree with them. There is evidence that the conclusion arrived at by the majority of the arbitrators was not clearly wrong, a result which is fully demonstrated in the elaborate review of the facts made by Mr. Justice Ouimet. I am therefore of opinion that the case should not be referred to a new board of arbitrators, but that the award appealed from should be maintained. See *Benning et al.* v. *The Atlantic and North-West Railway Company* (2); *The Queen* v. *Charland* (3); *The Queen* v. *Paradis* and *The Queen* v. *Beaulieu* (4); *Lemoine* v. *The Mayor etc. of the City of Montreal* (5) and authorities therein quoted by Mr. Justice Taschereau. See also

(1) 9 Can. S. C. R. 206.
(2) M. L. R. 5 S. C. 136; 20 Can. S. C. R. 177.
(3) 16 Can. S. C. R. 721.
(4) 16 Can. S. C. Rep. 716.
(5) 23 Can. S. C. R. 390.

1898

THE GRAND TRUNK RAILWAY COMPANY v. COUPAL.

Girouard J.

*Oldfield* v. *Price* (1); Russell. 7th ed. 307; *Rolland* v. *Cassidy* (2); *Re Collins and The Water Commissioners of the City of Ottawa* (3); *In re Kirkleatham Local Board and Stockton and Middlesborough Water Board* (4).

The appeal should, in my opinion, be dismissed with costs.

*Appeal allowed with costs.*

Solicitor for the appellant: *E. Z. Paradis.*

Solicitors for the respondent: *Béïque, Lafontaiaine, Turgeon & Robertson.*

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(1) 6 C. B. N. S. 539.

(2) 13 App. Cas. 770; 32 L. C. Jur. 169.

(3) 42 U. C. Q. B. 378.

(4) [1893] 1 Q. B. 375; 63 L. J. Q. B. 56.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANT) ..... APPELLANT;

1898
*Mar. 10.
*June 14.

AND

J. R. ANDERSON AND JESSIE McKENZIE (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Railways—Regular depot—Traffic facilities—Railway crossings—Negligence—Walking on line of railway—Trespass—Invitation—License—* 51 *V. c.* 29, *ss.* 240, 256, 273 (*D*).

A passenger aboard a railway train, storm-bound at a place called Lucan Crossing on the Grand Trunk Railway, left the train and attempted to walk through the storm to his home a few miles distant. Whilst proceeding along the line of the railway, in the direction of an adjacent public highway, he was struck by a locomotive engine and killed. There was no depot or agent maintained by the company at Lucan Crossing, but a room in a small building there was used as a waiting room, passenger tickets were sold and fares charged to and from this point and, for a number of years, travellers had been allowed to make use of the permanent way in order to reach the nearest highways, there being no other passage way provided. In an action by his administrators for damages.

*Held*, Taschereau and King JJ. dissenting, that, notwithstanding the long user of the permanent way in passing to and from the highways by passengers taking and leaving the company's trains, the deceased could not, under the circumstances, be said to have been there by the invitation or license of the company at the time he was killed and that the action would not lie.

APPEAL from the judgment of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) which had reversed the judgment of the trial court, (Meredith C.J.,) dismissing the plaintiffs' action with costs.

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 24 Ont. App. R. 672. (2) 27 O. R. 441.

1898

THE GRAND TRUNK RAILWAY COMPANY v. ANDERSON.

On the 8th of February, 1895, one William McKenzie purchased from the railway company a return-ticket from the Village of Ailsa Craig, a station on the main line of the Grand Trunk Railway, to the City of London. He was carried safely to London, and when at that station, just before commencing the journey home to Ailsa Craig, was informed and warned by the defendant that he would not be able to reach Ailsa Craig that night, as the passenger trains on the main line had been cancelled on account of an extraordinary blizzard and snowstorm, then prevailing, having caused a blockade on the line. He, nevertheless, journeyed as far as Lucan Crossing, a station on the line of the railway, about three miles from Ailsa Craig, where the train became blocked by the storm and he there left the train and proceeded in the face of the storm to walk along the line of the railway towards the public road leading to Ailsa Craig, although warned as to the danger in doing so, and whilst walking along the road-bed between the railway tracks he was struck and killed by the engine of a freight train.

Lucan Crossing is a point where the main line of the Grand Trunk Railway crosses a line of railway, from London to Wingham by an overhead crossing, which railway, (from London to Wingham) was originally a line of an independent company, but had become part of the Grand Trunk system about ten years prior to the accident. There are platforms along each of the railway lines, and a stairway connecting them, for the convenience of passengers transferring from trains on one railway to connecting trains on the other, but no depot or station-building is maintained there, although passengers were allowed to await the arrival of trains in a room in the company's "section-house." The lines of railway are both fenced

1898

THE GRAND TRUNK RAILWAY COMPANY v. ANDERSON.

in and there is no entrance to or exit from this crossing point to any public highway, the nearest public road being a distance of twenty-five and one-third rods to the eastward, and there being also another highway to the westward, distant about one mile and forty-six rods, all the lands at the crossing being those taken and used by the defendant for the railway lines, thirty-three yards in width. The company had no agent at the crossing but tickets were sold to and from the crossing and conductors were in the habit of collecting fares in cash from residents in that vicinity travelling on these railways and these people climbed over the fences or came through the gates at their farm-crossings and passed along the line of the railway, in taking or leaving the company's trains at the crossing. This use of the permanent way had continued for a number of years, prior to the accident.

The action was brought, under Lord Campbell's Act, by the administrator and administratrix of deceased, and it was agreed at the trial that if there was any evidence of negligence on the part of the defendant towards the deceased which would entitle the plaintiffs to have the case submitted to the jury, judgment should be entered for the plaintiffs for $3,000. His Lordship Chief Justice Meredith who tried the case, dismissed the action. The plaintiff thereupon appealed to the Divisional Court which allowed the appeal, directed that the judgment entered at the trial should be vacated and set aside and that $3,000 be paid into court to be apportioned among the widow and children of the deceased. From this judgment the defendant appealed to the Court of Appeal for Ontario where the decision of the Divisional Court was affirmed.

It is from this judgment that the present appeal is taken.

*Osler Q.C.* for the appellant. The question is whether the proximate cause of the accident was

1898

THE GRAND TRUNK RAILWAY COMPANY v. ANDERSON.

the negligence of the deceased, or such negligence on the part of the company as would entitle the plaintiffs to have the case submitted to the jury. The first inquiry must be whether the deceased was on the line of the railway at the time of his death by the invitation, express or implied, of the company. There is no such evidence, and the deceased was not lawfully there for the following reasons:—The ticket sold to the deceased entitled him to travel only from London to Ailsa Craig, and though such a ticket might entitle him to leave the train at any regular station of the company and proceed to the highway at the company's risk, it did not permit him to leave the train at any intermediate point at which the train might happen to stop and attempt to reach the highway unless he did so at his own risk. Lucan Crossing is not a "regular" station as understood in *Parsons* v. *The New York Central and Hudson River Railroad Company* (1). It is a station only to such an extent as is sufficient to satisfy the requirements of section 240 of "The Railway Act" to afford facilities for receiving and forwarding traffic arising from another railway, and though the railways at present belong to the same system, yet, at the time the crossing was built, the Wingham Branch was an independent line, and the crossing still falls within that section. The station was not placed there by the company for the purpose of receiving passengers, but only for the convenience of those changing from one line to the other; nor was there any ticket or telegraph office established there. The fact that the company sold tickets to this crossing from regular stations does not, under the circumstances, make the crossing a "regular" station. See *Land* v. *Wilmington and Weldon Railroad Company* (2). The deceased could not claim the right to use the

(1) 113 N. Y. 355. (2) 40 Am. & Eng. R. R. Cas. 18.

road-bed as a way of necessity since he was warned in London that he would not be able to proceed further than Lucan Crossing and should, therefore, have left the train at the nearest regular station, but, having chosen to travel to Lucan Crossing, his attempt to reach the highway was made at his own risk.

The present case is not on a par with the case of an accident between two stations, for in the latter case the person could not be expected to foresee the accident which would detain him between the two stations, whereas in the present case he was specially warned. In any event if the deceased under the circumstances was entitled to leave the train at the crossing and proceed towards the highway he had no right to use for such purpose, except at his own risk, any part of the railway line which was dangerous by reason of the passing trains, but merely to use for that purpose that part not immediately occupied by tracks, specially as the danger on the track was greatly increased at the time by reason of the storm then raging. The trespassing that may have occurred from time to time on the part of people who wished to board the train at Lucan Crossing instead of proceeding to the nearest regular station did not give any license to the public to use the road-bed, and in any event could not apply to a person ticketed to another station; *Central Railroad of Georgia* v. *Brinson* (1); *Baltimore and Ohio Railroad Company* v. *State of Maryland* (2). Even if the company had acquiesced in the use of the track for pedestrian purposes merely by not objecting to such use this would not be sufficient to prove a license to so use it; *Carrington* v. *Louisville and Nashville Railroad Company* (3) at pages 544 and 546. And further, had

(1) 19 Am. and Eng. R.R.Cas. 42.
(2) 19 Am. and Eng. R.R Cas. 83.
(3) 41 Am. and Eng. R. R. Cas. 543; 88 Ala. 472.

1898

THE GRAND TRUNK RAILWAY COMPANY v. ANDERSON.

there been such a license to use, the licensee in the user assumes all risk and there is no implied guarantee that the traffic of the road should not proceed in the ordinary way; *Jones* v. *Grand Trunk Railway Company of Canada* (1); *Richards* v. *Chicago, St. Paul and Kansas City Railroad Company* (2). No custom such as is claimed can be established in the face of section 273 of "The Railway Act" (3).

*Aylesworth Q.C.* and *McEvoy* for the respondents. No means of ingress to or egress from the Lucan Crossing Station had then been provided by the defendant company, and passengers set down at that station, or taking trains there, had for many years been, with the knowledge of the company's officers and servants and without any objection, permitted to use, and had used, the line of track and road-bed of the railway as means of getting to the nearest highways east or west of the station.

The company having established a station for passengers at Lucan Crossing, were bound to furnish a safe and reasonable means of ingress to and egress from the same. A waiting-room for passengers is provided in a building at the station, furnished with a stove and benches; the station has the usual platform and other accessories; tickets are sold to and from the station itself on the trains and at all other stations exactly as for any ordinary station upon the railway. The evidence shows that, especially on market days, there is a very considerable passenger traffic to and from the station in question, and that regular passenger trains both on the branch line and on the main line are timed to stop there. Upon these facts it was negligence on the part of the company to furnish no means

(1) 16 Ont. App. R. 37; 18 Can. S. C. R. 696.

(2) 45 Am. and Eng. R.R. Cas. 54.

(3) 51 V. c. 29 (D).

1898

THE GRAND TRUNK RAILWAY COMPANY v. ANDERSON.

of access whatever to the station in question, and to compel passengers to walk along the tracks of the railway in going to or departing from the station. When damage has resulted, in direct consequence of such negligence, it is actionable negligence. *Oldright* v. *Grand Trunk Railway Company of Canada* (1); Patterson, Railway Accident Law, secs. 251-254. Passengers were justified in using the road-bed as the only passage-way held out by the carrier as a means of entrance and exit to and from the public highways. *Collins* v. *Toledo etc., Railroad Company* (2).

The evidence is clear that from the time the train emerged from the cutting, fifteen rods from the highway, until it had crossed the highway and struck McKenzie, the whistle was not sounded nor the bell of the engine rung, a clear infraction of section 256 of "The Railway Act" (3). McKenzie had no warning of the train behind him when it was at a considerable less distance from him than that which the statute fixes as the limit for the first warning to be given as an engine is approaching a highway crossing. This is alone a sufficient circumstance of negligence to support this action. The liability for damages sustained by reason of any such neglect on the part of the company's servants is not limited to travelers upon the highway. The statute (sec. 256), declares that in the case of such neglect the company shall be liable for all damages "sustained by any person" by reason of such neglect. It was incumbent upon the defendant to exercise special care and observe special precautions in the running of trains past the station in question. The company had full knowledge that for many years it had been customary for passengers to walk along the main line of the track east and west of the cross-

(1) 22 Ont. App. R. 286. (2) 80 Mich. 390.
(3) 51 Vict. ch. 29 (D).

1898

THE GRAND TRUNK RAILWAY COMPANY v. ANDERSON.

ing, using the road-bed as the only means of reaching or leaving the station. The train on which deceased travelled was a regular train, stopping at this station at the same hour every afternoon, and usually carrying several passengers to or from this station. The regular west-bound passenger train on the main line is timed to stop at this station to make close connection with the train on which deceased travelled. Sometimes main line freight trains stop at this station to take up passengers. On this particular day, although on account of the storm, there were no passenger trains running on the main line, it was none the less incumbent on those in charge of the freight train to observe even more than ordinary precautions in passing over this portion of the main line track. Wherever a particular point on a line of railway has been used for purposes of travel by pedestrians, with the permission of the company, such circumstances enhance the duty of servants of the company to exercise caution and prudence in the operation of the road at that place. *Illinois Central Railroad Company* v. *Hammer* (1); *Murphy* v. *Chicago etc. Railroad Company* (2); *Harty* v. *Central Railroad Company of New Jersey* (3); *Kansas Pacific Railway Company* v. *Pointer* (4); *Kay* v. *Pennsylvania Railroad Company* (5); *Pennsylvania Railroad Company* v. *Lewis* (6); *Daley* v. *Norwich and Worcester Railroad Company* (7). In *Byrne* v. *The New York Central and Hudson River Railroad Company* (8), it was held that where the public for a long period of time had been in the habit of crossing a railroad at a point not in a travelled public highway with the acquiescence of the railroad corporation,

(1) 72 Ill. 348.
(2) 45 Iowa, 661; 38 Iowa, 539.
(3) 42 N. Y. 468.
(4) 9 Kan. 620; 14 Kan. 37.
(5) 65 Pa. St. 269.
(6) 79 Pa. St. 33.
(7) 26 Conn. 591.
(8) 104 N. Y. 362.

this acquiescence amounted to a license and imposed a duty upon the corporation, as to all persons so crossing, to exercise reasonable care in the running of its trains so as to protect them from injury. Where a railway company permits persons to cross its lines or premises it is bound to exercise care, and it cannot treat them as trespassers. *Murphy* v. *Boston and Albany Railroad Company* (1); *Barry* v. *New York Central and Hudson River Railroad Company* (2); *Barrett* v. *Midland Railway Company* (3). See also *Gallagher* v. *Humphrey* (4); *Thomson* v. *North British Railway Company* (5); *Wright* v. *Midland Railway Company* (6); *Brown* v. *Great Western Railway Company* (7). The defendants allowed deceased so to use their track, if they did not compel him to do so. He was there with their license at all events, and they had a duty imposed upon them to take care of him; they must be taken to have held out to their passenger a guarantee that he might use it with safety. See *Rogers* v. *Rhymney Railway Company* (8), and *The Dublin Wicklow and Wexford Railway Company* v. *Slattery* (9), especially the opinion of Earl Selborne in the latter case at pages 1187 and 1188. See also the subsequent decisions of the Court of Appeal in England in *Crowther* v. *Lancashire and Yorkshire Railway Company* (10); and in *Coburn* v. *Great Northern Railway Company* (11). At the trial the learned judge seemed to consider that the deceased by alighting at Lucan Crossing station before arriving at the terminus of his journey, and by leaving such station on foot, lost his character of passenger with the company. This view is erroneous. We contend

(1) 133 Mass. 121.
(2) 92 N. Y. 289.
(3) 1 F. & F. 361.
(4) 6 L. T. 684.
(5) 4 Court of Sess. Cas. (4th Ser.) 115.
(6) 1 Times L. R. 406 n.
(7) 1 Times L. R. 406 and 614.
(8) 26 L. T. 879.
(9) 3 App. Cas. 1155.
(10) 6 Times L. R. 18.
(11) 8 Times L. R. 31 n.

1898

THE GRAND TRUNK RAILWAY COMPANY v. ANDERSON.

that until the deceased reached a highway he was entitled, as against the defendants, to all the rights of a passenger. See *Parsons* v. *New York Central and Hudson River Railroad Company* (1).

TASCHEREAU J. (dissenting).—I am not disposed in this case to interfere with the unanimous judgments of the Divisional Court and of the Court of Appeal.

The case is not free from doubt, but the appellants have failed to convince me that there is error in the conclusion arrived at in favour of the plaintiffs.

GWYNNE J.—I agree that the appeal should be allowed for the reasons stated by Mr. Justice Sedgewick.

SEDGEWICK J.—I am of the opinion that the judgment of the trial judge was right and that there should be judgment in this case for the defendant. It must be admitted for the purposes of this case that the provision of the Railway Act, section 256, relating to the sounding of the whistle and the ringing of the bell was not complied with, and that all persons rightfully upon the railway track as well as upon the highway crossing next to the coming train are entitled to the advantage of this provision, and the sole question to be determined in this case is whether or not the deceased Mackenzie at the time he was killed was lawfully walking upon the railway track. In other words whether he was a trespasser or a licensee or invitee of the defendant company. I have not been able to find in the record sufficient evidence to justify the findings that he was lawfully there. In the first place the Railway Act, section 273, makes it a criminal offence for any one, not having special right, to walk upon

(1) 113 N. Y. 355.

1898

THE GRAND TRUNK RAILWAY COMPANY v. ANDERSON.

Sedgewick J.

the railway track. And in the second place the area of the track is completely surrounded and guarded on each side by a fence and where the highways cross by cattle guards, so that not only no carriage can go upon or near the platform at Lucan Crossing but no foot passenger can do so without leaping over the fence or walking on the rails themselves.

Now the statute and these means of protection were a warning to all the world against trespassing or entering upon the roadbed. What evidence is there to shew that the deceased was on the railway track by the invitation of the company? The two highway crossings, as I understand the evidence, are one mile seventy-one and one-third rods apart. It was proved that farmers owning lands between these two crossings instead of going by the ordinary highway to the stations eastward and westward occasionally either went over the railway fences or through the gates at the farm crossings on to the railway lands along the track to the platform at the railway crossing. It was proved too that tickets were sold from various points to this crossing and that conductors were in the habit of receiving payment of fares to this point. The deceased was not one of these farmers, nor did he live in the vicinity of the crossing but at a station close to his own home more than three miles away. This I think is all the evidence tending to shew that he was rightfully where he was when he met his death.

Now this does not strike me as evidence proving licence or invitation by the railway company. Whatever the custom may be in England, and however carefully railway companies there may guard their tracks from being trespassed upon, it is a matter of common knowledge that, notwithstanding the criminal provisions of the Railway Act, people in this country living near to a railway do almost uni-

1898

THE GRAND TRUNK RAILWAY COMPANY v. ANDERSON.

Sedgewick J.

versally walk upon the railway track, if it suits their convenience, getting at it by such means as they can, not dreaming that they are there upon the invitation of the company, but conscious all the while that they are there at their own risk and peril. The mere fact that in this country railway companies do not have officials at all points upon their line to warn off trespassers, and are not at all times alert to bring criminal prosecutions against trespassers, is no evidence of assent on their part to the violation of the law. When they surround the railway track with all the safeguards and means of protection which the statute demands, they in my view have done all that they are required to do. Nor is it any evidence that people are invited to use the railway track because of the platform at Lucan Crossing. It is admitted and there is no question as to the limited purpose of that platform, namely, for the convenience of passengers getting on or off the train at that point to use either line which crosses there. Nor is the fact that conductors were in the habit of taking pay from persons boarding the train there any evidence of invitation. Conductors would have the right to presume that they came there lawfully by means of the railway crossing. Even assuming that the class of individuals who were in the habit of getting to the platform by jumping over the fences were there by invitation of the company and were not liable as trespassers, how could the deceased take advantage of a privilege which had never been extended to him, but was confined to a class to which he did not belong? No doubt, if the public generally are in the habit of crossing a railway track at any well known particular, specified spot for their own convenience in cases such as appear in *Dublin, Wicklow and Wexford Railway Company* v. *Slattery* (1), and that

(1) 3 App. Cas. 1155.

in the very face of the company's officials, that would be evidence of assent and a judgment based on it might be supported. But here in the present case there is no evidence that even the usage of the farmers which is proved in the evidence, was ever brought to the knowledge of any officer of the company having authority to give a right of passage or other privilege to any portion of the public. There was no agent of the company at Lucan Crossing; no one there empowered in any way to make contracts for the company. The conductors to whom the farmers paid the fares were not supposed to know how they came to Lucan Crossing, whether by train or otherwise, and even if they did they had no authority to bind the company. In the judgment, the learned Chief Justice of the Court of Queen's Bench, in the Divisional Court (1), argues that inasmuch as the deceased rightfully got off the train at Lucan Crossing, and inasmuch as there was no public way from the crossing to any highway in the vicinity he had a right by necessity to walk upon the company's track in order to reach a highway. But although he doubtless had a right during the progress of his journey to alight upon the platform yet the contract between him and the company was to carry him on to Ailsa Craig, and before he started on his journey he knew that it was impossible for him to make connection that night.

Now I am of opinion that the evidence does not support the allegation that he was an invitee of the company, and not being an invitee his representatives cannot claim the protection which the statute would otherwise have given him. In my view the appeal should be allowed and the judgment of the trial judge restored, the whole with costs.

(1) 27 O. R. at pages 446-449.

1898

THE GRAND TRUNK RAILWAY COMPANY v. ANDERSON.

King J.

KING J.—I think the judgment in the court below is free from error, and that this appeal should be dismissed.

GIROUARD J.—I am of the opinion that this appeal should be allowed with costs.

*Appeal allowed with costs.*

Solicitor for the appellant: *John Bell.*

Solicitors for the respondents: *McEvoy, Wilson & Pope.*

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1898

*Mar. 12, 14.

*June 14.

MICHAEL JAMES JORDAN *et al.* (PLAINTIFFS) ..... APPELLANTS;

AND

THE PROVINCIAL PROVIDENT INSTITUTION (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Insurance, life—Conditions and warranties—Indorsements on policy—Inaccurate statements — Misrepresentations — Latent disease—Material facts—Cancellation of policy—Return of premium—Statute, construction of*—55 *V. c.* 39, *s.* 33, (*Ont.*)

The provisions of the second sub-section of section thirty-three of "The Insurance Corporations Act, 1892," (Ont.) limiting conditions and warranties indorsed on policies providing for the avoidance of the contract by reason of untrue statements in the applications to cases where such statements are material to the contract, do not require the materiality of the statements to appear by the indorsements but the contract will be avoided only when such statements may subsequently be judicially found to be material as provided by the third sub-section.

Misrepresentations upon an application for life insurance so found to be material will avoid the policy notwithstanding that they may have been made in good faith and in the conscientious belief that they were true.

*Venner* v. *The Sun Life Insurance Company* (17 Can. S. C. R. 394) followed.

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PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

APPEAL from the judgment of the Court of Appeal for Ontario, second division, affirming the judgment of Falconbridge J. in the High Court of Justice, which dismissed the plaintiffs' action with costs.

The Provincial Provident Institution, the respondent, was incorporated in 1884 by a declaration under the Ontario Benevolent Societies Act, (R. S. O. 1877, c. 167,) and in 1886 was registered under section 38 of the Insurance Act of Canada, (R. S. C. c. 124,) to transact with its members the business of life insurance on the co-operative or assessment plan.

On the 21st June, 1894, Maria Jordan made a proposal in writing to the respondent for an insurance upon her own life to the amount of $2,000, and thereby agreed that the proposal should form part of the contract and to undergo a medical examination, and that the examination paper should also form a part of the contract.

On the next day the applicant paid her entrance fee to the local agent of the respondent and submitted herself to the respondent's local medical examiner, and completed her proposal for insurance by subscribing her name, (in the presence of the examiner,) to the answers to the questions contained in her application for membership, and also to the medical examination paper and to the agreements and warranties therein set forth.

In a memorandum prefixed to the medical examination paper the examining physician is directed to obtain "a decisive answer to each question," and at the end of the medical examination paper the examining physician certifies as follows: "I have carefully asked all the questions on the first page, and noted the applicant's replies." The declaration and warranty contained in the medical examination paper and application for membership, are in the words follow-

1898

JORDAN v. THE PROVINCIAL PROVIDENT INSTITUTION.

ing: "I hereby declare that I have given true answers to all questions put to me by the medical examiner, and that I am the person above described. And" * * "it is hereby covenanted, declared and agreed that all the agreements, covenants, statements and answers contained in my application and this medical examination for membership, shall together be the basis and form part of the contract between me and the Provincial Provident Institution, which statements and answers are hereby warranted to be complete and true, and any certificate which may be issued upon my application and this medical examination by said Institution shall be accepted upon the express condition that if any of the statements or answers herein are materially untrue, or if any violation of any covenant, condition or restriction of the said certificate shall occur, then the said certificate shall be null and void"

The proposal and medical examination papers so completed were forwarded to the respondent, and on the 28th June, 1894, the certificate or policy of the respondent for an insurance of $2,000 was issued to the applicant, setting forth that the respondent, "in consideration of the representations, agreements and warranties made to and with said Institution in the application and medical examination herefor, both of which are part of this contract, and the payment of," etc. * * * "doth issue this certificate to Maria Jordan." * * * "with the following agreements": "That upon the death of said member while this certificate is in force, she and the beneficiaries herein named having conformed to all the conditions hereto and hereon endorsed, and also to the by-laws of the Institution from time to time in force," there should be payable, within ninety days after proofs of death, to the beneficiaries, $2,000. Upon this policy or certificate was printed verbatim the declaration

and warranty contained in the applicant's proposal for the policy and in the medical examination paper.

The second of the conditions indorsed on the policy was in the words following: "2. The member having subscribed the application and medical examination papers furnished by the Institution, each of which is a part of the contract between him and the Institution, the withholding or non-communication of information or any fraudulent or misleading statements of a fact material to the contract in the application or medical examination shall render this certificate null and void."

On the 12th July, 1894, within two weeks after the policy issued the applicant in pursuance of the advice of a physician whom she had consulted professionally on the 1st, 4th and 11th days of June, 1894, underwent an operation for cancer of the uterus which while it could not cure her disease was advised by the surgeon in the hope of ameliorating her condition. The application and examination paper made no mention of the disease and it appeared that the insured made her answers in good faith and without any knowledge that she was affected with the disease.

In March, 1895, the respondent became aware for the first time of the misrepresentations made in the proposal for insurance and in her answers to the questions in the medical examination paper, and on the 14th of that month, gave written notice to the applicant that the policy was cancelled on account of untruthful representations, and returned the total amount paid by her to the respondent but she, through her solicitors, refused to consider the policy at an end.

On the 18th of April, 1895, the applicant died, the cause of her death being cancer of the uterus, and on the 10th of October, 1895, proofs of death were presented to the respondent on behalf the beneficiaries,

1898

JORDAN v. THE PROVINCIAL PROVIDENT INSTITUTION.

who on the 14th January, 1896, brought action against the respondent to recover on the policy.

At the trial, before Falconbridge J., and a jury, certain questions were submitted to the jury, and by their answers to such questions the jury found that the applicant's answers to thirteen of the questions submitted to her in the proposal for insurance were untrue, that these thirteen questions and answers were all material to the contract, but that the applicant did not wilfully or fraudulently give the false answers or conceal any fact known to her which she should reasonably have considered material for the defendant to have been made aware of, and that she had no intention to mislead or prevent the defendant from knowing her condition if she failed to mention her visits to physicians for medical advice prior to her application.

Upon these findings judgment was rendered dismissing the plaintiff's action with costs. On appeal to the Court of Appeal for Ontario this judgment was affirmed by the unanimous decision of the second division of that court from which the present appeal was taken by the plaintiffs.

*Reeve Q.C.* and *Day* for the appellants. If the statements alleged to have been made by the deceased in her examination upon effecting the insurance form part of the contract and are warranties, then the appellants cannot succeed; if, however, these statements are not warranties, and have been made in good faith, and there is absence of all fraud, then they are entitled to succeed. The medical examination cannot be construed as and does not form part of the contract, nor are the statements therein warranties, by reason of the fact that the defendant has failed to comply with the statutory provisions in not having them set out or made to appear on the face or back of the policy,

and in not having accurately and fully set out conditions and provisions relating thereto, and of which they form a part. R. S. C. ch. 124, secs. 27, 28; 52 Vict. ch. 32, (Ont.) secs. 4, 5; 55 Vict. ch. 39, (Ont.) sec. 33, s.s. 1, 2, 3; 58 Vict. ch. 34, (Ont.) sec. 5, s.s. 10 (1). The jury found that the applicant's answers to the following two questions were untrue:

"33. Have you had any serious illness or injury?" "No."

"90. Have you ever had a miscarriage; if so, how often and how recently?" "No."

The illness referred to was a cold contracted after childbirth some twenty odd years before. It could not for a moment be suggested that the woman had any possible object in answering these questions untruthfully; the idea would be altogether foreign to her mind that an illness resulting from a cold contrected under the circumstances stated would in any way affect her application for insurance; the same may be said as regards her answers to the other question—a miscarriage which had occurred many years before. It is evident that the answers given under such circumstances must have been the result of some misunderstanding, forgetfulness or mistake, or that some mistake occurred in recording the answers. Every reasonable protection should be afforded against the grave results of mistakes made in good faith, and of a strict construction of and compliance with any provisions which has that object in view.

The warranty, provisos and agreements contained in the contract are confined to material statements; the statements warranted are all statements and answers in the application and medical examination, and the proviso and agreement is, that if any of the statements or answers are materially untrue, then the

(1) At page 196 of Statutes.

1898

JORDAN v. THE PROVINCIAL PROVIDENT INSTITUTION.

certificate shall be null and void. The result of non-compliance with the legislative provision is that the statements and answers of the insured cannot be construed or relied on as warranties, nor is the contract of insurance liable to be defeated by merely proving their untruth, but the contract must be construed as freed from and unaffected by any stipulation, warranty or proviso modifying or impairing its effect. See 55 V. ch. 39, sec. 33, s.s. 1 (Ont.) The other printed conditions on the back of the policy in so far as they relate to the statements and answers of the insured, are open to the same objection that the Act has not been complied with by reason of their not being set out in full. They all are conditions of a like character and dealing with the same subject and consequently the contract must be either free from all conditions which deal with a like and common subject matter, or subject to all such conditions in their entirety. A contract cannot be construed in the light of and as subject to only a part of a number of conditions, all of which deal with and are applicable to the same subject matter, and subject to the whole of which it was intended the contract should be made. *Village of London West* v. *London Guarantee and Accident Company* (1); *Moore* v. *Connecticut Mutunl Life Insurance Company* (2); *The Life Association of Scotland* v. *Foster* (3) per Lord Deas. See also *Anderson* v. *Fitzgerald* (4); *Thomson* v. *Weems et al.* (5) at pages 683 and 689; *Wheelton* v. *Hardisty* (6) at page 273; *Gravel* v. *L'Union St. Thomas* (7); *Twycross* v. *Grant* (8) at pages 530-531. This case is clearly distinguished from the case of *Fitzrandolph* v. *The Mutual Relief Society of Nova Scotia* (9).

(1) 26 O. R. 520.
(2) 6 Can. S. C. R. 634 : 6 App. Cas. 644 ; 3 Ont. App. R. 230.
(3) 11 Court of Sess. Cas. (3 ser.) 351.
(4) 4 H. L. Cas. 484.
(5) 9 App. Cas. 671.
(6) 8 E. & B. 232.
(7) 24 O. R. 1.
(8) 2 C. P. D. 469.
(9) 17 Can. S. C. R. 333.

*Osler Q.C.* and *McMurchy* for the respondent. The question of materiality is a question of fact for the jury; 55 Vic. c. 39, Ont., sec. 33, sub-sec. 3; Bunyon, Life Insurance (3 ed.) 46; Porter, Insurance, (2 ed.) 152; May, Insurance, (3 ed.) sec. 195. We make special reference to the words of Sir William Ritchie, C.J., in *FitzRandolph* v. *The Mutual Relief Society of Nova Scotia* (1) at page 336. Untrue statements, omissions or suppressions in the application and answers should avoid a policy. The application and policy must be construed together and together form the contract, and the truth of the representations and answers becomes a condition precedent to liability. See also *Boyce* v. *The Phœnix Mutual Life Insurance Company* (2) per Ritchie C.J. at page 728; *Fowkes* v. *The Manchester and London Life Assurance Association* (3); *Anderson* v. *Fitzgerald* (4) at page 504; *Dalglish* v. *Jarvie* (5) at page 243; *London Assurance* v. *Mansel* (6); *Newcastle Fire Insurance Company* v. *Macmorran & Co.* (7); *Weems et al.* v. *Standard Life Assurance Company* (8).

The like result follows in favour of the respondent, whether we consider the findings of the jury as establishing that the applicant made false representations material to the contract, or that there was a breach of warranty. If there has been misrepresentation it will avoid the policy if a statement of a material fact contained in the declaration is untrue, even though not to the knowledge of the assured; Porter, Insurance, (2 ed.) page 140; *Macdonald* v. *Law Union Fire and Life Insurance Company* (9); Bunyon, Life Insurance, p. 41; Cooke, Life Insurance, p. 35; *Duckett* v. *Williams* (10).

(1) 17 Can. S. C. R. 333.
(2) 14 Can. S. C. R. 363.
(3) 3 B. & S. 917.
(4) 4 H. L. Cas. 484.
(5) 2 M. & G. 231.
(6) 11 Ch. D. 363.
(7) 3 Dow 255.
(8) 21 Sc. L. R. 791.
(9) L. R. 9 Q. B. 328.
(10) 2 Cr. & M. 348; 4 Tyr. 240.

1898

JORDAN v. THE PROVINCIAL PROVIDENT INSTITUTION.

This rule is equally applicable to warranties and to material representations; *Benham* v. *United Guarantie and Life Assurance Company* (1). The proper question is whether any particular circumstance was in fact material and not whether the party believed it to be so; *London Guarantee Company* v. *Fearnley* (2), at page 916; *Hambrough* v. *Mutual Life Insurance Company of New York* (3). The company must be protected against untruthful representations whether or not these representations are untrue to the knowledge of the party effecting the insurance. The policy is vitiated if the representation made as preliminary to the contract was not in fact true. In this case the fact was, that on three occasions shortly prior to her proposal for insurance the applicant consulted a Dr. Nevitt, who made a uterine examination and informed her that there was "some uterine trouble which it would be well to attend to"; but the only information she gave the company was that another physician had attended her nineteen years previously in child-birth.

All insurance officers are entitled to the opportunity of consulting with the medical man who has been last in attendance on the assured, *Morrison* v. *Muspratt et al.* (4). And where the reference was made to a person who had been the ordinary adviser, but no mention was made of the person attending at the time of the insurance, the policy was vacated; *Everett* v. *Desborough* (5); *Huckmen* v. *Fernie* (6). See also Joyce, Insurance, sec. 2070, referring to *Cazenove* v. *British Equitable Assurance Company.* (7). Where there was a question in the application "By what physician were you last attended?" the applicant was held to have been

(1) 7 Ex. 744.
(2) 5 App. Cas. 911.
(3) 72 L.T. 140.
(4) 4 Bing. 60.
(5) 5 Bing. 503.
(6) 3 M. & W. 505.
(7) 29 L. J. C. P. 160; 28 L. J. C. P. 259; 6 C. B. N. S. 437.

attended by a physician, within the meaning of that question, where it appeared that he had called upon a physician and submitted to an examination by him and had subsequently called upon the same physician and consulted him professionally, *White* v. *Provident Savings Life Assurance Society* (1).

The policy in question is expressed to be made "in "consideration of the representations, agreements and "warranties made to and with said Institution in the "application and medical examination made herefor, "both of which are a part of this contract," thus incorporating the proposal as part of the contract. *Venner* v. *Sun Life Insurance Company* (2). This is sufficient compliance with section 27 of the Insurance Act of Canada, inasmuch as the policy referred in express terms to the representations, agreements and warranties contained in the application. The question having arisen whether the provision of the Ontario statute (55 Vict. ch. 39) required anything more than such a distinct reference to the proposal, the Legislature by 58 Vict. c. 34, sec. 5, subsection 10, added a declaratory clause to subsection 1 of section 33 of that Act to the effect that nothing herein contained should exclude the proposal or application of the assured from being considered with the contract, and that the court should determine how far the insurer was induced to enter into the contract by any material misrepresentation contained in the application or proposal.

By rescinding the policy, during the lifetime of the applicant, immediately upon becoming aware of the untrue representations, and at the same time returning to the applicant the total amount of premium paid by her, the respondents placed themselves in a strong equitable position within the intent of *Fenn* v. *Craig*

(1) 163 Mass. 108.

(2) 17 Can. S. C. R. 394.

1898

JORDAN v. THE PROVINCIAL PROVIDENT INSTITUTION.

(1). We also refer to the decisions in *Confederation Life Association* v. *Miller* (2); *Mason* v. *Agricultural Assur. Assoc.* (3); *Mahon* v. *Pacific Mutual Life Insurance Company* (4); *Gardner* v. *Lucas* (5) at page 603.

The judgment of the court was delivered by

SEDGEWICK J.—We have been unable to find any error in the judgment appealed from. We consider that the Ontario Insurance Act of 1892, section 33, subsection 1, was complied with in the present case, following, as we do, the decision in the case of *Venner* v. *The Sun Life Insurance Company* (6).

As to the objection, relied upon by the appellants, that the insurance company failed to comply with the requirements of subsection two of section thirty-three, just mentioned, we are of opinion that that section must be read with and qualified by the following subsection, which shows that it is for the jury to determine whether or not a misrepresentation made in an application for insurance is material. If they find such misrepresentation immaterial, these clauses save the policy although it would otherwise have been vitated. In other words, notwithstanding any convention between the parties to an insurance policy upon the effect of misrepresentation, only that species of misrepresentation will void the policy which may subsequently be judicially found to be material and would have affected the basis of the contract.

*Appeal dismissed with costs.*

Solicitors for the appellants: *Reeve & Day.*

Solicitors for the respondent: *McDougall & Robertson.*

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(1) 3 Y. & C. Ex. 216.
(2) 14 Can. S. C. R. 330.
(3) 18 U. C. C. P. 9.
(4) 144 Pa. 409.
(5) 3 App. Cas. 582.
(6) 17 Can. S. C. R. 394.

ELIZABETH MURRAY (DEFENDANT) ..... } APPELLANT;

AND

THOMAS K. JENKINS (PLAINTIFF)...RESPONDENT.

1898

*May 3, 4.

*June 14.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Vendor and purchaser—Principal and agent—Mistake—Contract—Agreement for sale of land—Agent exceeding authority—Specific performance—Findings of fact.*

Where the owner of lands was induced to authorize the acceptance of an offer made by a proposed purchaser of certain lots of land through an incorrect representation made to her and under the mistaken impression that the offer was for the purchase of certain swamp lots only whilst it actually included sixteen adjoining lots in addition thereto, a contract for the sale of the whole property made in consequence by her agent was held not binding upon her and was set aside by the court on the ground of error, as the parties were not *ad idem* as to the subject matter of the contract and there was no actual consent by the owner to the agreement so made for the sale of her lands.

APPEAL from the judgment of the Supreme Court of Nova Scotia reversing the judgment of Henry J. in the trial court by which the plaintiff's action had been dismissed with costs.

The action was brought to recover damages for breach of a contract for the sale of twenty-six lots of land in the city of Halifax, N.S. The special circumstances under which the controversy arose are as follows:—

The defendant, an old lady, who resided with her son-in-law, J. F. Forgan, in Chicago, Ill., was owner of twenty-six lots of land in Halifax, N.S., of which ten

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1898

MURRAY v. JENKINS.

were known as the "swamp lots," the adjoining sixteen lots being high and dry. She placed the property in the hands of a real estate agent in Halifax to be sold and after some correspondence on the subject between the agent and Forgan, who usually attended to the defendant's business affairs for her, the agent telegraphed Forgan that he had been offered $1,000 for the lots mentioned in a letter referred to. Forgan understood that the lots referred to were the swamp lots only and upon informing the defendant that the offer was for these lots he obtained her consent to send a telegraph to the agent at Halifax directing him to accept the offer. The offer actually applied to the whole of the lots and on receipt of this telegram the agent made a contract with the proposed purchaser for the sale of the twenty-six lots at the price offered by accepting a deposit on account of the price and granting a receipt in writing therefor. This is the contract upon which the action was based.

The case was tried before Mr. Justice Henry without a jury and His Lordship found that the defendant's agent, Forgan, had no authority to bind her in respect of sixteen of the lots which are the subject matter in dispute; that there was not sufficient evidence that she held him out as her agent to bind her in respect to these lots; that the plaintiff had not shown that she delegated Forgan to send the telegram in answer to plaintiff's offer to purchase certain lots in Halifax, relied upon by him, so as to bind her in respect to the lots in question; that in communicating this offer to defendant, Forgan told her that the offer was for ten swamp lots only, and that he was authorized by her to sell these ten lots only, and therefore judgment was ordered to be entered for the defendant with costs. On appeal to the full court this judgment was reversed and it was ordered that judgment should be entered

fer the plaintiff against the defendant for damages to be assessed before the trial judge. The defendant now appeals against this decision of the full court.

*Newcombe Q C.* for the appellant. Whether or not Forgan had the requisite authority to bind defendant is a matter of fact upon which the finding of the trial judge should be upheld. Defendant never authorized Forgan to sell anything but the ten swamp lots and Forgan also understood that that was what he was selling; he erroneously supposed at the time that the sixteen lots on Acadia and Brussels Streets were the swamp lots which were to be sold. Plaintiff intended to buy twenty-six lots, worth not less than $3,000; he was on the spot and familiar with the ground; he saw all the correspondence and must have known from Forgan's letter referring to the offer of "one thousand dollars for the swamp lots," and his subsequent enumeration of the lots as only eighteen in all, that Forgan was under a complete misapprehension as to what he was selling. The absurd inadequacy of the price to the value must have told him the same thing. The particularity with which plaintiff wrote twenty-six lots into the receipt which he took shews that he knew there had been a mistake, and that he snapped at it,—an exactly similar case to *Webster* v. *Cecil* (1), to which James L.J. refers in *Tamplin* v. *James* (2) at page 221. We also rely upon *Garrard* v. *Frankel* (3). A contract entered into by mistake by one party cannot be enforced against him by the other if the latter is aware of the mistake and seeks to take advantage of it; *Hamer* v. *Sharp* (4); *Wilde* v. *Watson* (5); *Prior* v. *Moore* (6). See also Leake on Contracts, pp 511,

(1) 30 Beav. 62.
(2) 15 Ch. D. 215.
(3) 30 Beav. 445.
(4) L. R. 19 Eq. 108.
(5) L. R. Ir. 1 Eq. 402.
(6) 3 Times L. R. 624.

1898

MURRAY v. JENKINS.

512, and cases there cited, particularly *Collen* v. *Wright* (1); *Richardson* v. *Williamson* (2); *Cherry and McDougall* v. *Colonial Bank of Aastralasia* (3). We contend that the memorandum in writing is insufficient under the statute of frauds; *Williams* v. *Jordan* (4); Agnew, Statute of Frauds, p. 258.

*Borden Q.C.* for the respondent. The statute of frauds cannot be relied upon by the appellant, as it has not been pleaded; *Filby* v. *Hounsell* (5), and cases there cited; *Commins* v. *Scott* (6), at page 16. The memorandum is sufficient. The land, the parties and the price are all distinctly expressed, and an agent for signing a memorandum of sale of lands may be appointed without writing; Agnew, Statute of Frauds, 287; Story, Agency, secs. 73, 126, 127, and note to Brown, Statute of Frauds (5th ed.), sec. 370; *Beaufort* v. *Neeld* (7) at pages 273-274 and 290; *Commercial Bank of Canada* v. *Merritt* (8), at pages 358, 363, 364.

The defendant authorized the telegrams which directed the acceptance of the offer of one thousand dollars for the twenty-six lots and all the business of the defendant with reference to these lots had been transacted by her for some seven years through Forgan, who was her son-in-law. All the correspondence was carried on by Forgan. In May, 1894, he gave directions as to the sale of two of these lots and the agreement was carried out by the defendant. When inquiries were made of Forgan as to the price which the defendant would accept for the remaining twenty-six lots he submitted the letter to her, read it to her, and obtained her authority to fix a price, and did fix a price

(1) 7 E. & B. 301.
(2) L. R. 6 Q. B. 276.
(3) L. R. 3 P. C. 24.
(4) 6 Ch. D. 517.
(5) [1896] 2 Ch. 737.
(6) L. R. 20 Eq. 11.
(7) 12 C. & F. 248.
(8) 21 U. C. Q. B. 358.

for these lots. There could be no misapprehension in the mind of any reasonable person. Then on receipt of the telegrams offering $1,000 for the twenty-six lots mentioned in the letter of inquiry, the telegrams were communicated to the defendant and both replies by telegraph were sent after communication with her and by her authority. The law judges of an agreement exclusively from the mutual communications which have taken place and the defendant is bound, in the absence of fraud or warranty, by his acceptance of the proposal however clearly she may afterwards make it appear that she was laboring under a mistake. She cannot escape by merely showing that she understood the terms in a different sense from that which they bear in their grammatical construction and legal effect. If she did not take reasonable care to ascertain what she was doing she must bear the consequences. Kerr, Fraud and Mistake (2 ed.) 479; Leake on contracts (3 ed.) 265, 277; *Scrivener et al.* v. *Pask* (1); *Smith* v. *Hughes* (2); *Tamplin* v. *James* (3) at p. 217; *Alvanley* v. *Kinnaird* (4) at page 7, per Cottingham L.J.; *Griffiths* v. *Jones* (5) per James L.J. at page 281; *McKenzie* v. *Hesketh* (6); *Ireland* v. *Livingston* (7); Evans' Principal and Agent (2 ed.) 583.

TASCHEREAU J.—For the reasons given by Mr. Justice Gwynne I would allow this appeal and restore the judgment of Mr. Justice Henry rendered at the trial.

GWYNNE J.—This appeal should, in my opinion, be allowed, and the judgment of the learned trial judge restored with costs.

(1) L. R. 1 C. P. 715.
(2) L. R. 6 Q. B. 597.
(3) 15 Ch. D. 215.
(4) 2 M. & G. 1.
(5) L. R. 15 Eq. 279.
(6) 7 Ch. D. 675.
(7) L. R. 5 H. L. 395.

1898

MURRAY v. JENKINS.

Gwynne J.

The defendant, an old lady, who formerly lived at Halifax, Nova Scotia, has since 1887 been living at Chicago with her son-in-law, a Mr. Forgan, a cashier of a bank there. She was the owner of several small town lots within the limits of the city of Halifax or in the immediate vicinity. In some she was interested merely as executrix of her deceased husband's estate, and of others she was seized in her own right as her own property. In the month of May, 1894, her son-in-law communicated to her that a Mr. Naylor, a land agent in Halifax, had made to him an offer of two hundred and fifty dollars cash for two of those lots which had belonged to her husband and formed part of his estate in her hands as executrix. She authorized her son-in-law to accept this offer which he did by telegram to Mr. Naylor, and at the same time directed him to prepare a deed and to send it to Chicago for signature. Besides these two lots she had ten other similar lots which were situate on low swampy ground, and which were called and known as swamp lots. These lots also constituted part of her husband's estate, and she also herself owned sixteen other small lots situate near the swamp lots, but upon higher ground and of varying values. Upon the 7th June, 1894, Mr. Naylor enclosed to Mr. Forgan a deed for execution by the defendant of the *two* lots above mentioned to a Mr. Miller, which the defendant executed, and when executed was forwarded by Mr. Forgan to a bank at Halifax, as an escrow until the two hundred and fifty dollars should be paid therefor. In a letter accompanying the deed so sent by Mr. Naylor, to Chicago for execution, he inquired of Mr. Forgan what he would take for the ten swamp lots, and the other sixteen. While depreciating the lots, he mentioned a sum which he said that he thought he could sell them for. While it is strange that Mr.

Forgan should have misconceived the contents of this letter it cannot be doubted for a moment, I think, upon the evidence that he construed the letter and carried it in his mind as relating to the swamp lots only, and that he communicated it to the defendant as relating to these swamp lots only, which formed part of her husband's estate. Some correspondence then passed between Mr. Forgan and Mr. Naylor in relation to the lots of the nature of which the defendant knew nothing.

Upon the 19th or 20th of June Mr. Forgan received a telegram from Mr. Naylor as follows:

Offered thousand dollars lots mentioned in my letter of the 7th instant—wire.

Mr. Forgan labouring under the impression and belief, which although *bonâ fide* entertained by him was nevertheless erroneous, that the letter of the 7th of June related to the swamp lots only, informed the defendant of this offer as being an offer of $1,000 for the swamp lots and advised her to accept it and, both of them so understanding the offer, he replied to Mr. Naylor by telegram

accept offer if better cannot be done

to which Naylor replied that he did not care to take the responsibility of deciding, and Mr. Forgan having communicated this reply to the defendant she, who had never heard of any other offer than that as communicated to her by her son-in-law, namely $1,000 for the swamp lots, authorised him to accept that offer which he did thus by telegram to Mr. Naylor on the 21st June:

Accept offer. We sail by Parisian from Montreal Saturday morning, in Quebec over Saturday night.

Mr. Naylor having received this telegram entered into the contract which is the subject of the present action in the words following:

1898

MURRAY v. JENKINS.

Gwynne J.

HALIFAX, 23rd June, 1894.

Received one hundred dollars being deposit on purchase of 26 lots of the Murray lands, in Trider's field, for the sum of one thousand dollars, title guaranteed.

JOHN NAYLOR,
*Agent.*

MR. THOS. K. JENKINS.

The defendant and her son-in-law went to England in June, 1894, shortly after Mr. Forgan's telegram to Naylor of the 21st of that month, and they did not return until October when the defendant having been called upon to execute a deed in fulfilment of Naylor's contract, Mr. Forgan discovered the mistake he had made and immediately entered into a correspondence with the plaintiff and Naylor acknowledging the mistake to be, as it in point of fact was, wholly his own and offering the plaintiff to make to him any reasonable compensation for the loss occasioned to him by his, Forgan's, mistake. The plaintiff, however, having declined to come to any arrangement which Mr. Forgan considered reasonable, and the defendant having wholly repudiated the contract as one which she had never authorised or contemplated authorising or had in fact ever heard of, the plaintiff has brought the present action in which he claims $1,500 as damages by him sustained by reason of his loss of the benefit which he expected to realize from his purchase of the lots for which he had offered $1,000, but which by his own evidence were well worth $2,700, and the sole question is—whether or not the defendant is bound by the contract, the terms of which she had never heard of and which she never in point of fact authorized. The learned trial judge has found, as matter of fact, 1st: That the only offer communicated to the defendant was one of $1,000 for the swamp lots only, and that the only authority she ever gave to her son-in-law was to sell those swamp lots only, ten in number for $1,000; 2ndly:

That in point of fact Mr. Forgan had no authority whatever from the defendant to bind her in respect of the sixteen lots which were the subject matter in difference; and 3rdly: That there is not sufficient ground for holding that she held him out as her agent to bind her in respect of the lots in question. That these findings of the learned trial judge are in precise accord with the evidence cannot, I think, admit of any doubt.

As to the third of the above findings there was no evidence whatever offered unless it was the evidence that the sale to Miller had been made through the plaintiff as Miller's agent, and that the defendant had accepted the offer in that case through her son-in-law by telegram from him to Naylor. Well, as a matter of fact, the defendant authorized her son-in-law to accept it in the precise terms in which it was communicated to her. Then certain passages of the defendant's evidence are relied upon as supporting a contention that the defendant's son-in-law had general authority from her as her agent sufficient to bind her by the contract entered into by Naylor through her son-in-law contrary to the express finding of the learned trial judge upon that point. The evidence so relied upon is to this effect—the defendant said that her son-in-law was a very capable man, as cashier of a bank in Chicago he no doubt was; that she trusted in him in relation to her business; she was willing he should make any bargains he thought advisable but never gave him any authority to close a bargain without her sanction. There can be no doubt, I think, that all she meant to convey by this, and that she was so understood by the learned trial judge was—that as her son-in-law she had the utmost trust and confidence in him that he would advise her judiciously, and that he took such an interest in her affairs that she would willingly let him if he was so pleased initiate bargains for

1898

MURRAY v. JENKINS.

Gwynne J.

her, well knowing that he could not, and from her confidence in him, that he never would attempt to, close any bargain so initiated without communicating its terms to her, and advising with her as to it, and obtaining her authority to close it. These private and confidential trusts and good understandings existing between such near relations are natural and highly commendable and to be encouraged and held sacred, and it would shake all such trusts and confidences to their foundation and instead of confidences breed dissensions in families if out of such trusts and confidences could be inferred authority conferred by the parent upon the son to bind the parent to the contract of which he or she had never approved nor had ever heard. Then again it was argued that as the defendant had not called upon her son-in-law to shew her the letters and telegrams which he received from Naylor, it should be assumed, notwithstanding the fact to the contrary proved and found by the learned trial judge, that the offer she authorised him to accept was the one *in fact* contained in the telegrams and letters and not the one which he had in point of fact communicated to her as being the offer. I fail to see any principle upon which such assumption could be made contrary to the actual fact as conclusively proved in evidence. The not asking to see those letters and telegrams is in perfect consistence with that trust and confidence which the defendant had in her son-in-law. In fine the judgment of the learned trial judge cannot, in my opinion, be reversed without subjecting the defendant, contrary to every principle of law, to a contract which in point of fact she had never contemplated, and the terms of which had never been communicated to her, and to make which she had never given to any person any authority whatever.

1898

MURRAY v. JENKINS.

Sedgewick J.

SEDGEWICK J.—The appellant, an old lady residing with her son-in-law, James B. Forgan, in Chicago, was the owner of twenty-six lots in the city of Halifax, sixteen in her own right and ten as executrix of her husband. The former were situated on Acadia and Brussels streets, and were upon good dry ground, while the other ten were to a greater or less extent situated in a swamp and were always known as the swamp lots. The land of which the lots are composed is an open field, and there are no streets laid out upon the ground. On the 7th of June, 1894, one John Naylor, a real estate agent in Halifax, wrote a letter to Mr. Forgan asking him what he would take for the whole twenty-six lots stating he thought he could sell the lots mentioned for about $1,300. On the 12th June, Forgan in reply stated that Mrs. Murray was very desirous of disposing of those lots, and proceeded as follows:

> If you can sell them between now and September 1st for $1,300 or more, she will give you a commission of $100, and ten per cent on whatever you may get in excess of $1,300.

In writing this letter Forgan made a mistake, a most grievous mistake, as he himself says, in regard to the extent of the land referred to. He was under the impression that the letter of the 7th June, referred not to the whole of the twenty-six lots but only to what was known as the swamp lots. His evidence is conclusive upon that point. The trial judge so found, and it was stated at the argument that he was labouring under the misapprehension when he wrote the letter of the twelfth. There is no question that all the lots were worth much more than $1,300. Jenkins himself states that he expected within three months from the purchase to make a profit out of the transaction of $2,000 to $2,500, thereby admitting the land to be worth over $3,000, although in his sworn evidence he values it at $2,700, and Mrs. Murray valued it at

1898

MURRAY v. JENKINS.

Sedgewick J.

the same figure. After the receipt of Forgan's letter, Naylor began negotiating for the plaintiff for the price of the twenty-six lots, and on the 19th of June telegraphed to Forgan as follows;

Offered thousand dollars lots mentioned my letter 7th inst. Wire.

On the following day, 20th of June, he answered:

Accept offer if better cannot be done.

On the same day Naylor replied:

Do not care take responsibility, decide.

And he replied:

Accept offer.

On the 23rd of June Naylor made a contract for the sale of the lots with Jenkins, the contract being in these terms:

HALIFAX, 23rd June, 1894.

Received $100 being deposit on purchase of twenty-six lots of the Murray lands in Trider's field, for the sum of $1,000, title guaranteed.

JOHN NAYLOR,
*Agent.*

Mr. THOMAS JENKINS.

and received from him the $100 therein mentioned. The deed having been sent to Mr. Forgan for execution by the defendant he for the first time became aware of the misapprehension as to the quantity of land sold, and the deed so tendered was consequently not executed. This action was thereupon brought to recover damages for the breach of the alleged contract. At the trial, the trial judge, Mr. Justice Henry, made the following findings:

That James B. Forgan had no authority from defendant to bind her in respect of the sixteen lots which are the subject matter of dispute in this action:

That there is not sufficient ground for holding that she held him out as her agent to bind her in respect to these lots:

That it has not been shown that she delegated him to send the answer to plaintiff's offer relied upon by plaintiff so as to bind her in respect to the lots in question:

As to this I find that in communicating plaintiff's offer to defendant, Forgan told her that the offer was for the ten lots spoken of as

the swamp lots, and that he was authorized by her to sell these ten lots only:

and judgment was entered for the defendants in pursuance of such findings. Upon appeal to the Supreme Court of Nova Scotia this judgment was reversed and it was referred back to the trial judge in order that the plaintiff's damages might be assessed. I am of opinion that the judgment of the trial judge should be restored, his finding being, to my mind, in perfect accord with the evidence. It is, as already stated, manifest that Forgan, in conducting the correspondence which he did, was labouring under a fundamental mistake in regard to the subject matter of the proposed contract. He never intended to offer for sale any more than the swamp lots, nor had he any authority from Mrs. Murray saving in respect to the swamp lots, and if he exceeded his authority through ignorance or negligence clearly the defendant is not to be allowed to suffer.

The judgment appealed from apparently proceeds upon the hypothesis that the present case is the same as if Forgan had owned the land and on his behalf had authorised Naylor to make a contract with the plaintiff. It might not be proper to say that even upon this hypothesis whether there being a unilateral but fundamental mistake on his part he would be held bound, but I fail to see upon what principle the defendant is bound. Forgan was the old lady's agent to do only what he was instructed to do, viz.: to offer for sale the swamp lots. He knew that was the extent of his authority and if through ignorance or negligence on his part he exceeded that authority, he not being an agent held out by Mrs. Murray as such, she cannot suffer for his acts. If she is to be held to this bargain it can only be by virtue of some principle of estoppel, but there is no evidence of that in this

1898

MURRAY v. JENKINS.

Sedgewick J.

case. The leading case of *Foster* v. *Mackinnon* (1) following *Thoroughgood's Case* (2) contains a luminous exposition of the law upon this point.

It seems plain on principle, and on authority, that if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.

In that case the defendant indorsed a bill upon the understanding that it was a guarantee and not a bill, and upon the trial the learned Lord Chief Justice instructed the jury that if the signature was obtained upon the fraudulent representation that it was a guarantee, and if the defendant signed it without knowing that it was a bill and under the belief that it was a guarantee, and if he was in ignorance and there was no negligence in so signing the paper, the defendant was entitled to the verdict. The Court of Common Pleas in sustaining this statement of the law says:

In the case now under consideration, the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and if he were guilty of no negligence it was not even his fault, that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple Church, or on the fly-leaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make

(1) L. R. 4 C. P. 704. (2) 2 Rep. 9b.

the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case the signer would not have been bound by his signature, for two reasons, first, that he never in fact signed the writing declared on, and secondly, that he never intended to sign any such contract.

This case was lately followed by Lord Russell of Killowen in the recent case of *Lewis* v. *Clay* (1). The cases of *Hickman* v. *Berens* (2), and *Wilding* v. *Sanderson* (3), are cases in which courts have refused to enforce a compromise upon the simple ground that the parties were not *ad idem*, one of the counsel being under a misapprehension as to the subject matter of the agreement.

For these reasons I am of opinion that the appeal should be allowed.

KING and GIROUARD JJ. concurred.

*Appeal allowed with costs.*

Solicitor for the appellant: *Hector McInnes.*

Solicitor for the respondent: *Joseph A. Chisholm.*

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(1) 14 T. L. R. 149.

(2) [1895] 2 Ch. 638.

(3) [1897] 2 Ch. 534.

1898

*May 16.

*June 14.

THE GEORGE MATTHEWS COMPANY (DEFENDANT) ..... APPELLANT;

AND

ABEL BOUCHARD (PLAINTIFF).....RESPONDENT.

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

*Negligence—Master and Servant—Employer's liability—Concurrent findings of fact—Contributory negligence.*

In an action by an employee to recover damages for injuries sustained there was some evidence of neglect on the part of the employers which, in the opinion of both courts below, might have been the cause of the accident through which the injuries were sustained, and both courts found that the accident was due to the fault of the defendants either in neglecting to cover a dangerous part of a revolving shaft temporarily with boards or to disconnect the shaft or stop the whole machinery while the plaintiff was required to work over or near the shaft.

*Held*, Taschereau J. dissenting, that although the evidence on which the courts below based their findings of fact might appear weak, and there might be room for the inference that the primary cause of the injuries might have been the plaintiff's own imprudence, the Supreme Court of Canada would not, on appeal, reverse such concurrent findings of fact.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Superior Court, District of Ottawa, which maintained the plaintiff's action with costs.

In order to make certain repairs that had become necessary in their factory, the company had erected a temporary scaffolding on which there was a platform fourteen feet square at the height of about eleven feet from the floor, the edge of the platform at one end being close to the main shaft which, at this point, was

PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

fitted with a collar to keep it from slipping. The collar was fixed to the shaft with a set-screw, the head of which protruded, and the condition of the whole arrangements thus made for the workmen's convenience was well known to the plaintiff who had assisted in erecting the scaffold and platform. While at work on the platform the plaintiff was ordered to place a piece of timber in position near the shaft which was then in motion and while doing so his foot was caught and crushed by the set-screw in such a manner as to make the amputation of a part of the foot necessary and render him lame for life. The plaintiff brought his action for $4,000 and the defendant, amongst other defences, pleaded that the injuries were caused by the plaintiff's own fault and carelessness, and that they could not have occurred had he used ordinary prudence in avoiding the danger of which he was well aware. The evidence was taken at *enquête* and the written depositions filed of record, but the witnesses were not heard in presence of the trial judge who rendered a verdict for the plaintiff for $1,328 with costs and this decision was affirmed by the Court of Queen's Bench, on appeal, Mr. Justice Bossé dissenting. In rendering his judgment in the trial court Mr. Justice Gill considered "that the defendant was at fault in not either covering the shaft temporarily with boards, or by not disconnecting the shaft so as to stop it, or by not altogether stopping the whole machinery whilst plaintiff and the other men were required to work over or near the said shaft."

*Chase-Casgrain Q.C.* and *R. G. Code* for the appellant. The plaintiff had been employed by the company for some time, as a general handy man, which he had represented himself to be, but he was careless and imprudent in his work upon the scaffolding at the time of the accident. It was a temporary structure eleven

1898

GEORGE MATTHEWS COMPANY v. BOUCHARD.

feet above the floor, the shaft was visible to anybody working on the scaffolding, the plaintiff himself had changed the collar to the outside of the box the day before the accident, placed the set-screw in the position where it caught his foot, and the injuries were due solely to plaintiff's own fault. There is no proof of any careless or negligent act on the part of the company and employers are not insurers of either the lives or safety of their employees. See *Mercier* v. *Morin* (1); *Walsh* v. *Whiteley* (2); *Sarault* v. *Viau* (3); *The Montreal Rolling Mills Co.* v. *Corcoran* (4); *The Globe Woollen Mills Company* v. *Poitras* (5); *Roberts* v. *Dorion* (6); *Currie* v. *Couture* (7); *Tooke* v. *Bergeron* (8); Sourdat, "Responsibilité," no. 912; 34 Dalloz Rep. vo. "Ouvrier," nos. 103, 104, 108 and note 1 at foot of page 2106. It was impossible to stop the shaft revolving as it was used not only to drive all the machinery in the building but also to produce air currents necessary to prevent the loss of the hog products under treatment in the factory; an inconvenience and possible loss which could only be avoided by keeping the shaft constantly in motion. See *Smith* v. *Baker & Sons* (9); *Poll* v. *Hewitt* (10).

*Gordon* and *Talbot* for the respondent. It is not the practice of this court to disturb findings of fact, and it should not be done in such a case as this where the findings are concurrent in the courts below; *Gingras* v. *Desilets* (11); *Levi* v. *Reed* (12); *Cossette* v. *Dun et al* (13).

Even if there had been imprudence on the part of the respondent, the applicants would not thereby be

(1) Q. R. 1 Q. B. 86.
(2) 21 Q. B. D. 371.
(3) 11 R. L. 217.
(4) 26 Can. S. C. R. 595.
(5) Q. R. 4 Q. B. 116.
(6) Q. R. 4 Q. B. 117.
(7) 19 R. L. 443.
(8) 27 Can. S. C. R. 567.
(9) [1891] A. C. 325.
(10) 23 O. R. 619.
(11) Cass. Dig. (2 ed.) 213.
(12) 6 Can. S. C. R. 482.
(13) 18 Can. S. C. R. 222.

relieved from their responsibility for the accident which they might have prevented by covering the shaft and set-screw as required by the Factories Act. See also 20 Laurent, no. 488.

TASCHEREAU J. (dissenting.) — The respondent's action is based on the ground that while employed as a workman in appellant's establishment, he, on July 31st, 1896, was ordered to mount a scaffolding and put in place a piece of timber near a shaft which was then in motion, and that, while so doing, through appellant's negligence in not having the shaft properly covered, the respondent's foot was caught in the machinery and the little toe of his left foot torn off, necessitating amputation of a part of the foot, and rendering him lame for life. The damages are set at $4,000.

The appellant pleaded a general denial, and an exception in which it was alleged that the respondent had been employed by the company for some time as a general handy man; that he was generally careless and imprudent in performing his duties; that the scaffolding on which he was working at the time of the accident was a temporary structure some eleven feet from the floor; that the shaft was visible to anybody working on the scaffolding, and that if respondent was injured it was due solely to his own imprudence, negligence and fault.

It appears by the evidence that the accident occurred under the following circumstances:

Certain repairs having to be made in the appellant's slaughter house and pork packing establishment, at Hull, P.Q., it became necessary for that purpose to erect a temporary scaffolding eleven feet from the floor and about seven feet from the roof. That was done by the respondent himself, with one Moore and one St. Denis.

1898

GEORGE MATTHEWS COMPANY v. BOUCHARD.

Taschereau J.

Touching one end of the scaffolding, which was fourteen feet square, was the main-shaft, and on the main-shaft, a collar to keep it from sliding; the collar was fixed to the shaft by a set-screw, the head of which protruded. While working with Moore on the scaffolding and lifting a piece of timber, the respondent pushed his foot too near the end of the shaft, so that it was caught by the set-screw and badly crushed.

The witnesses were not heard in the presence of the judge who rendered the judgment of the Superior Court condemning appellants to pay respondent $1,323, which judgment was confirmed by the Court of Appeal, Mr. Justice Bossé dissenting.

I am of opinion that there is error in these judgments and that the appeal should be allowed. There is no evidence whatever that the negligence of the company, assuming negligence to be proved, caused the accident in question, and an affirmance of the condemnation against it would unquestionably be at variance with our own jurisprudence. *Tooke* v. *Bergeron* (1); *Burland* v. *Lee* (2); *Canada Paint Company* v. *Trainor* (3). The trial judge does not find that the accident was caused by the company's negligence. He simply finds two facts, 1st, the accident, 2ndly, the negligent act of the company, without connecting the one with the other in any way whatever. It seems to be taken for granted in the courts below that because there was an accident, and because there was an act of negligence, it follows that the plaintiff has proved his case. Now, that is not the law. He had further to prove clearly that the accident was due to the negligent act charged, and he has not done it. The evidence might be consistent with his theory, but it is equally consistent, to say the least, with the theory that the accident was due to his own careless-

(1) 27 Can. S. C. R. 567. (2) 28 Can. S. C. R. 348.
(3) 28 Can. S. C. R. 352.

1898

GEORGE MATTHEWS COMPANY v. BOUCHARD.

Taschereau J.

ness, and it is a rule that where the evidence is as consistent with one state of facts as with another it proves neither. The negligence of the appellant did not justify respondent's carelessness and imprudence, and the evidence is all one way, to use the expression of one of the witnesses that "there was no reason for a man meeting with an accident except through his own carelessness." The accident, it is true, would not have happened if this shaft at that spot had been covered, but it is as clear that it would not have happened if respondent had used ordinary care and prudence. In *Tooke* v. *Bergeron* (1), if the machinery there in question had been protected by a board the accident would not have happened; yet, the action was dismissed because the victim's own act was the direct cause of the accident. That is a precisely similar case. Contributory negligence by the defendant is unknown in law as a ground to support a claim of this nature, where the accident would not have happened but for the claimant's own want of ordinary prudence. *Volenti non fit injuria* is the rule under the civil law as it is under the English law. For instance, in France, where by the collision of two waggons during the night, one of the two drivers has been hurt, he cannot, on the ground that the other did not leave him half of the roadway, according to the regulations, recover damages against him, if he himself did not carry the proper lights on his waggon (2). And, in Louisiana, it is now well settled that if the party injured might have avoided the accident by a reasonable amount of prudence, he cannot recover damages. *Mercier* v. *New Orleans and Carrollton Railroad Company* (3); *Schwartz* v. *Crescent City Railroad Company* (4); *Woods* v. *Jones et al* (5).

(1) 27 Can. S. C. R. 567.
(2) Sourdat, Resp. No. 660.
(3) 23 La. An. 264.
(4) 30 La. An. 15.
(5) 34 La. An. 1086.

1898

GEORGE MATTHEWS COMPANY v. BOUCHARD.

Taschereau J.

Here, there was no danger whatever on the platform in question for a man of ordinary prudence. It was large, well built, and well lighted, and respondent, better than any one else, knew of the common sense care required from any one working upon it, as he himself had placed the set-screw where it was when the accident happened.

We ruled in *Tooke* v. *Bergeron* (1) that where an employee sustains injuries in a factory through coming in contact with machinery, the employer, though he may be in default from not covering that machinery as required by the statute, is not liable in damages, unless it is shown that the accident by which the injuries were caused was directly due to his neglect. I feel bound by that ruling to hold here that appellant is not liable because not only it does not appear that the accident in question was directly due to their neglect, but it, on the contrary clearly appears that but for respondent's want of prudence and ordinary care, the accident would not have happened.

The judgment of the majority of the court was delivered by:

GIROUARD J.—The principles governing actions like the present one are very well known; they have been laid down by this court in several cases and more particularly in *The Montreal Rolling Mills Company* v. *Corcoran* (2); and *Tooke* v. *Bergeron* (1). The rule of law is therefore well established that no employer is responsible for his fault towards an employee, unless the latter proves that it is the immediate, necessary and direct cause of the injury he sustains. That rule is embodied in article 1053 of the Civil Code of Quebec; it is one of almost universal law among civilized nations, as well under the civil law as under the common law of England, a proposition which the

(1) Can. S. C. R. 567. (2) 26 Can. S. C. R. 595.

authorities quoted in *The Montreal Rolling Mills Company* v. *Corcoran* (1) fully establish. It has, however, been recently assailed with great vigour by eminent jurists, and among others Labbé, Prosper Staer, Gibon, Hubert-Valleroux and Béchaux, as being unjust and unfair to the workingman who often finds it difficult and sometimes impossible to give a true account of the accident; but in no less than ten or twelve decisions, which have reached us since *The Montreal Rolling Mills Company* v. *Corcoran* (1) was decided, the old rule has been re-affirmed most emphatically by the highest courts of France; Cass. 12 Dec. 1893, Pand. Fr. '94, 1,507; Cass. 6th Fev. 1894; ibid. '94, 1,519; Cass. 5 Avril, 1894, ibid. '95, 1,90; Orléans, 17 fev. 1894, Douai, 21 fev. 1894, ibid. '94, 2,140; Paris, 4 Avril et 27 juillet, 1894, ibid. '95, 2,209; Cass. 7 aout, 1895, ibid. '95, 1,485; Cass. 15 juillet, 1896, et 13 janv. 1897, ibid. '97, 1,513. These two last *arrêts* have been accepted as having settled the French jurisprudence, and no hope of a remedy is entertained except by applying to the legislature. The whole situation is carefully summarized in the interesting annotations of Mr. Fernand Chesnay to the reports of the *arrêts* (2). The learned jurist concludes at page 517:

Il est constant que le patron ne peut être déclare responsable de l'accident dont a été victime son ouvrier, si celui-ci n'établit pas de la façon la plus certaine, en premier lieu, que son patron a commis une faute, une négligence, une imprudence, une contravention aux lois et règlements, et, en second lieu, que c'est bien cette faute qui a occasionné l'accident, qu'il existe réellement entre la faute et l'accident un rapport de cause à effet. Si ce dernier élément de la responsibilité du patron fait défaut, ou s'il existe un doute sur le point de savoir si l'accident doit être attribué a la faute du patron, aucune indemnité n'est due à l'ouvrier. C'est ce qu'à décide avec raison la Cour de Cassation dans les arrêts du 15 juillet, 1896, et du 13 janvier, 1897, que nous annotons.

(1) 26 Can. S. C. R. 595. (2) Pand. Fr. '97, 1,513.

1898

GEORGE MATTHEWS COMPANY v. BOUCHARD.

Girouard J.

Finally, with regard to the "*contravention aux lois et reglements*" or the police regulations, it must be noticed that the French laws, like the Factories Acts and other similar statutes in force in England, Scotland, Ontario and other British colonies are very different from the Quebec Act; they do not contain any such enactment as section thirty-seven or article 3053 of the Quebec Revised Statutes, which declares in express terms that its provisions are not intended to modify "in any manner" the civil responsibility of the employer towards his employee.

Now, has the plaintiff proved that the defendant has been guilty of negligence which was certainly the cause of the accident? The evidence adduced by him is weak; it is urged by the appellant, and not without reason, that his own imprudence was the primary cause of it; and if we are called upon to reverse a decision rendered in favour of the appellant, we should probably decline to do so; but we are far from being satisfied that the judgment appealed from is clearly wrong; there is some evidence of neglect on the part of the employer, which two courts have considered as having caused the injury sustained, and in such a case the jurisprudence of this court is well settled that we would not disturb the finding of these two courts. The Superior Court and the Court of Appeal, almost unanimously, have found that the accident was due to the fault of the defendant

in not either covering the shaft temporarily with boards, or by not disconnecting it so as to stop it, or by not stopping altogether the whole machiney whilst plaintiff and the other men were required to work over and near the said shaft.

Witness Blondin says that in some of the mills in Hull (where the accident happened), and he mentions those of Mr. Eddy, the shafts are generally covered, and he adds:

1898

GEORGE MATTHEWS COMPANY v. BOUCHARD.

Girouard J.

Quand ils ne ne sont pas couverts, les machines sont arretées quand une personne passe dans une place dangereuse.

The position of the respondent was undoubtedly dangerous, but it is to be regretted that, with regard to the practice prevailing among mill-owners in Hull, the evidence is not more full and conclusive, although easily obtainable. The dangerous position of the shaft was, in the opinion of the official inspector, Guyon, the cause of the accident, and although it is only the evidence of an expert, it is entitled to a great deal of weight, especially as there is in fact no clear evidence of the direct and immediate cause of the accident.

There is also some evidence that the year previous, in 1895, Mr. Guyon had called the attention of the defendant to the unprotected and defective condition of the shaft, although this can only be inferred from his testimony, his letter written at the time to the appellant and intended to be filed of record as exhibit "Y" to complete it, not being in the printed case before us, but it is proved that his recommendations, whatever they were, were only carried out in part, a fact he ascertained on a subsequent visit, made after the accident, in 1896.

Manufacturers should realize that it is in their interest to comply with the precautionary measures adapted by their neighbours in similar establishments or suggested by the recognized authority, although their default may only subject them to the penalties or imprisonment; in doing so, however, they may rest assured that they will save often troublesome and expensive litigation, sometimes irreparable injury, and in some cases, unfortunately too frequent, valuable lives.

Upon the whole and all the circumstances of the case being duly weighed, we think, but not without

1898

GEORGE MATTHEWS COMPANY v. BOUCHARD.

Girouard J.

some hesitation, that the judgment of the two courts below should be confirmed, and the appeal is dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *Arthur McConnell.*

Solicitor for the respondent: *A. X. Talbot.*

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1898

*May 16, 17.
*June 14.

## GAUTHIER *v.* JEANNOTTE.

*Libel—Slander'— Privileged statements—Public interest — Charging corruption against political candidate—Justification—Challenging suit—Costs.*

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (1), which reversed, but without costs, the judgment of the Superior Court, District of Montreal, maintaining the plaintiff's action for libel and slander and condemning the defendant to pay one hundred dollars damages with costs as of an action of that class.

The circumstances under which the action was brought were as follows:

The plaintiff and defendant were rival candidates at an election of a member to represent the County of L'Assomption in the House of Commons of Canada, and during a public meeting of the electors at which both candidates were present the defendant stated to the meeting that he had bribed the plaintiff when he was presenting himself as a candidate, on the occasion of a former election for the Provincial Legislature, to retire from the field for a sum of money he had paid to him. The defendant afterwards caused this state-

PRESENT:—Sir Henry Strong, C.J., and Taschereau, Sedgewick, King and Girouard JJ.

(1) Q. R. 6 Q. B. 520.

ment to be printed in a newspaper, and on a separate "dodger" or fly-sheet, which was circulated in large numbers through the constituency, with a printed challenge to the defendant and others implicated to justify their innocence of the charges made by taking an action for damages in case they were not guilty, and offering at the same time to make a deposit to cover the costs of suit. At the trial before Curran J. the plaintiff recovered a verdict which the Court of Queen's Bench set aside.

THE CHIEF JUSTICE was of opinion that the appeal should be allowed and the judgment of Curran J. restored.

TASCHEREAU J.—Cet appel doit être renvoyé. Nous n'avons rien à ajouter aux remarques du savant juge en chef de la cour d'appel telles que publiées dans le dernier numéro des rapports judiciaires (1). L'analyse des faits de la cause y est complète et le raisonnement inattaquable. Qu'il nous suffise de dire ici que Jeannotte ne devra pas, parce qu'il obtient le renvoi de l'action, croire qu'il échappe avec honneur de cette lutte devant les tribunaux. Dans un des paragraphes de son plaidoyer il réclame le droit de dire publiquement de Gauthier qu'un candidat qui reçoit une somme d'argent pour se retirer d'une lutte électorale se vend et fait un acte déshonorant. Avec la cour d'appel, nous lui concédons ce droit, mais qu'il n'oublie pas que tout aussi déshonorant est l'acte de celui qui achète ce candidat et de ses complices.

L'appel est renvoyé, mais sans frais. Les deux parties vont peut être maintenant comprendre qu'elles auraient dû pour plusieurs raisons éviter ce procès.

SEDGEWICK, KING and GIROUARD JJ. concurred in the opinion that the appeal should be dismissed without costs. *Appeal dismissed without costs.*

*Béique Q.C.* for the appellant.

*Bisaillon Q.C.* for the respondent.

(1) Q. R. 6 Q. B. 520.

1898

*May 20.

*June 14.

PAUL F. BOULTON AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

LOUISA L. BOULTON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Estoppel—Conveyance by married woman—Agreement—Recital.*

B., a married woman, in order to carry out an agreement between her husband and his creditors consented to convey to the creditor a farm, her separate property, in consideration of the transfer by her husband to her of the stock and other personal property on, and of indemnity against her personal liability on a mortgage against, said farm. The conveyance, agreement and bill of sale of the chattels were all executed on the same day, the agreement, to which B. was not a party, containing a recital that the husband was owner of the said chattels but giving the creditor no security upon them. The chattels having subsequently been seized under execution against the husband it was claimed, on interpleader proceedings, that the bill of sale was in fraud of the creditor.

*Held*, affirming the decision of the Court of Appeal, that the recital in the agreement worked no estoppel as against B.; that as it appeared that the husband expressly refused to assign the chattels to his creditor there was nothing to prevent him from transferring them to his wife, and that the Court of Appeal rightly held the transaction an honest one and B. entitled to the goods and to indemnity against the mortgage.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of Mr. Justice Rose at the trial in favour of the defendants.

The material facts of the case are sufficiently set out in the above head-note and in the judgment of the court.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and King JJ.

1898

BOULTON v. BOULTON.

*Wallace Nesbitt* and *W. J. Clarke* for the appellants.

*O'Flynn* for the respondent.

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—I am of opinion that the judgment of the Court of Appeal in this case was entirely right.

The respondent, Louisa Boulton, was the owner in her own right of forty acres of land part of the north half of lot 14, in the 7th concession of Sydney. This is the common case of both parties.

This property was subject to a mortgage to the Messrs. Biggar. On the 25th of September, 1891, the respondent in compliance with the earnest entreaties of her husband George A. Boulton, conveyed the equity of redemption in this land to the appellant Paul Boulton, a brother of the respondent's husband, in order to carry out an agreement of the same date entered into between George A. Boulton and Paul Boulton which had for its principal object the settlement of a debt due from the former to the latter.

It is established by evidence of the most satisfactory kind that the respondent by way of valuable consideration for thus parting with her land stipulated with her husband that he was to transfer to her certain chattel property consisting principally of farm stock and other personal property then upon the farm, and also for indemnity against her personal liability on the mortgage held by the Biggars. It is also clear that George A. Boulton expressly refused when pressed to do so to assign this chattel property to his brother Paul as part of the arrangement for a settlement of the debt.

In pursuance of the agreement under which the erspondent conveyed her equity of redemption, George

1898

BOULTON v. BOULTON.

The Chief Justice.

A. Boulton made a bill of sale of the goods in question to the respondent on the same day as that on which the agreement with Paul was executed. The principal question in the cause was as to the *bona fides* of this assignment.

The goods in question having been afterwards seized by the sheriff and interpleader proceedings having been taken, it was asserted that the bill of sale to the respondent was in fraud of Paul. The agreement, although it recited that George was the owner of these goods, gave Paul no security upon them or rights in them and the respondent was not a party to the agreement.

This recital (as a majority of the Court of Appeal have held) manifestly worked no estoppel as regards the respondent and was in fact true. There was moreover nothing in the recital of this fact, and more especially in view of the refusal already mentioned of George to give his brother any security on the goods, to estop George himself from dealing with them in the way he did, namely, by assigning them to his wife as part of the consideration for the conveyance by her of the land to Paul; indeed he could not honestly have refused to carry out his agreement to do so.

Under this state of facts it would be impossible as it seems to me to hold that the bill of sale was fraudulent, and so to take away from the respondent the principal consideration she got for her land. I think the transaction an honest one and that it has been properly upheld by the Court of Appeal.

The only other question is as to the agreement o indemnify the respondent against personal liability under the covenant in the Biggar mortgage. This was, in addition to the chattels, part of the consideration which the respondent had stipulated for in the conveyance of her land.

1898

BOULTON v. BOULTON.

The Chief Justice.

The Court of Appeal has held that she was entitled to this indemnity, and in respect of it the court has given her the usual vendor's lien on the land. This it seems was also right.

Both Mr. Justice Rose and the Court of Appeal have held that the mortgage executed by Paul in favour of Hiram Boulton and the conveyance of the equity of redemption to Alexander Boulton were fraudulent as against the respondent's claim to a lien for this indemnity.

The only other matter in question was the damages which the Court of Appeal has referred it to the master to assess.

The appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants: *W. J. Clark.*

Solicitor for the respondents: *F. E. O'Flynn.*

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MARGARET WALLACE AND WILLIAM WALLACE, HER HUSBAND (DEFENDANTS)..... } APPELLANTS;

AND

PAUL LEA (PLAINTIFF).....RESPONDENT.

1897

*Nov. 9, 10.

1898

*June 14.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Married woman—Separate property—Conveyance—Contracts—C. S. N. B. c. 72.*

Sec. 1 of C. S. N. B. ch. 72, which provides that the property of a married woman shall vest in her as her separate property, free from the control of her husband and not liable for payment of his debts, does not, except in the case specially provided for, enlarge her power for disposing of such property or allow her to enter into contracts which at common law would be void. *Moore* v. *Jackson* (22 Can. S. C. R. 210) referred to. *Lea* v. *Wallace et al.*, (33 N. B. Rep. 492) reversed.

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*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

1897

WALLACE v. LEA.

APPEAL from the decision of the Supreme Court of New Brunswick (1), reversing the judgment of the Chief Justice in favour of the defendants.

The following statement of facts and questions at issue in the case are taken from the dissenting judgment of Mr. Justice Hanington in the court below:

The plaintiff claimed that, at the request of the female defendant, and on the credit of her separate property, he furnished her with lumber and other material, used in the reconstruction and repairing of a hotel, on her real estate, in Moncton, to the amount unpaid in all of about $698. A part of the amount, $89.90, is made up of materials furnished one Thorne, who was carrying on the work before it was taken in hand by the defendant personally. One Lounsbury was originally the contractor with the female defendant for the construction of the work, including materials. He, after a part performance of his contract, being unable to complete it, made an assignment and gave up the work. Thorne then went on with the job for some time, ordering the materials from the plaintiff, amounting to the sum of $89.90, and then abandoned it. After Thorne gave it up the female defendant continued the work herself, and it is for materials furnished her during such construction, (including Thorne's work), that the plaintiff claimed payment out of her separate estate. The female defendant disputed the fact of having ordered any of the goods for which the plaintiff sought to recover, contended that she was in no way liable for the goods Thorne got, and that the only goods she got, or authorized to be had at the plaintiff's, were paid for by her.

The cause came down for hearing before Mr. Justice Tuck, sitting in equity, who found that the female

(1) 33 N. B. Rep. 492.

defendant was not liable for the amount of the goods furnished to Thorne; that the balance of goods, amounting to $598.81, were ordered by her and furnished by the plantiff, on the credit of her separate property, but that the plaintiff was not entitled to a decree for the payment thereof out of such separate property, as her tenure of, or estate or property in, it under the Act then in force or otherwise, was not such as would raise any liability in law or equity against either her real or personal property, and ordered that the bill should be dismissed. The property against which the decree was sought is real estate which came to the female defendant partly by inheritance and partly by purchase. * * * * *

The principal question is: Was the learned judge, as the law then stood, in error in refusing to decree that the value of the goods, which he found had been furnished by the plaintiff to the female defendant, should be paid for out of her own property? Since the decree, the Provincial Legislature passed an Act whereby the property of a feme covert would be liable in a case like the present, and the question had to be determined, whether or not it was so liable before such enactment.

*Pugsley* Q.C. and *Teed* for the appellants. The property of the female defendant was not and is not settled to her separate use by any deed, will or settlement, but falls within the provisions of chapter 72 of the Consolidated Statutes of New Brunswick, relating to the property of married women, and the effect of the statute is not to make the property of a married woman property held to her separate use within the meaning or principles of courts of equity, or to make it liable to the burdens which equity imposes upon such estates; *Fitzpatrick* v. *Dryden* (1); *Re Cleveland*

(1) 30 N. B. Rep. 558 at p. 582.

1897

WALLACE v. LEA.

(1); *Lamb* v. *Cleveland* (2); *Pourrier* v. *Raymond* (3); *Taylor* v. *Meads* (4); *Royal Canadian Bank* v. *Mitchell* (5); *Chamberlain* v. *McDonald* (6): *Mitchell* v. *Weir* (7); *Wright* v. *Garden* (8); *Kraemer* v. *Glass* (9); *Moore* v. *Jackson* (10).

The property of the wife, under chapter 72, is entirely the creation of the statute, and her power of disposition must be governed by the statute itself, and there is no analogy between the power of disposition of a woman under the statute and a woman having property to her separate use in equity, with power of anticipation. The judgment of Sir George Jessel, in the case of *Howard* v. *The Bank of England* (11), is not applicable to the Act now presented for construction; he was dealing with legislation in which the husband's rights were clearly taken away, and in which there were no limitations upon the wife's disposition. Even if the statute should be held to have created an estate to the separate use of the woman as fully as recognized in courts of equity, yet all property held to the separate use is not chargeable with the payment of debts,—it must be with full power of an anticipation. If there be a restraint upon that, or a limitation to a particular mode of disposition, the property can be charged only in the manner pointed out by the limitation. *London Chartered Bank of Australia* v. *Lempriere et al.* (12); *Pike* v. *Fitzgibbon* (13). The provision in section one that the real property shall not be conveyed, encumbered or disposed of while she lives with her husband, except by her being a party to the instru-

(1) 29 N. B. Rep. 70.
(2) 19 Can. S. C. R. 78.
(3) 1 Han. N. B. 520.
(4) 11 Jur. N. S. 166.
(5) 14 Gr. 412.
(6) 14 Gr. 447.
(7) 19 Gr. 568.
(8) 28 U. C. Q. B. 609.
(9) 10 U. C. C. P. 470.
(10) 22 Can. S. C. R. 210.
(11) L. R. 19 Eq. 295.
(12) L. R. 4 P. C. 572.
(13) 17 Ch. D. 454.

ment duly acknowledged, &c., is a distinct and positive restraint or fetter upon the disposition of the real estate, at least in any mode other than that so pointed out; *Mitchell* v. *Weir* (1), per Strong V. C.; *Moore* v. *Jackson* (2), at page 225, per Strong C J.

The appellant contends that if the land be conveyed under the decree now made, it will be "disposed of" in a manner contrary to the express term of the statute of which the evident scope was to protect the property of the wife whilst she lived with her husband.

The statute neither removed her disability during such peried nor improved the liability for debts upon her estate. No *jus disponendi* is given to the woman by the first section of the Act.

We also rely upon the decisions in *Chamberlain* v. *McDonald* (3); *Mitchell* v. *Weir* (1); *Royal Canadian Bank* v. *Mitchell* (4); *Pourrier* v. *Raymond* (5); *Wright* v. *Garden* (6).

*Powell* Q.C. for the respondent. The respondent contends that the price of lumber and material obtained by the female defendant on the credit of property which accrued to her after marriage should be chargeable upon and paid out of such property which by the chapter seventy-two of the Consolidated Statutes of New Brunswick, vested in her and was owned by her as her separate estate, and is of the character of separate estate which in equity may be charged with the debts of a married woman. In construing the first section, the words "the real and personal property belonging to a woman before or accruing after marriage, except such as may be received from her husband while married, shall vest in her and be owned by her as her separate estate," make all property

(1) 19 Gr. 568.
(2) 22 Can. S. C. R. 210.
(3) 14 Gr. 447.
(4) 14 Gr. 412.
(5) 1 Han. N. B. 520.
(6) 28 U. C. Q. B. 609.

1897

WALLACE v. LEA.

coming within the section separate property in equity, and attaches to it in equity all the incidents that attach to equitable separate property vested in and owned by her; *In re Poole's Estate, Thompson* v. *Bennett* (1), but gives to the married woman no separate legal rights either *disponendi* or of contract, or of action with reference thereto. See remarks by Strong C.J. in *Moore* v. *Jackson* (2), at page 218, and also *Howard* v. *The Bank of England* (3), per Jessel M.R. The contention that because the estate is separate estate created by statute it is a new creature of statute, and not as such possessed of the peculiar properties of separate estate in equity, is directly in variance with *In re Poole's Estate. Thompson* v. *Bennett* (1); *Butler* v. *Cumpston* (4), and *Sanger* v. *Sanger* (5).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—I am of opinion that this appeal must be allowed.

Mr. Justice Hanington in a very full and able judgment has set forth the reasons for a similar conclusion, and as I entirely agree in his opinion I need not repeat at length the arguments brought forward by him in which I fully concur.

In the case of *Moore* v. *Jackson* (2) I had occasion to consider a question similar to this, on an appeal from the Court of Appeal for the Province of Ontario. The judgment in that case was not, it is true, an authority binding the learned judges of the court below in the present case, inasmuch as it arose under the statute law of another Province in some respects not identical with the enactment now in question, and I do not refer to it as a controlling authority. In my judgment in

(1) 6 Ch. D. 739.
(2) 22 Can. S. C. R. 210.
(3) L. R. 19 Eq. 295.
(4) L. R. 7 Eq. 16.
(5) L. R. 11 Eq. 470.

1898

WALLACE v. LEA.

The Chief Justice.

*Moore* v. *Jackson* (1) however, I examined the general rules of interpretation applicable to legislation such as that we have to apply here, and I therefore refer to it as embodying the reasons why I think the judgment now under appeal is not sustainable.

The first section of chapter 72 of the Consolidated Statutes of New Brunswick does, it is true, provide that the property of a married woman shall vest in her and be owned by her as her separate property, but while this indicates that her enjoyment of her property shall be free from the control of her husband, and that it shall not be liable to her husband's debts, it does not indicate that she shall have the power of binding it, encumbering and disposing of it as if she were an unmarried woman. So far from this being the case it contains an express provision that she can only convey it by a deed "duly acknowledged as provided by the laws for regulating the acknowledgements of married women," thus conclusively shewing that her *jus disponendi* was not enlarged but remained as it was before the Act, requiring a conveyance duly acknowledged, to which her husband would be a necessary party. This certainly does not do away with the disability of a married woman to alienate her freehold lands or to enter into contracts which at common law would be absolutely void. Again, it is apparent that the legislature did not intend any such change in the law from the circumstances that the same section provides for her power of disposition as if she were a *feme sole* in the case of desertion by her husband, a power which is not conferred generally but is confined to that particular case.

Further, the provision at the end of the section that her separate property should be liable for her debts

(1) 22 Can. S. C. R. 210.

1898

WALLACE v. LEA.

The Chief Justice.

contracted before marriage and for judgments recovered against her husband for her torts whilst under coverture warrants the conclusion that the liability in contracts entered into during coverture was not intended to be imposed, and that her property was not liable to judgments and execution except in the cases specially provided for, an inference which is strengthened by the change in the law effected by the legislation of 1895 enacted during the pendency of this suit.

As the exhaustive judgment of Mr. Justice Hanington covers all the grounds referred to, and as from the recent changes in the law the question here raised is not likely to be of frequent occurrence, I do not feel called upon to do more than indicate what I consider conclusive grounds for not upholding the judgment under appeal.

The appeal must therefore be allowed with costs, and the decree of the learned Chief Justice dismissing the bill must be restored, with costs to the appellant in all the courts.

*Appeal allowed with costs.*

Solicitors for the appellants: *Teed Hewson & Hanington.*

Solicitor for the respondent: *David I. Welsh.*

FREDERICK H. SMITH, TRUSTEE (PLAINTIFF) ..... } APPELLANT;

AND

THE SAINT JOHN CITY RAILWAY COMPANY AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

1898

*May 9, 10.

June 14.

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THE CONSOLIDATED ELECTRIC COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

THE ATLANTIC TRUST COMPANY AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

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THE CONSOLIDATFD ELECTRIC COMPANY (DEFENDANT) ..... } APPELLANT.

AND

NATHAN D. PRATT AND OTHERS PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Appeal—Discretion of court appealed from—Costs.*

It is only when some fundamental principle of justice has been ignored or some other gross error appears that the Supreme Court will interfere with the discretion of provincial courts in awarding or withholding costs.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the order of Hanington J. who decreed that the three suits had been consolidated by order of the late Judge in Equity, and that the costs should be taxed on the basis of such consolidation.

Mr. Justice Palmer, the late Judge in Equity, when the cases first came before him for hearing directed a

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1898

SMITH v. THE SAINT JOHN CITY RAILWAY COMPANY.

THE CONSOLIDATED ELECTRIC COMPANY v. THE ATLANTIC TRUST COMPANY.

THE CONSOLIDATED ELECTRIC COMPANY v. PRATT.

consolidation, but no order was taken out by the plaintiffs. Judge Palmer having retired the hearing was proceeded with before Mr. Justice Hanington who gave effect to the previous direction and ordered the costs to be taxed as on a consolidated case. The full court affirmed this order and an appeal was then taken to this court.

*Pugsley* Q.C. for the appellants. There was no formal order for consolidation issued and Judge Palmer could not have directed it as separate pleas were made in the three suits.

An appeal will lie in these cases though they involve a question of costs only as the orders for taxation were made in error as to the facts and in violation of the rules of practice; *Archbald* v. *Delisle* (1). *In re Chennell*, *Jones* v. *Chennell* (2).

The order was not made by Mr. Justice Hanington in the exercise of a judicial discretion and if it were an appeal would lie, as sec. 27 of The Supreme Court Act does not apply to decretal orders in equity. And see Daniels' Chancery Practice, 6 ed. pp. 1271 and 1274.

*W. Cassels* Q.C., *Stockton* Q.C. and *Tilley* for the several respondents. The order for consolidation was properly granted on application of the plaintiffs. *Martin* v. *Martin & Co.* (3).

There is no appeal on a question of costs. *The Managers Metropolitan Asylum District* v. *Hill* (4); *McGugan* v. *Mc-Gugan* (5).

The judgment of the court was delivered by:

SEDGEWICK J.—We are all of opinion that these appeals should not be allowed.

They relate solely to an order of Mr. Justice Hanington asking that the costs of several actions should be taxed as if these actions had been consolidated by a formal order as they were intended to be as evidenced

(1) 25 Can. S. C. R. 1.
(2) 8 Ch. D. 492.
(3) [1897] 1 Q. B. 429.
(4) 5 App. Cas. 582.
(5) 21 Can. S. C. R. 267.

1898

SMITH v. THE SAINT JOHN CITY RAILWAY COMPANY.

THE CONSOLIDATED ELECTRIC COMPANY v. THE ATLANTIC TRUST COMPANY.

THE CONSOLIDATED ELECTRIC COMPANY v. PRATT.

Sedgewick J.

by the verbal direction of Mr. Justice Palmer then sitting as Judge in Equity and hearing the cases.

It is only in extreme cases where some fundamental principle of justice has been ignored, or where some gross error appears that this court will interfere with the discretion of provincial courts in awarding or withholding costs. This is not such a case. For my own part I think the order of Mr. Justice Hanington was properly made. There was no doubt that Mr. Justice Palmer when at an early stage he heard these cases directed that they should be consolidated and that direction was a matter of record.

If the appellants, they having the conduct of the several cases, did not choose to take out the order they have only themselves to blame, and Mr. Justice Hanington was perfectly right in putting in formal shape what was the expressed intention of his predecessor.

The learned counsel for the appellants, it seems to us, gave a wider scope to the order appealed from than we think it bears. The taxing authority will doubtless tax him not only for all the disbursements in the three cases but for all work necessarily done over and above what would have been done had there been only one suit.

The appeal is dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants: *William Pugsley.*

Solicitor for the respondents, The St. John City Railway Company and others: *Arthur I. Trueman.*

Solicitor for the respondents, The Imperial Trust Company of Canada: *L. P. D. Tilley.*

Solicitor for the respondents, The Molsons Bank and New Brunswick Electric Company: *C. T. Coster.*

Solicitor for the respondent Pratt: *A. G. Blair.*

Solicitor for the respondent Hayward:

*H A. McKeown.*

1897
*Nov. 9.

## BAYNE ET AL. *v.* THE EASTERN TRUST COMPANY ET AL.

*Trustees -- Misappropriation—Surety — Knowledge by cestui que trust— Estoppel—Parties.*

APPEAL from the judgment of the Supreme Court of Nova Scotia (*sub nomine Eastern Trust Co.* v. *Forest et al.*) (1) *en banc* affirming the decision of Mr. Justice Meagher at the trial (1) in favour of the plaintiffs.

After hearing counsel for both parties the court dismissed the appeal for the reasons given in the court below but without delivering any judgment in writing.

*Appeal dismissed with costs.*

*Ross Q.C.* for the appellants.

*McInnes* for the respondent.

*PRESENT :—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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1898
*Mar. 18.

## THE CORPORATION OF THE COUNTY OF CARLETON.

*v.*

## THE CORPORATION OF THE CITY OF OTTAWA.

*Municipal corporation—Statute, construction of*—55 V. *c.* 42 *ss.* 397, 404 469, 473 (*Ont.*)—*City separated from county—Maintenance of court house and gaol—Care and maintenance of prisoners.*

APPEAL from the judgment of the Court of Appeal for Ontario (2), dismissing an appeal and a cross-

*PRESENT.—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

(1) 30 N. S. Rep. 173. (2) 24 Ont. App. R. 409.

1898

THE CORPORATION OF THE COUNTY OF CARLETON v. THE CORPORATION OF THE CITY OF OTTAWA.

appeal from the decision of Mr. Justice Rose affirming an award of arbitrators under the Municipal Act as to the costs of the care and maintenance of prisoners, and as to the use by the City of Ottawa of the Court House and Gaol of the Cunty of Carleton.

After hearing counsel on the part of the appellant, and without calling upon counsel for the respondent, the court dismissed the appeal with costs, but without giving any written reasons for judgment.

*Appeal dismissed with costs.*

*Chrysler* Q.C. for the appellant.

*O'Gara* Q.C. and *Wyld* for the respondent.

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## THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY *v.* RUDOLF.

1898

*May 5.

*June 14.

*Insurance, Marine—Partial loss on cargo—Stranding—Evidence for jury —Jury trial.*

APPEAL from a judgment of the Supreme Court of Nova Scotia *en banc* (1) refusing to set aside the verdict of a special jury in favour of the plaintiff.

After hearing counsel for both parties the court reserved judgment and on a subsequent day dismissed the appeal but without giving any written reasons for judgment.

*Appeal dismissed with costs.*

*Harris Q.C.* for the appellant.

*Newcombe Q.C.* for the respondent.

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*PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 30 N. S. Rep. 380.

## DRESCHEL ET AL. *v.* THE AUER INCANDESCENT LIGHT MANUFACTURING COMPANY.

1898

*May 12.
*June 14.

*Statute, construction of—Patent of invention—Expiration of foreign patent —"The Patent Act," R. S. C. c. 61, s. 8.—55 & 56 V. c. 24, s 1.*

APPEAL from a judgment of the Exchequer Court of Canada (1) which declared a certain patent of invention to be a good, valid and subsisting patent, and that it had been infringed by the defendants, and making absolute an injunction against the defendants in respect thereof with costs.

After hearing counsel for both parties the court reserved judgment and on a subsequent day dismissed the appeal with costs and without giving any written reasons for judgment.

*Appeal dismissed with costs.*

*Geoffrion Q.C.* and *Martin* for the appellants.

*Atwater Q.C.* and *Duclos* for the respondent.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

## ALLEY v. THE CANADA LIFE ASSURANCE CO.

1898

*May 14.
*June 14.

*Vendor and purchaser—Sale of leased premises—Lease, termination of—Art. 1663 C. C—Damages.*

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, (appeal side) (2), affirming the judgment of the Superior Court, District of Montreal (3), which dismissed the plaintiff's action with costs.

After hearing counsel for both parties the court reserved judgment and on a subsequent day dismissed the appeal with costs for the reasons stated by the judges in the Court of Queen's Bench, but without delivering any written reasons for judgment.

*Appeal dismissed with costs.*

*Lafleur* and *Lamothe* for the appellants.

*Falconer* for the respondent.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

(1) 6 Ex. C. R. 55. (2) Q. R. 7 Q. B. 293.
(3) Q. R. 7 Q. B. 294.

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC ..... APPELLANTS;

AND

THE DOMINION OF CANADA.....RESPONDENT.

1897
*Nov. 2,3,4.
1898
*June 14.

# *IN RE* COMMON SCHOOL FUND AND LANDS.

ON APPEAL FROM AN AWARD IN AN ARBITRATION RESPECTING PROVINCIAL ACCOUNTS.

*Constitutional law—B. N. A. Act, s. 142—Award of 1870, validity of—Upper Canada Improvement fund—School fund—B. N. A. Act, s. 109—Trust created by—Effect of Confederation on trust.*

The arbitrators appointed in 1870, under s. 142 of the B. N. A. Act, were authorized to "divide" and "adjust" the accounts in dispute between the Dominion of Canada and the Provinces of Ontario and Quebec, respecting the former Province of Canada. In dealing with the Common School Fund established under 12 V. c. 20 (Can.), they directed the principal of the fund to be retained by the Dominion and the income therefrom paid to the provinces.

*Held*, that even if there was no ultimate "division and adjustment," such as the statute required, yet the ascertainment of the amount was a necessary preliminary to such "division and adjustment," and therefore *intra vires* of the arbitrators.

*Held* further, that there was a division of the beneficial interest in the fund and a fair adjustment of the rights of the provinces in it which was a proper exercise of the authority of the arbitrators under the statute.

By 12 V. c. 200, s. 3 (Can.), one million acres of the public lands of the Province of Canada were to be set apart to be sold and the proceeds applied to the creation of the "Common School Fund" provided for in sec. 1. The lands so set apart were all in the present Province of Ontario.

*Held*, that the trust in these lands created by the Act for the Common Schools of Canada did not cease to exist at Confederation, so that

PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

the unsold lands and proceeds of sales should revert to Ontario, but such trust continued in favour of the Common Schools of the new Provinces of Ontario and Quebec.

In the agreement of reference to the arbitrators appointed under Acts passed in 1891 to adjust the said accounts questions respecting the Upper Canada Improvement Fund were excluded, but the arbitrators had to determine and award upon the accounts as rendered by the Dominion to the two provinces up to January, 1889.

*Held*, that the arbitrators could pass upon the right of Ontario to deduct a proportion of the schools lands the amount of which was one of the items in the accounts so rendered.

APPEAL from an award of the arbitrators appointed to adjust the accounts between the Dominion of Canada and the Provinces of Ontario and Quebec respectively and between the said provinces.

The arbitrators were appointed under authority of statutes passed by the Dominion Parliament and legislatures of the said provinces in 1891, namely, 54 & 55 Vict. ch. 6 (D); 54 Vict. ch. 2 (Ont.); and 54 Vict. ch. 4 (Que.) These statutes were identical in terms that passed by the Dominion Parliament containing the following provisions:—

"An Act respecting the settlement of accounts between the Dominion of Canada and the Provinces of Ontario and Quebec, and between the said provinces."

"Whereas certain accounts have arisen or may hereafter arise in the settlement of the accounts between the Dominion of Canada and the Provinces of Ontario and Quebec, both jointly and severally, and between the two provinces, concerning which no agreement has hitherto been arrived at; and whereas it is advisable that all such questions of account should be referred to arbitration; Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:"

"1. For the final and conclusive determination of such accounts, the Governor General in Council may

unite with the Governments of the Provinces of Ontario and Quebec in the appointment of three arbitrators, to whom shall be referred such questions as the Governor General and the Lieutenant-Governors of the said provinces shall agree to submit."

"2. The arbitrators shall consist of three judges, one to be appointed by the Governor General in Council and one by each of the said Provincial Governments, and all three shall be approved of by each Government."

"3. The arbitrators shall not assume to decide any disputed constitutional question; but if any are raised they will note and report them with their award, but without delaying their proceedings."

"4. Any two of the arbitrators shall have power to make an award."

"5. The arbitrators, or any two of them, shall have power to make one or more awards, and to do so from time to time."

"6. The arbitrators shall not be bound to decide according to the strict rules of law or evidence, but may decide upon equitable principles, and when they do proceed on their view of a disputed question of law, the award shall set forth the same at the instance of either or any party. Any award made under this Act shall be, in so far as it relates to disputed questions of law, subject to appeal to the Supreme Court of Canada and thence to the Judicial Committee of Her Majesty's Privy Council, in case their Lordships are pleased to allow such appeal."

"7. In case of an appeal on a question of law being successful, the matter shall go back to the arbitrators, for the purpose of making such changes in the award as may be necessary, or an appellate court shall make any other direction as to the necessary changes."

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

"8. The appointment of the said arbitrators by Order in Council and their award in writing, shall be binding on Canada, save in case of appeal on question of law, in which case the final decision thereon shall be binding on Canada."

"9. In case of a vacancy by death or otherwise among the arbitrators, the same shall be filled in the same manner as the appointment was first made, any such appointment to be approved of by the other two Governments."

The Honourable John A. Boyd, Chancellor of Ontario; the Honourable Sir Louis Napoleon Casault, Chief Justice of the Superior Court of Quebec; and the Honourable George A. Burbidge, Judge of the Exchequer Court of Canada, were appointed arbitrators, in accordance with the provisions of the said statutes, and an agreement of submission was entered into on behalf of the three governments, which provided that the following, among other matters, should be submitted to them:

"1. All questions relating to or incident to the accounts between the Dominion and the Provinces of Ontario and Quebec, and to accounts between the two Provinces of Ontario and Quebec."

"2. The accounts are understood to include the following particulars:"

"(*a*) The accounts as rendered by the Dominion to the provinces up to January, 1889."

"(*b*) In the unsettled accounts between the Dominion and the two provinces the rate of interest and the mode of computation of interest to be determined."

"(*c*) The accounts as rendered by the Dominion to the two provinces up to January, 1889, to be determined upon."

* * * * * * * *

"(*h*) The ascertainment and determination of the amount of the principal of the Common School Fund, the rate of interest which would be allowed on such fund, and the method of computing such interest."

"(*i*) In the ascertainment of the amount of the principal of the said Common School Fund, the arbitrators are to take into consideration, not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold."

On this submission the arbitrators made and published an award in respect to the Common School Fund and Lands which, after formal recitals proceeded as follows:

"Now therefore we, the said arbitrators, exercising our authority to make an award at this time respecting some of such questions and to reserve others for further consideration, do award, order and adjudge in and upon the premises as follows:"

"1. That the sum held by the Government of the Dominion of Canada on the tenth day of April, 1893, as part of the principal of said Common School Fund, amounted to two million four hundred and fifty-seven thousand six hundred and eighty-eight dollars and sixty-two cents ($2,457,688.62), made up of the following sums, that is to say: 1st, the sum of one million five hundred and twenty thousand nine hundred and fifty-nine dollars and twenty-nine cents ($1,520,959.29), that at the Union of the Provinces came into the hands of the Government of Canada, and upon which interest has from time to time in the accounts referred to us been credited to the said Provinces; secondly, the sum of nine hundred and twenty-five thousand six hundred and twenty-five dollars and sixty-three cents ($925,625.63), for which, in 1889, the Government of

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

Ontario accounted to the Government of the Dominion; and thirdly, the sum of eleven thousand one hundred and three dollars and seventy cents ($11,103.70), for which the Government of Ontario accounted to the Government of the Dominion in the following year (1890)."

"From this finding Chief Justice Sir Louis Napoleon Casault dissents, he being of opinion that the sum then held by the Dominion Government as part of the principal of the said Common School Fund was greater than has been stated by an amount of one hundred and twenty-four thousand six hundred and eighty-five dollars and eighteen cents ($124,685.18), which sum in the said accounts has been deducted from the said fund and credited to the Upper Canada Improvement Fund."

"2. That the Province of Ontario is not liable out of the proceeds arising from the sale of the Crown Lands of the Province, other than the million acres of Common School Lands as set apart in aid of the Common Schools of the late Province of Canada, to contribute anything to the said Common School Fund."

"Mr. Chancellor Boyd dissents from so much of this finding as may imply that Ontario is under any liability in respect to the Common School Fund or lands."

"3. That, subject to certain deductions, the Province of Ontario is liable for the moneys received by the said province since the first day of July, 1867, or to be received from or on account of the Common School Lands set apart in aid of the Common Schools of the late Province of Canada."

"Mr. Chancellor Boyd dissents from this finding as to liability."

"4. That from the moneys received by the Province of Ontario since the first day of July, 1867, from or on account of the Common School Lands set apart in aid

of the Common Schools of the late Province of Canada, the Province of Ontario is entitled to deduct and retain the following sums as provided by the award of the 3rd of September, 1870, that is to say":

"First,—In respect of all such moneys, six per centum on the amount thereof for the sale and management of such lands."

"Secondly,—In respect of moneys arising from sales of such lands made between the fourteenth day of June, 1853, and the sixth day of March, 1861, twenty-five per centum of the balance remaining after the deduction of six per centum for the sale and management of such lands."

"Chief Justice Sir Louis Napoleon Casault dissents from so much of this finding as relates to the deduction in the cases mentioned of the twenty-five per centum on such balance."

"5. That in respect of the matters mentioned in the four preceding paragraphs, we the said arbitrators have proceeded upon our view of disputed questions of law."

"6. With reference to the Quebec Turnpike Trust debentures in which a part of the Common School Fund was invested, we do award, order and adjudge that there is in respect thereof no liability on the part of the Dominion to either of the provinces, or on the part of the Province of Quebec to the Province of Ontario, but that whatever sums may be realized from the principal moneys due on such debentures, or from the arrears of interest due thereon, on the first day of July, 1867, shall be added to and shall form part of the principal of the said Common School Fund, and that whatever sums may be realized for interest on such debentures that has accrued due since the first day of July, 1867, or which may hereafter accrue due shall be dealt with as income arising from such fund"

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

"7. With respect to the claim made by the Province of Quebec, that the Dominion is liable for interest on moneys received by the Province of Ontario from the sales of Common School Lands and retained by that province, we do award, order and adjudge that the Dominion is not liable therefor."

"8. And with respect to other questions and matters relating to the Common School Lands and Fund, we, the said arbitrators, do not now make any award, but reserve the same for further consideration."

Each of the said arbitrators published his reasons for the decision arrived at on the disputed questions of law dealt with in the said award, which reasons are as follows:

BOYD C.—"1. No claim exists on the part of Quebec, to have more lands set apart for Common School purposes than were actually set apart by Old Canada. Upper and Lower Canada, now Ontario and Quebec, were the constituents of the joint Province of Canada, and are bound by what was done, or what was left undone in this regard prior to Confederation. That the claim is a 'new one' does not for that reason bar it, but it goes a long way to discredit it; nor do I perceive any intrinsic merit in the claim which would justify us in taking it into further consideration."

"2. So far as Quebec claims to impeach the action of the first arbitrators in their award of 1870 touching the Upper Canada Land Improvement Fund, and as to what they have directed to be placed to the credit of that fund, presently and prospectively, I cannot see my way to interfere for many reasons. For one thing, the very subject matter is withheld from our jurisdiction by the terms of the reference. (See paragraph 5 of Deed of Submission of 10th April, 1893);"

"And, for another thing: Apart from the provisions of the first award of 1870, the Province of Quebec would have no *locus standi* to make any claim as to the Common School Fund out of which this Land Improvement Fund was segregated by the first arbitrators."

"3. The key to that award is the fact that all the fund was derived from land in Upper Canada, and that all the school lands were locally situate in Ontario and became or were retained as the property of Ontario on the dissolution of the Union. It was of grace to give any (much more a substantial) proportion of the future proceeds of those lands to Quebec, and the arbitrators could well modify the former proportion by withdrawing so much for the purposes of land improvement in the counties of the terrritory which furnish the lands. That was within the equity of the Act, Consolidated Statutes of Canada, Chapter 26, section 7, which provided for such a reserve being formed."

"4. But, again, if the first award is as to these lands, impeachable (as I think it is), consider the state of affairs when Old Canada ceased to exist: What became then of the Common School Fund? Now, it is not hypercritical to apply accurate rules of construction to the language used in the constituting Statute, 12th Victoria, Chapter 200, which was reserved for and obtained the Queen's Royal sanction. The Act recites that 'it is desirable to raise moneys from the public lands of this province (that is Canada) for the maintenance and support of Common Schools therein' (*i.e.*, in the Province of Canada). The same thought is repeated in the body of the Act, section 4, 'for the support, etc., of Common Schools in this Province.' Consolidated Statutes of Canada, Chapter 26."

"What became of these schools when Canada ceased to exist as a joint Province and became a new political

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

entity formed by the addition of other Provinces and established as the Dominion? There were then, in truth, no Common Schools in Canada. The existing schools became Common Schools in Ontario and Common Schools in Quebec, and not, therefore, the objects of the trust. The scheme of the Act and the scope of the trust was that public lands of Canada should support the Public Schools of Canada; but it does not therefore follow that the public lands of Ontario should help to support the Public Schools of Quebec, unless clear legislation to that effect is found. But none such can be found, for it is submitted that the general words of Section 109 of the Imperial Act 'subject to any trusts existing in respect thereof and to any interest other than that of the province in the same,' do not cover the case in hand. It is no answer to say that then there would be no trust remaining for the Common Schools of Ontario *quoad* the unsold lands—granted; but Ontario having all the lands could provide for her own schools."

"In this aspect the reason and the motive of the whole scheme of support for the Public Schools of Canada disappeared when the union of the provinces was dissolved and Ontario retained her lands out of which the fund had been created and was to be maintained. When there ceased to be any Common Schools of Old Canada there ceased to be any beneficiaries for the future annual payments out of this fund. The fund itself, as it then existed, would revert in equity to the province out of whose lands it was created, if there was no legislation to the contrary, and there is none. Compare, by contrast, sections 139 and 140 of the British North America Act, making careful provision for events in the provinces after Confederation, but nothing analogous to which is found as to the trusts relating to Common Schools."

" 5. The point is therefore pressed that no trust exists as to this Old Common School Fund of Canada. The Award of 1870 itself, in clause IX, shows its invalidity, for it purports to deal with moneys received and to be received by Ontario ' on account of the Common School lands set apart in aid of the Common Schools of the late Province of Canada,' but the province had disappeared politically and really and so had the schools; what remained was the Dominion of Canada and the schools of Ontario and the schools of Quebec. The annihilation of the beneficiaries appears on the face of the Award, and, therefore, the futility of the supposed trust is also manifested; hence the Award is at variance with section 109 of The British North America Act, which gives the lands in Ontario and the moneys due thereon to that province subject to existing trusts only, but this is a non-existing trust, and so the lands and moneys due for the lands go absolutely to Ontario. So far as concerns the money collected out of the lands and held by Old Canada prior to Confederation but not invested, the Imperial statute is silent. The part investment, namely, the $58,000 represented by the Quebec Turnpike Trust, is included in the fourth schedule of assets as the property of Ontario and Quebec jointly. That being mentioned, and the uninvested fund being excluded from mention, throughout the Act favours rather than makes against the present argument."

" Now the moneys collected and held by the Dominion as part of the general account are also earmarked as parts of this Trust Fund intended for the benefit of the Common Schools of (United) Canada, but when these schools ceased to exist, as such, at the date of Confederation, the moneys should, on principles of equity and fair dealing, have reverted to Upper Canada (*i.e.*,

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

Ontario) from whom it was taken (1). A gift to a charity which has expired is as much a lapse as a gift to an individual, and it cannot be applied *cy-pres*—*Re Rymer* (2). Where the society intended has merged in another society then the gift fails—*Mackeown* v. *Ardagh* (3). This is a case in which the sub-division of Canada and the alteration of the Common School organization consequent upon the change of Government destroy the identity of the original beneficiaries (4)."

"6. This is not a case in which there can be or should be any application of the *cy-pres* doctrine for this one good reason, that the scheme was one wherein the property and the schools were subject to one common Legislature, but it would be a perversion of the bounty to apply the property jointly when all control of the Quebec schools has passed from (United) Canada and Ontario. When the scheme was framed and intended to be perpetual there was but one Government controlling all,—fund, trustees and beneficiaries. But now the perpetuity has ended and there are three Governments; and matters of school legislation are no longer controlled by the general Government but are remitted, as matters of local concern, to local legislation. Surely these circumstances, leaving out of sight others which might be mentioned, are sufficiently distinctive from those existing when the fund was formed to displace any equitable claim of Quebec (5)."

"The words of the Imperial Statute 'subject to existing trusts,' etc., yield a plain, intelligible mean-

(1) *Lindsay Petroleum Co.* v. *Pardee*, 22 Gr. 18; *Cunnack* v. *Edwards* [1895], 1 Ch. 489.

(2) [1895] 1 Ch. 19.

(3) Ir. R. 10 Eq. 445 [1876].

(4) *Re Joy, Purday* v. *Johnson*, 60 L. T. 175.

(5) See *Marsh* v. *Fulton County*, 10 Wall. 676; and *The Attorney General* v. *Borough of North Sidney*, 14 N. S. W. Rep., Eq. 154; *Penn* v. *Lord Baltimore*, Ridg. Temp. Hardwick, pp. 336-7; 1 Ves. 444.

ing, and call for no latitude of construction to include anything beyond what is obvious. To ascertain what are the trusts we must fall back upon prior provincial legislation, and one cannot affirm that the Legislative body which enacted 12th Victoria and sanctioned its consolidation in Chapter 26, had any trusts in view other than those pertaining to the whole body of the Canadian Public Schools in (United) Canada and that in perpetuity. If there is meant to be a continuation of that trust for schools after the constitutional disappearance of Old Canada and the practical severance of that trust to and for the benefit of the new Provinces of Ontario and Quebec, one would expect to find proper provision therefor in suitable and explicit language."

"CASAULT C.J.—The Provincial Statute 4 & 5 Vict. ch. 18, which by its sec. 23, was to come in force on the first of January, 1842, enacted, sec. 2:"

'That for the establishment, support and maintenance of Common Schools in each and every township and parish in this province, there shall be established a permanent fund which shall consist of all such moneys as may accrue from the selling or leasing of any lands which, by the legislature of this province, or other competent authority, may hereafter be granted and set apart for the establishment, maintenance and support of Common Schools in this province, and of such other monies as are hereinafter mentioned; and all such monies as shall arise from the sale of any such lands or estates, and certain other monies hereinafter mentioned, shall be invested in safe and profitable securities in this province, and the interest of all monies so invested, and the rents, issues and profits arising from such lands or estates as shall be leased or otherwise disposed of without alienation, shall be annually applied in the

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

manner hereinafter provided, to the support and encouragement of Common Schools.'

"Section 3 of the same Act decreed that fifty thousand pounds should be granted annually, to be distributed amongst the several districts of the province, and that this sum should be composed and made of the revenue derived from the permanent fund to be created under the previous section, and such further sums from the unappropriated moneys which were then raised and levied or might thereafter be raised and levied by the legislature for the uses of the province as might be required to make the above mentioned sum, and that the said annual grant should be and be called 'The Common School Fund.'

"At the same session was passed the statute 4 & 5 Vict. ch. 100 for the disposition of public lands within the province, which was reserved as required by the Union Act (sec. 42 of the Imperial statute 3 & 4 Vict. ch. 35), and received the royal assent which was duly signified. That statute gave to the Government of Canada the power to deal with the public lands, but it excluded free grants excepting to the extent of ten acres for schools, school houses, etc."

"The limit put by that statute to the extent of free grants for schools, etc., etc., did not preclude the appropriation of a larger area for the maintenance of schools generally. It only limited the number of acres which could be granted to each special school, as shown by its reproduction in 16 Vict. ch. 159, sec. 10, in the Consolidated Statutes of Canada, chap. 22, sec. 11, and in 28 Vict. ch. 2, sec. 14."

But this question has no interest because the setting apart of one million of acres the price of which when sold was to constitute the Common School Fund was done under the authority of a subsequent Act."

"It has been contended that 4 & 5 Vict. ch. 18, had never been repealed and is law to this day. This contention has also for the same reason no interest. But it is incorrect. This statute was repealed, 1st, implicitly by 12 Vict. ch. 200, which covered the same grounds, and 2nd, by the Consolidated Statues of Canada, (22 Vict. ch. 29, p. xxxv), which at sec. 5, stated that the several Acts or parts of Acts mentioned as repealed in Schedule A thereto annexed, and in which we find as repealed 4 & 5 Vict. ch. 18, shall stand and be repealed. The Act 7 Vict. ch. 9 need not be noticed except in so far as it directs the sum of fifty thousand pounds granted for the support of the Common Schools to be apportioned between the divisions of the former provinces of Upper and Lower Canada in proportion to the population of each as ascertained by the next anterior census."

"Then comes, in 1849, the statute 12 Vict. ch. 200, sanction of which was reserved and granted by Her Majesty in Council on the 9th of March, eighteen hundred and fifty (1850) and communicated to the legislative council and assembly on the twenty-seventh of May one thousand eight hundred and fifty (1850), and which was law until repealed by the Revised Statutes of Canada, where all its provisions have been embodied. It is copied *in extenso* in the Ontario case. It is enacted by its first section that all moneys that shall arise from the *sale* of any public lands of the province, shall be set apart for the purpose of creating a capital which shall be sufficient to produce a clear sum of one hundred thousand pounds per annum, which said capital and the income to be derived therefrom shall form a public fund to be called the Common School Fund; by section 2, that the capital of the said fund may be invested as therein mentioned and that the fund and the income thereof

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

shall not be alienated but shall remain a perpetual fund for the support of Common Schools and the establishment of township and parish libraries; by section 4, that the grant of money out of the provincial revenue for common schools shall cease when the income from the school fund shall have realized fifty thousand pounds, with, however, a proviso that, if the income from the school fund fall short of that amount, the Receiver General shall complete that amount out of the consolidated revenue and repay these advances from the said income whenever it shall exceed the said sum; and by section 3, 'that the commissioner of crown lands under the direction of the Governor in Council, shall set apart and appropriate one million of acres of such public lands, in such part or parts of the province as he may deem expedient, and dispose thereof on such terms and conditions as may by the Governor in Council be approved, and the money arising from the sale thereof shall be invested and applied towards creating the said Common School fund; provided always that before any appropriation of the moneys arising from the sale of such lands shall be made, all charges thereon, for the management and sale thereof, together with all Indian annuities charged upon and payable thereout, shall be first paid and satisfied.'

"An Order in Council of the 8th of October, eighteen hundred and fifty (1850), approved the report of the Commissioners of Crown Lands of the same date proposing the appropriation of one million acres of land for school purposes indicating and determining the lands so appropriated, to wit: in the counties of Huron, Gray, Bruce and Perth, and, as some of said lands not yet surveyed might contain swamps and lands of very inferior quality, suggesting that fifty-nine thousand six hundred and twenty-five acres in

the township of Carrick be reserved until the quality of the unsurveyed part of one million acres be ascertained, and the department be authorized to make the exchanges, acre for acre, from the disposable Crown lands in the said township or elsewhere."

"An Order in Council of the seventh July, one thousand eight hundred and fifty-two, reduced the price of school lands in the counties of Bruce and Grey to ten shillings an acre, and decided that a measure be submitted to parliament to authorize the expenditure of a sum equal to two shillings and sixpence per acre of the purchase money on the improvement of roads and harbours within the said counties. That authorization was granted on the fourteenth day of June, one thousand eight hundred and fifty-three by the following section of the Act to amend the law for the sale and settlement of public lands (16 Vict. ch. 159.)

'Sec. 14.—It shall be lawful for the Governor in Council to reserve out of the proceeds of the school lands in any county, a sum not exceeding one-fourth of such proceeds, as a fund for public improvements within the county, to be expended under the direction of the Governor in Council, and also to reserve out of the proceeds of unappropriated crown lands in any county a sum not exceeding one-fifth as a fund for public improvements within the county, to be also expended under the direction of the Governor in Council: Provided always, that the particulars of all such sums, and the expenditure thereof shall be laid before parliament within the first ten days of each session: Provided always, that not exceeding six per cent on the amount collected, including surveys, shall be charged for the sale and management of lands forming the Common School Fund, arising out of the one million acres of land set apart in the Huron Tract.'

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

"On the third of July, one thousand eight hundred and fifty-four, an Order in Council fixed at ten shillings the upset price of the school lands in the counties of Huron, Perth, Bruce and Gray."

"An Order in Council of the twenty-seventh February, one thousand eight hundred and fifty-five, authorized the expenditure of thirty-five thousand five hundred and eighty-nine pounds from the improvement fund which the fourteenth section above transcribed of the Act 16 Vict. ch. 159, gave authority to establish. But it appears by an Order in Council of the seventh December, one thousand eight hundred and fifty-five (1855), that, notwithstanding the expenditure of twenty-five thousand pounds from the same, the improvement fund had not yet been set apart, and that the Crown Lands Department was directed to apprize the Inspector General of the amount at the credit of each county from the proceeds of sale of both Crown and School Lands, so that the proportions accruing to the improvement fund might be set apart by the Receiver General for that purpose."

"Such were the legislation and the Orders in Council under it relating to the Common School lands which I think important to notice at present, when the Consolidated Statutes of Canada took effect on the fifth December, one thousand eight hundred and fifty-nine. These last repeal 12 Vict. ch. 200; (ch. 29, sec. 5, and schedule A); but they incorporate at ch. 26 all the enactments of this last mentioned statute and of section 14 of 16 Vict. ch. 159, without in any way changing their sense so that it is useless to cite them again. It may be noted that the 14th section of 16 Vict. ch. 159, though forming part of that land Act, was omitted from ch. 22 of the Consolidated Statues of Canada, where the Land Act is reproduced; and that ch. 22 of the Consolidated Statutes

of Canada was subsequently repealed by 23 Vict. ch. 2, which was still law at Confederation; and that, on the sixth March, one thousand eight hundred and sixty-one an Order in Council rescinded that above mentioned of the seventh December, one thousand eight hundred and fifty-five."

"The Common School Fund was not dealt with by the Government of the province of Canada as the law directed; most of the lands set apart were sold and proceeds realized of the same, though kept as a separate fund which was credited with interest quarterly, (see Public Accounts of the Province of Canada, 1864 ii, p. 47; 1865 ii, p. 53; 1866 ii, p. 45; 1867 ii, p. 61) were not invested as directed by law, save $58,000 of the same which were exchanged for debentures of the Quebec Turnpike Trust, nor was the interest accruing applied towards the expenses of education, but the fund and the interest were left to accumulate, and the two hundred thousand dollars which the law required to be applied yearly for the maintenance of Common Schools was furnished out of the Consolidated Fund and exclusively charged to the same. So that, at the date of Confederation the funds in the hands of the Government amounted to $1,733,224.47, including the $58,000 debentures mentioned and $29,580 interest on the same, and it appears that $1,704,738 remained due upon the lands already sold, and 8,559 acres of land had not yet been disposed of. (See Langton's Report, Long Book, pp. 4 and 8)."

"The British North America Act, 1867, (30 Vict. ch. 3), came in force on the first of July, 1867. By section 109 of the same all lands belonging to the Province of Canada and all sums then due and payable for such lands were given to the provinces of Ontario and Quebec, in which the same were situated or arose,

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

subject to any trusts existing in respect thereof and to any interest other than that of the province in the same."

"It seems to be undeniable that the lands which had been set apart in execution of a special law directing it so that the proceeds of their sales should constitute a fund for the maintenance of Common Schools in the then two sections of the Province of Canada as well as the sums due or payable for the same were affected by a trust, and that Quebec, one of the sections, had in what remained unsold of these lands and in the unpaid balance of the price of those already sold, a special interest distinct from that of Ontario, where those lands were situate. We have already decided that the lands ceded by the Indians were affected with a trust for the payment of the annuities which were stipulated as the consideration of their cession, though the deeds of cession contained no stipulation to that effect, whilst the school lands were expressly set apart and dedicated to a special service required for the welfare and good government of the Province of Canada."

"The division of that province into two separate sections with distinct legislative powers could not without direct terms and did not revoke the dedication made for the common benefit of both; and far from so directing the British North America Act, as already mentioned, in giving the lands and the sums due for the same to the province in which they were situated, expressly stated that the lands and the unpaid balance of those sold did remain subject to the trust existing in respect of them and to any kind of interest other than that of the province to which they were assigned in the same."

"Was it possible to maintain in a more forcible way as against the unsold lands and what remained due of the price of those already sold, the existence of the

trust with which they had been affected, and to reserve to the late Province of Lower Canada, made Quebec by that Act, the interest which it then had in both? To my mind, it was not. I deduce, from what precedes, that the Province of Quebec owes to the law and not to the award of eighteen hundred and seventy the right which it has to a share of the proceeds of the lands in Ontario whether sold or unsold, which have been set apart for the benefit of the common schools, and that its share was independent of that award. I will hereafter examine the effect the award had on the same."

Such was the opinion of the late Auditor Langton. At page 8 of his remarks in the long book headed 'Arbitration between Ontario and Quebec,' he expresses himself as follows: 'There are, however, many questions which are not represented by any items in the statement of affairs which will necessarily come before the Arbitrators. The most important of these in amount, are the amounts not yet realized from the common school lands. They are all situated in Ontario, and are handed over to that province, but subject to a trust, in which Quebec is interested to the extent of its share according to population, or in whatever other way the realized fund may be divided. The sums must necessarily be collected by Ontario, and it might either pay over annually to Quebec its share of the collections, less expenses; or, which would be much more convenient, the lands and arrears due might be valued, a deduction being made for costs of collection, and upon Quebec's share of the capital ascertained Ontario might pay five per cent interest. The best way of arranging this would be for Ontario to pay the Dominion so much more interest, and Quebec so much less. As to the valuation from a return made to me by the Crown Lands Depart-

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

ment, the outstanding instalments amount to $1,704,738.00, and only 8,959 acres remained unsold, valued at two dollars an acre, or $17,918. As all the other instalments bear six per cent interest, the whole property can hardly be valued at less than $1,700,000, or, charging twenty per cent for costs of management and collection $1,460,000. Of this sum the share of Quebec would be, on its population in eighteen hundred and sixty, about $648,000, equal to an annual sum of $32,400.'

And the treasurer of Ontario in his argument before the first arbitrators said (see Quebec case, p. 16; the whole speech is there cited as being in Vol. 220 of the miscellaneous pamphlets in the library at Ottawa): 'As to the outstanding moneys on lands sold, and the unsold lands, I think Ontario took them subject to the trust in respect of the same, and are therefore bound to collect the moneys, charging only the statutory allowance therefor, and when collected, to pay the money over to the Dominion, to be added to and held on the same trust as it holds the fund already in its hands.' And further on, speaking of the statute creating the Common School Fund, he said: 'By that Act the fund was created for the support of the Common Schools, as well in Lower Canada as in Upper Canada, and although the relations of the two sections of the late Province of Canada are now changed, yet in the Confederation Act it remains as it was before Confederation, and must be carried out in all its provisions; and therefore, Lower Canada must, in my opinion, according to law, have the same portion of the annual income from the capital of this fund as it would have had, had Confederation never taken place.'

"The several statutes authorizing this arbitration, namely, 54 & 55 Vict. ch. 6, Canada; 54 Vict. ch. 2 (1891),

Ontario, and 54 Vict. ch. 4 (1890), Quebec, at section 1 of each of them, limit the powers of the arbitrators and their inquiring into the accounts between Canada and the Provinces of Ontario and Quebec jointly and severally and between the two provinces to such questions as the three governments shall mutually agree to submit. The first agreement of submission which was approved and concurred in by the three governments, referred to the arbitrators the following questions which may have arisen from the controversy relating to the Common School Fund:

'1. All questions relating or incident to the accounts between the Dominion and the provinces of Ontario and Quebec and to accounts between the two provinces of Ontario and Quebec, said accounts being understood to include, amongst other particulars, the following:'

'(*b*) In the unsettled accounts between the Dominion and the two provinces, the rate of interest and the mode of computation of interest to be determined.'

'(*e*) The arbitrators to apportion between Ontario and Quebec any amount found to be payable by the Dominion of Canada.'

'(*f*) All other matters of account (1) between the Dominion and the two provinces; (2) between the Dominion and either of the two provinces, and (3) between the two provinces.'

'(*g*) The rate of interest, if any, to be allowed in the accounts between the two provinces, and also whether such interest shall be compounded, and in what manner.'

'(*h*) The ascertainment and determination of the amount of the principal of the Common School Fund, the rate of interest which should be allowed on such fund, and the method of computing such interest.'

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

'(*i*) In the ascertainment of the amount of the principal of the said Common School Fund, the arbitrators are to take into consideration, not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the school lands which are not yet sold.'

'5. It is further agreed by and between the parties hereto that the questions respecting the *Upper Canada Building Fund*, and the *Upper Canada Improvement Fund* are not at present to form any part of this reference, but this agreement is subject to the reservation by Ontario of any of the rights to maintain and recover its claims, if any, in respect of the said funds as it may be advised.'

"The last clause reserved to the parties the right to submit, upon mutual agreement, other questions or matters."

"It appears to me that, under clause (*e*) of this submission, being empowered to apportion between Ontario and Quebec the amount found to be payable to them by the Dominion, we could not only determine the amount due by Canada to the Common School Fund, but also apportion that amount between the provinces. But as this would divide only part of that fund, and as the statutes passed by the Parliament of Canada and by the legislatures of the two provinces, in eighteen hundred and ninety-four (1894) contemplate a division of the whole, and the counsel for Quebec did not insist upon a partition of anything but the annual interest, it may be that we should not go beyond establishing the total amount of the fund and dividing the income or interest derived therefrom."

"But it seems to me that, with the exception to our powers made by clause five (5) of the submission, we

must determine the amount of the fund without any regard to the Upper Canada Improvement Fund and as if it did not exist, save by adding in the terms of the submission, that we do so under reservation to Ontario of its rights to maintain and recover its claim, if any, in respect to that fund. Both parties have argued that we have no right to pass on the question of that fund, true it is for different reasons, Ontario maintaining it has incontrovertibly been made hers by the first award, and Quebec that the award was, in that respect, a nullity. It has been argued by Ontario that what was excluded by the reference was its claims for the addition to that fund of one-fifth of the proceeds of the Crown lands sold between June, one thousand eight hundred and fifty-three (date of the sanction of 16 Vict. ch. 159, which authorized the creation of that fund), and March, eighteen hundred and sixty-one, when the fund was abolished. But the reference permits no such distinction. It excludes in plain words the Improvement Fund, without exception. I do not see how we can take upon ourselves to say that that designation does not include the whole fund and to limit its meaning to a part of it only. To urge upon us that distinction or limitation it has been argued that Quebec never objected to that part of the award. But we find that the Treasurer of Ontario, on the ninth December, eighteen hundred and sixty-eight (1868), not satisfied with the statement of liabilities prepared by the Dominion, transmitted to the Finance Minister at Ottawa one according to his views where he mentions the Improvement Fund at $5,180.04, as stated in the Dominion account, and puts down the Common School Fund at $1,733,224.47, without any deduction, and proposes that Canada should keep all investments on account of trust funds (Canada Sessional Papers, 1869, No. 46). In eighteen hundred and

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

sixty-nine the same Treasurer sent another revised statement of debt where he charges $124,685.18 for the Improvement Fund, besides the $5,119.08, at which, after a small reduction therein specified, that Fund was entered in the Dominion statement of the debt. The statement so submitted by the Treasurer of Ontario was communicated to the Treasurer of Quebec, who, on the twenty-ninth of December, 1869, prepared himself a statement where he puts $5,119.08 as the only amount constituting the Improvement Fund. (Canada Sessional Papers, 1870, No. 11)."

"That was a protest against the larger amount introduced by the Treasurer of Ontario in his statement. We find Quebec still protesting after the award."

"I do not think that the mention of the sum of $124,685.18 as part of the Improvement Fund in the joint case of Ontario and Quebec on the question of interest can be taken as an admission by the counsel for the latter province, that Ontario was entitled to that amount. As Mr. Girouard did put it, the only question then mooted was that of interest; and as the Improvement Fund was excluded by the reference, what was said or written about the Fund in the joint case prepared for the two provinces by the counsel for Ontario was immaterial and its exclusion not worth an objection by the counsel for Quebec to a case which, in all other particulars, met his views."

"But, moreover, No. 49, at pp. 65, 66 and 67 of the joint case on interest, was only a citation of part of the award, followed with a statement of the funds in the hands of the Dominion for the purpose of showing how the Government at Ottawa treated it and had come to the amount of the semi-annual interest there mentioned as paid to each province by that Government."

"I wish it to be understood that I express no opinion whatever on the merits or demerits of the pretensions

of Ontario as to that Fund. What I say about the protest of Quebec is only to show that the exclusion of that fund from the matters submitted to our decision was not only to part of what Ontario claims to be the Improvement Fund but to the whole Fund."

"I now come to what, in the submission, is stated under letter (*h*), the ascertainment and determination of the amount of the Common School Fund."

"I think that Fund must be composed:

| | | |
|---|---|---|
| 1. Of the amount which is in the hands of the Dominion | | $1,733,224 47 |
| Less investment in Quebec Turnpike Trust Debentures | $58,000 00 | |
| And eight and a half year's interest credited, though not received | 29,580 00 | |
| | | 87,580 00 |
| | | $1,645,644 47 |
| And subsequent payments by Ontario to the Dominion on account of that Fund, which were credits given Ontario for so much, and which must be debited to the Dominion from the date of the credit, 1889, December 1st | | 925,169 14 |
| Of the credit, 1890, April 20th | | 11,103 70 |
| | | $2,581,907 31 |

"2. The debentures above mentioned and the interest due on the same."

"3. The amount received by Ontario on account of the price of school lands sold before and since the first day of July, 1867, less the two amounts above mentioned as credited by the Dominion on the first December, 1889, and the twentieth of April, 1890. In this must be included the amounts which will be established

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

as erroneous entries and which are claimed by Quebec under No. 1 at p. 11 of its case, as $9,468.59."

"4. The outstanding balances due on sales of lands, which, in the reply of Quebec, are stated to have been on the thirty-first December, 1892, $485,801.65."

"5. The ascertained value of the lands unsold, if the parties agree to such valuation. If they do not agree, our award should state that the price of those lands when sold, less six per cent for management, shall form part of the Common School Fund and be accounted for by Ontario as such. I say less six per cent, though an Order-in-Council of the twenty-third June, eighteen hundred and sixty, authorized a charge of twenty per cent, because six is the amount fixed by 16 Vict. chapter 159 and by section 7, No. 2 of chapter 26 of the Consolidated Statutes of Canada, and that an Order-in-Council could not change the law. The Treasurer of Ontario admitted in his speech above in part quoted, that the statutory allowance only could be charged."

"I do not think, either, that though the investment of part in debentures of the Quebec Turnpike Trust was not one authorized by the law, that the late Province of Canada can be made responsible for the same. The dealings of the province bound its two successors, the Provinces of Ontario and Quebec, and they have all along since recognized those debentures to be what they were considered by the late Province of Canada, that is as so much to be deducted from the amount received by the Province of Canada on account of the Common School Fund and as an absolutely valueless asset."

"Quebec cannot be made responsible for the same from the decision of the Privy Council in the case of *Belleau et al* v. *The Queen* (1), that the bearers of the

(1) 7 App. Cas. 473.

debentures of the Quebec Turnpike Trust had no other recourse for their payment than against the trust."

"While on this subject, I may say that I entirely concur with the opinion expressed by my brother arbitrators at the argument, that the provinces have no recourse against the Dominion for the interest on said debentures which it appears could have been partly collected. Barring all other reasons, the two provinces having, by their dealings, concurred in the opinion that the debentures were valueless, could not afterwards, without notice to the contrary, and a request that the debentures themselves or the interest on the same should be collected, pretend that the Dominion was responsible for either."

"The claim which the counsel for Quebec qualified as a "New Aspect" is the addition to the Common School Fund of the amount from the sales of Crown lands by the Province of Ontario and Quebec since Confederation required to form, with the net proceeds of the school lands and the net proceeds of the public lands sold from the twenty-seventh of May, 1850, to the first of July, 1867, a capital sufficient at six per cent to produce an annual revenue of $400,000. It is founded on section 2 of the Statute, 12 Vict. ch. 200, which is in the following terms: 'All moneys arising after the twenty-seventh of May, 1850, from the sale of any public lands of the province, shall remain, or be set apart as part of the capital of said school fund until the same is sufficient at the rate aforesaid (six per cent) to produce the said sum of $400,000.'

"The Government of the late Province of Canada never carried that law into effect. It did not credit the Common School Fund with the proceeds of any of the public lands, but it furnished every year the whole of the $200,000 which the school law required to be applied for the establishment and maintenance of Com-

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

mon Schools, not only without charging any part of it against the revenue of the school fund, as directed by law, but adding quarterly interest to the same. Quebec could not, and does not complain of what was done in that respect by the late province, but it wants us to award that the Common School Fund must be credited out of the price of public lands sold by Ontario and Quebec since the first of July, 1867, with the amount required to make, with the price of the school lands sold, the value of those unsold and the price of the public lands sold from the twenty-seventh of May, 1850, to the first of July, 1867, after deducting a percentage for administration, a sum of $6,666,666.66."

"Ontario contends that the sale of lands in 12 Vict. ch. 200, comprises the lease of lands for cutting wood. I do not think so. The license to cut wood, though renewable, were made for one year only, and conveyed no proprietary rights in the soil. They were, as they expressed it, but a permit to cut timber (12 Vict. ch. 30, sec. 1, and Consolidated Statutes of Canada, ch. 23, sec. 2,) which when cut, was the property of the licensee. His license even contained a condition that lots thereafter licensed to settlers would be excepted from the limits in which he was authorized to cut. The amounts received from the licensees to cut timber being excluded, the price of the public lands sold from the twenty-seventh of May, 1850, to the first of July, 1867, together with the price of the school lands sold and the value of those unsold, did not, after deduction of percentage for administration, amount to $6,666,666.66,"

"But Quebec has never urged what is now, and for the first time presented by its counsel as a "New Aspect." It has always limited its claim to the part of the Common School Fund in the hands of the Dominion to the balances due on the first of July, 1867, by the pur-

chasers of Common School lands, and to the proceeds of those lands sold since and the value of those unsold. This is admitted by its counsel, and the fact that they lay that part of its claim as a "New Aspect" is of itself a substantial acknowledgement that the province which they represent adopted the dealings of the Government of the late province in relation to the proceeds of the Crown lands, and consented that they should continue to be dealt with as previous to Confederation. This is made the more apparent from the fact that Quebec during the twenty-five years which have elapsed since it became a distinct province has not kept a separate account of the proceeds of its Crown lands but has continued to merge them in its Consolidated Fund, and to deal with them as part of the same. Section 2 of 12 Vict. ch. 200, affected the lands of the whole Province of Canada, and, if the lands which section 109 of the Imperial Act made the property of Ontario could still be subject to the completion of the $6,666,666.66, amount required to complete the Common School Fund, those which by the same Act were made that of Quebec, were also subject to it. And the agreement, clause 3 (i), should have joined Quebec to Ontario when it stated that in the ascertainment of the amount of the principal of the Common School Fund, the arbitrators were to take into consideration not only the sum held by Canada but also the amount for which Ontario is liable and the value of the school lands not yet sold. The exclusion of Quebec shows plainly that the liability of Ontario was intentionally limited to the price of the school lands, as otherwise Quebec would have been liable for the price of its lands sold since the first of July, 1867, required, with those sold by Ontario after that date, to make up the above mentioned capital of the said Common School Fund. I take it, therefore, that the

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

submission clearly excludes from our consideration what Quebec has presented as a "New Aspect."

"The counsel for Quebec have not urged before us the claim against the Dominion for interest on collections not remitted by Ontario or moneys uncollected by that province. We have not to concern ourselves about it, save perhaps to adjudicate by the award that there is no liability in the Dominion on that score."

"As to the division of income, the assets in the fourth schedule of the Imperial Act were not the only ones which had to be divided between Ontario and Quebec. There were others as well as properties and credits of the late province which were common to the two sections of that province and which, after the loss of its distinct existence, remained the joint property of its successors, Ontario and Quebec. Amongst others of that description were the Common School Fund, the credits of which formed part of that fund, and the lands which had been appropriated to the fund, and which the Act of Confederation had assigned to Ontario subject to the trust with which they were affected. That fund, as well as all other joint properties or assets which the Confederation Act did not assign to the Dominion or specially to either Ontario or Quebec, were to remain in the possession of the Dominion until they were either divided between the two new provinces or regularly made over to one or the other."

"But though the possession of the fund remained with the Dominion until divided, the property of the same passed directly from the Province of Canada to its two successors, who hold it jointly. From the first of July, 1867, the Common School trust was the property of both Ontario and Quebec in the proportion of their respective populations, until a regular division should have changed that proportion."

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

"The Common School Fund had been created for a purely local service—the maintenance of Common Schools. That service after Confederation devolved on the Provinces of Ontario and Quebec, within whose jurisdiction it fell. The Dominion Government had no jurisdiction in the matter, could not continue it, or dispose of it. It was bound to hold it until divided between the two provinces and, until then, to give each province annually what on the first of July, 1867, apppeared to be the share of each province in the income produced by the fund. But the fund itself could not be left in abeyance, or its administration continued. It had to be divided and handed to the provinces in the proportions of their population at the preceding census, or perhaps in the proportion determined by the arbitrators. The law made this clear and it was so understood generally."

"In the statement of assets, which was prepared for the arbitrators, it is expressed as appearing that the part of the fund which had been allowed to accrue before Confederation should be divided as the grants were divided which should have been charged against it, viz.: according to population. In the principles upon which all transactions since the thirtieth of June, 1867, were to be introduced into the settlement of affairs of the late province, it is stated that 'the lands in each province were surrendered to them subject to existing trusts, and the Dominion is bound to see that the trusts are executed.' A very large sum, upwards of $1,700,000.00, remains outstanding on sales of Common School lands, situated in Ontario, but in which Quebec has a joint interest, and the apportionment of this asset must be left to the arbitrators. In the principles upon which the statement of affairs of June 30th, 1867, was to be revised in preparation for the arbitration between Ontario and

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

Quebec, we also find, 'but as Ontario and Quebec have a joint interest in the Common School Fund, the investments for that fund and the accrued interest thereon must be handed over to Ontario and Quebec conjointly, to be dealt with by the arbitrators.'

"In the suggestions by Mr. Langton, Auditor General, speaking of the Common School Fund, he says: 'As the educational grants, which ought to have been charged against this fund so far as it would bear them, have always been distributed according to population, the fund ought to be similarly treated, and would give to Ontario $964,940.27, to Quebec $768,284.20, unless indeed the population, as it is presumed to have stood at the date of the Union, be assumed as the basis.'

"The treasurer of Ontario did not, in December, 1868, contemplate that the School Fund 'would remain as a trust in the hands of the Dominion.' Writing on the fifth of December, 1868, about the Trust Funds, which the then Minister of Finance proposed to keep on paying five per cent, and mentioning specially amongst others the Common School Fund, he wrote (Canada Sssional Papers, 1869): 'I do not think the Government of Ontario have any authority to deal with these funds as you propose. Its action would be *ultra vires*. If the people of Ontario should decide to have these funds invested it may be, and most likely would be, that they could invest them in good security at six per cent. Your Government owes these moneys. Instead of paying the principal you propose to pay five per cent in perpetuity. I am not prepared to say the people of Ontario will accept this proposition. As these funds are for public purposes, it may be that Ontario and Quebec may sweep them away altogether and merge them in the general revenues of the provinces, and provide, by annual grants

or otherwise, for the object contemplated by the creation of these special funds. By doing so it would save much labour and many complications.'

"At a subsequent conference, to be found in the same papers, he renews his objection to leaving the Common School and other funds in the hands of the Dominion.

"It was to put an end to the joint ownership and joint liability of the Provinces of Ontario and Quebec that section 142 of the Imperial Act enacted: 'The division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada.'

"This section contains the extent and limit of the powers of the Arbitrators. They could adjust and divide; they could do nothing else without exceeding their authority. They could not decree that the joint property of the two provinces should forever remain undivided and be held conjointly by them in perpetuity. They could not create an everlasting trust and charge the Dominion with its execution. They could not, as they have done, assign a portion of the Common School Fund to one of the Provinces and direct that the rest should remain forever undivided and be transferred, or made over in trust to the Dominion which they charged with its execution. This was neither a division nor an adjustment of the joint property of the provinces. Adjust may have a larger meaning than divide; but it cannot be extended beyond regulating the accounts, putting them in order, making them accurate and conformable to the existing rights. In awarding that three-fourths of the Common School Fund should remain in trust in the hands

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

of the Dominion to be by it invested and the proceeds paid by that Government in certain variable proportions to the provinces, the arbitrators were exceeding their authority, and what they did was *ultra vires*. This has struck one of the counsel for Canada, Mr. Ritchie, who, speaking on the interest question, remarked that the arbitrators had no such powers. Mr. Justice Burbidge seems to have been so impressed at the argument, and it is plain that they had not. The consequence of having so exceeded their authority was to make their award in relation to the part of the Common School Fund in the hands of the Dominion and the uncollected price and interest of the lands set apart for the maintenance of Common Schools whether sold or unsold, a nullity. Their award so far was ineffective and could be resisted when it came in force. These are the expressions of the Lord Chancellor about what is *ultra vires* in the argument before the Privy Council. Speaking of what the arbitrators were alleged to have done in excess of their authority, he expressed himself as follows: 'These gentlemen were executing a Parliamentary power. It is not as if it was a private arbitration under a private instrument. Either this was within their power or was not. If it was not within their Parliamentary power, it goes for nothing.' And further still, 'there is a certain thing to be done under a certain Act of Parliament by particular individuals named. If they do anything more than they are authorized to do, it cannot have any possible effect.'

"The Government of Canada, though it has paid half-yearly to the provinces the interest on the amount belonging to the School Fund which it had in its hands, cannot be said to have accepted the trust so thrown upon it; but, even supposing that it did, its acceptance could not have made valid what was void,

nor made effectual against Quebec, which was one of the parties interested, an unauthorized and illegal award to which it had not consented, and the object of which was to keep it in a kind of tutelage so far as the School Fund was concerned."

"The judgment of the Privy Council in 1878 has often been alleged as confirming the award of 1870, and barring any objection to this award. But a reference to the case submitted by the provinces, to the question which that tribunal was called to answer, to the answers it has made and to the pamphlets containing the argument before it, will make it evident that the Privy Council did not pay attention to the objections to the award which were not specifically raised in the case; and confirmed the same upon the questions propounded in the said case without in any way considering the objections, which Mr. Benjamin had invoked against the paragraphs 7, 8, 9 and 10 of the award."

"The making and publication of their award was the exhaustion of the powers and authority of the arbitrators. They could not afterwards correct it, nor complete it by providing for what they had omitted. Appointed as we are to determine and award, amongst other things, all matters of accounts between the Dominion and the Provinces of Ontario and Quebec, and between these two provinces, we have to examine the statutes and the first award; and, if we find that any part of the award is null or void, we must proceed to the determination of said accounts as if that part of the award did not exist."

"The paragraphs already mentioned, namely, 7, 8, 9 and 10 of the award of 1870, being void for excess of authority, they are inoperative, and the school trust is and has always remained, since the first of July, 1867, the joint property of the Provinces of Ontario and

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

Quebec, and has ever since that date been held by them, absolutely as they then did. The income or interest which the fund produced had therefore to be divided between them in accordance with their respective rights at that date, that is, in proportion to their population, as ascertained by the then previous census, which was that of 1861."

"The division had to be complete and final, independent of any ulterior action. On that point I cannot do better than cite the opinion expressed by the late Mr. Gray, Dominion arbitrator: 'The powers of the arbitrators will close with their award, and that award must be so made that it can stand entirely *per se*, and not be dependent in any way upon ulterior action by either of the parties to the arbitration. It must give the asset, it must assign the burden—clear and unequivocal, whatever it may be, the asset must become the undoubted property, and the debt the undoubted burden of the one province or the other, as the case may be.' (Quebec Sessional Papers, 1870, No. 11.)"

"This is a correct definition of the duties of the arbitrators under sec. 142 of the Imperial Act. I cannot understand how the two of them, who must have drawn the award, came to do quite the reverse with the Common School Fund; and that, instead of dividing it, as the law directed, and giving to each of the two parties an undoubted property of its share, they decided that the fund be left in the hands of a third party forever, and the interest only be paid in variable portions to each of the two owners of the fund."

"Their award, so far as the Common School Trust was concerned, had no finality, which is an essential element to the validity of all arbitrators' award. Russell on Awards, 7 ed. part II, ch. 5, sec. 4; *Randall* v.

*Randall*, (1); *Ingram* v. *Milnes*, (2); *Smith* v. *Wilson*, (3); *Bhear* v. *Harradine*, (4); *Williams* v. *Wilson et al.* (5)."

"Russel cites a decision in an annonymous case, which is to be found in Dyer, p. 242*a*. That decision seems to me to be especially applicable to the case before us. It is that of a reference respecting the right, title, interest and possession of a certain parcel of land, where the award, instead of awarding the property in the land, only gave a profit out of it. It is precisely what has been done with the Common School Trust by the award of 1870. That this award, so far, was not final, is rendered more than apparent by the legislation that the Dominion and the two provinces have been obliged to originate for the division of that trust. Canada, 57 Vict., ch. 3; Ontario, 57 Vict., ch. II; Quebec, 57 Vic., ch. 3."

"I am of opinion that, if the arbitrators had not exceeded their powers and jurisdiction as I think they have, their award on the Common School Trust would be defective and void for this last reason, want of finality; and that we should award, as I have already mentioned, that the income or interest produced by the School Fund should be divided irrespective of what the award of 1870 pretends to have ordered, and according to the population of Ontario and Quebec in 1861."

"N B.—By sec. 3 of the British North America Act, 1867, the Dominion of Canada was to come into existence on the day fixed by a proclamation of Her Majesty. That proclamation was issued on the 22nd May, 1867, and fixed the first day of July, 1867, as that on which the three Provinces of Canada, Nova Scotia and New Brunswick, should be united and form the Dominion

(1) 7 East 80.
(2) 8 East 444.
(3) 2 Ex. 327.
(4) 7 Ex. 269
(5) 9 Ex. 90.

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

of Canada. Paragraphs 7 and 9 of the award of 1870 profess to deal with the Common School Fund as held on the 30th June, 1867, by the Dominion of Canada. But the Dominion had then no existence, and did not hold the Common School Fund, which, at that date, was still held by the Province of Canada."

"There is a very wide difference between annulling the first award and finding that it is on its face null for being *ultra vires*—as I think it is for dealing with the School Trust otherwise than directed by law, which empowered the arbitrators to divide and adjust and not to maintain it in division forever and to create a trust in relation to the same. If so doing was *ultra vires*, the award is, in the words of Lord Cairns, already quoted in my memoranda, ineffective and without any possible effect, goes for nothing and can be resisted, and we must treat it as such not for extraneous matter but for matters appearing on the face of it."

"I admit that we must, in that case, consider the Common School Trust as it was at Confederation, that is a Trust Fund for the benefit of the Common Schools of Canada, in which the two sections of that province named in the statute were then interested to the proportion of their population at that time. The law especially mentions the two divisions Upper and Lower Canada (sec 5, C. S. C. c. 26) as the divisions of the provinces to which the income of the Fund must be apportioned, and therefore the schools for the maintenance of which the trust was created were the schools of Upper and Lower Canada. The B. N. A. Act, 1867, changed nothing in that law and in the right of the two sections, or rather of Upper and Lower Canada whose names it has changed to those of Ontario and Quebec."

"The trust was absolutely for local or provincial purposes and therefore ceased to be under the disposal of

the Governor-General, whose duties, so far as provincial matters were concerned, devolved on the Lieutenant-Governor of each province."

"But it had first to be divided as a common fund and if it has not yet been legally divided, it is still in common; and, called to establish its amount, we must do so taking it as it was on the first of July, 1867."

"The lands had, under the law, been set apart for the maintenance of Common Schools in the two sections of the province; such was their destination. It mattered not where they were situated, they were affected by the object for which they had been so set apart, and which was a trust existing in respect of them; and the successor of Lower Canada, Quebec, was one of the two beneficiaries who had an interest in the same (sec. 109). Section 129 did for the laws in force in Canada before Confederation what secs. 139 and 140 did for the proclamations. C. S. C., ch. 26 remained in force and applied to Ontario and Quebec as it had applied, before the first July, '67, to Canada and its two divisions, Upper and Lower Canada."

"The Legislature of the Province of Canada had made the trust perpetual; but it could have altered the law and ordered its division between Upper and Lower Canada. It could even have put an end to the trust and declared its extinction. The division of Canada into the two provinces by making it the distinct and separate property of Ontario and Quebec, did not affect its perpetuity, which remained an obligation on each province so long as it did not legislate otherwise. But as it was theirs, the arbitrators had no authority to award that it should remain in the hands of a third party forever."

"If the first arbitrators had exercised the powers which the law had vested in them, that is divide and adjust the trust, they could have assigned to Ontario a

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

much larger share than to Quebec; but as they have assumed an authority which had not been conferred on them, the whole of their award on that Trust Fund is null and thereby without possible effect."

"I have already expressed that the fact that part of the trust consisted in lands in Ontario, which were made the property of that province subject to the trust, offered no obstacle to the division, as what was to be divided was the proceeds of the lands and all that was required for an effectual division was to award that Ontario should account to Quebec for a determined proportion of the price when realized."

"It seems to me that the cases of legacies to bodies which had ceased to exist at the death of the testator have no analogy to the case before us. Legacies take effect at the death of the testator, and as if made on that date. If the name legatee had previously lost its existence, there is nobody to receive the gift which returns to the general representative of the estate. But if the body to which the legacy was made had still its existence at the death of the testator, it received the gift, and its separation afterwards into two distinct bodies does not revoke the gift or deprive each of its share of the same, especially when each of the two continue the work which the legacy was expressly made to help."

"The statute created the trust for the maintenance of Common Schools in Canada, but directed that its income should be divided between Upper and Lower Canada, nominally, (C. S. C. c. 26, s. 3,) for the support of Common Schools in each, which is equivalent to the trust being made for both. It had been carried into effect for a number of years previous to the two sections of the province being divided, and their names, and nothing but their names changed. Even in case of a legacy the mere change before the death of

the testator of the name of the legatee would certainly not deprive it of the gift."

"If in establishing the amount of the school fund in the hands of the Dominion we deduct the $124,000, which, in the accounts submitted to our review, are deducted therefrom for improvement fund, we decide thereby that Ontario is entitled to that much for the improvement fund, and we therefore pass upon a matter which is specially excluded from our jurisdiction by the reference."

"If the arbitrators had divided, as they were directed to do, the Common School Trust Fund, however unjust the partition would have been, they would have acted within the scope of their jurisdiction, and their award, so far, would have on its face been legal; but called upon to adjust and divide that trust, they have chosen to award as to most of it what they had no authority to do, and in that, have exceeded their jurisdiction and made their award a nullity not only as to the part of it which is *ultra vires*, but as to the whole of that trust fund, as well as the amount of one hundred and twenty-four thousand dollars as the rest. The nullity of an award as to one point affects and nullifies the whole decision as to the other questions or subjects connected therewith, as admitted by the Lord Chancellor in the argument before the Privy Council."

"The Common School Trust was one complete asset. The other assets could be separated from it, and therefore, the award as to the others was not affected by the illegality of the same as to the school trust. But no part of the school fund or trust could be separated from the others. It was to be adjusted upon or divided in its entirety as one. It is upon that ground that I find null the deduction of $124,000, as well as the other deduction for improvement fund, and the whole of

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

their award so far as it extends to the subject of the Common School trust."

BURBIDGE J.—His Lordship cited the matters referred and the statutes appointing the arbitrators and proceeded as follows:

"Now, it is to be observed that the arbitrators are given authority, among other things, to determine all questions relating to or incident to the accounts as rendered by the Dominion to the provinces up to January, 1889 (Par. 2) (*a*) and (*c*), and to ascertain the amount of the principal of the Common School Fund, taking into consideration the sum then held by the Government of the Dominion of Canada (Par. 3) (*h*) and (*i*); but subject to this limitation, that the questions respecting the Upper Canada Improvement Fund are not to form any part of the reference."

"Turning now to the accounts rendered by the Dominion to the provinces up to January, 1889, the first mention I find of the Common School Fund is at page eight, Schedule A of Exhibit V, or No. 56, where it is stated at the sum of $1,733,224.47, which it is conceded on all sides was at the date of the Union the amount of the fund, including therein the sum of $58,000 invested in the Quebec Turnpike Trust Debentures, and also a sum of $29,580, arrears of interest on such debentures, which at the time were considered to be valueless. Then we find the fund mentioned again in Schedule A of the same Exhibit at p. 43, where, in the Ontario and Quebec subsidy account, the provinces are credited with interest on the Common School Fund, the first credit being of an amount of $41,141.11 for a half year's interest due January 1st, 1868; that is, one half year's interest at five per centum upon a sum of $1,645,644.47, the balance of the fund mentioned after deducting the amount of the Quebec

Turnpike Trust Debentures, and accrued interest. Some of the other credits of the half year's interest on the fund, as given in this account, are stated at amounts in excess of that mentioned, but the reason therefor and the error have been explained, and not being material to the question now before us need not be further referred to."

"In Schedule C. of the same Exhibit, page 102, the Common School Fund is stated in the account in the following manner:

| | | |
|---|---|---|
| 'Common School Fund | | $1,733,224.47 |
| Less Investments: | | |
| Quebec Turnpike Trust | $58,000.00 | |
| Arrears of Interest on Turnpike Trust | 29,580.00 | 87,580.00 |
| | | $1,645,644.47' |

"At page 121 of the same schedule, in a statement of the Province of Ontario account, the province is credited with the Upper Canada Improvement Fund, amounting to $124,685.18. This sum of $124,685.18 is an amount which, by the award of the third September, 1870, was deducted from the Common School Fund as held by the Dominion at the date of the Union. In the same statement of account, at page 123, in the Province of Ontario account, the province is credited on the thirty-first day of December, 1867, with its share according to population, of one half year's interest on the Common School Fund, stated to be $1,520,959.21 (it should be twenty-nine, not twenty-one cents), and at page 139 the Province of Quebec is credited with its share of the interest, the amount of the fund being stated at the same sum or figure. Like entries respecting the Common School Fund, the Upper Canada Improvement Fund, and the amount of the former fund on which the Dominion credited the provinces with

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

interest will be found in other exhibits. These statements present this difficulty, that in one place we find the amount of the Common School Fund stated at $1,645,644.47, without any deduction for the Upper Canada Improvement Fund, while in two other places the fund is stated at $1,520,959.21, the balance of $124,658.18 being credited to Ontario as part of the Upper Canada Improvement Fund. Now, but for the limitation as to the matters referred, contained in the fifth paragraph of the Agreement of Submission, the arbitrators would without doubt have authority to correct this discrepancy in the statements of the accounts, according to their view of what the rights of the parties to the reference are. The parties have, however, agreed that the questions respecting the Upper Canada Improvement Fund are not at present to form part of the reference, subject to the reservation by Ontario of any of its rights to maintain and recover its claims, if any, in respect of the said fund. The reservation was, it is admitted, made at the instance of Quebec. In the proposals set out in the Order-in-Council of the twelfth of December, 1890, mentioned in the Agreement of Submission, it was stated that the outstanding question as to the Upper Canada Land Improvement Fund was not to form part of the reference unless the Quebec Government thereafter consented to include the same. There were at the time two questions relating to this fund. One had to do with the deduction from the Common School Fund of the sum of $124,658.18 made by the award of September, 1870, and the further deduction of twenty-five per cent which the Province of Ontario was thereby authorized to make from any moneys collected after June thirtieth, 1867, on School Lands sold between the fourteenth of June, 1853, and the sixth of March, 1861; and the other was a claim made by Ontario that

the Upper Canada Improvement Fund should be increased by a further sum of $101,771.68, representing one-fifth of the receipts from Crown lands sold between the dates mentioned. The first question had been dealt with by the arbitrators appointed under the 142nd section of The British North America Act, 1867, and the other had never been passed upon, and was, I think, the "outstanding claim" that it was intended to exclude Quebec had nothing to lose but everything to gain by bringing again into debate the question that had in the earlier arbitration been determined against it. The credit to Ontario of the sum of $124,658.18 on account of the Upper Canada Improvement Fund was one of the items of the accounts which in express terms were referred to the arbitrators "to be determined upon." Then we have seen that the arbitrators are empowered to ascertain and determine the amount of the principal the Common School Fund and in doing so to take into consideration not only the sum then held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable. But how is that to be done without either including or excluding the deduction for the Upper Canada Land Improvement Fund? Either there is such a fund, consisting so far as the moneys are in the hands of the Dominion of Canada of a sum of $124,658.18, or there is not; and either the Province of Ontario is liable for the total of the sums collected from school lands, less six per cent for management, without any deduction for the Upper Canada Improvement Fund, or it is not; and when we determine that liability, we must, from the necessity of the case, either make or not make the deductions. So, for myself, I should, if it had been necessary, have been prepared to hold, and so far as it may be necessary I am prepared to hold, that inci-

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

dentally we have jurisdiction to deal with the Upper Canada Land Improvement Fund so far as that fund depends upon collections arising from the sale of school lands. However, for Ontario and Quebec both, it is contended that the arbitrators have no such jurisdiction, it being in substance argued for Ontario that the result is that the arbitrators must take the "sum" mentioned in clause (*i*) of the third paragraph of the Agreement of Submission, as then "held by the Government of the Dominion of Canada," to consist in the first place of the amount of $1,520,959.29 mentioned in the accounts, leaving the balance of the $1,645,644.47 to be credited as it is in the accounts to the Province of Ontario as part of the Upper Canada Land Improvement Fund; while for Quebec it is contended that the whole of the sum of $1,645,644.47 should be credited to the Common School Fund. Now, if we adopt the latter view, we must strike out of the statement of accounts submitted to us the amount of $124,685.18 that has been credited to Ontario, and add that sum to the $1,520,959.29 at which in that part of the accounts in which the statement has any effect upon the results the amount of the Common School Fund has been stated. That clearly is to deal with and pass upon the subject of the Upper Canada Improvement Fund. I do not forget that the learned Chief Justice of Quebec suggests that we could state the amount of the Common School Fund at the larger sum with an intimation that we had not determined whether or not any deductions should be made on account of the Upper Canada Improvement Fund. But that, it seems to me, is to refuse to exercise our authority. That is, not to ascertain and determine what the amount of the Common School Fund is, but to decline to determine such amount. And even if some such an expedient were open to us with reference to the $124,685.18, I do

not see how it could avail us when we come to determine the amount for which Ontario is 'liable' On the other hand, if we adopt the contention put forward on behalf of the Province of Ontario, it will not be necessary to make any changes in the items now in question in the accounts submitted, or to do or say anything with respect to the Upper Canada Improvement Fund, except to leave it in the statement of accounts where we find it. Wherever in the accounts submitted the Common School Fund is stated at $1,645,644.47, it is so stated as one of the items of a balance sheet, and to show at what the Commou School Fund stood as a liability at the union of the Provinces of Canada, and the result is all the same, whether it is so stated at the sum mentioned or whether it is divided into two parts, and one given as the amount then due to the Common School Fund, and the other as an amount owing to the Upper Canada Improvement Fund. I am of opinion, therefore, that in determining the amount of the Common School Fund, we must start out with the sum of $1,520,959.29 which we find that the Dominion held for the two provinces, and on which we find them credited with interest in the accounts submitted to us."

"Before leaving this part of the case, I wish, however, to add that whatever view may be entertained as to our authority to deal with the matter, I think the deductions from the Common School Fund made by the award of September, 1870, and those thereby authorized to be made on account of the Upper Canada Land Improvement Fund, were under all the circumstances of the case, just and proper deductions. The Common School Fund has had the benefit accruing to it from the sales of the land being made on the understanding that one-fourth of the proceeds would be set apart to make roads through such lands and other im-

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

provements for the settlers, and it was only common fairness and honesty to give effect to that understanding. I agree with the learned Chief Justice of Quebec that the question as to whether or not in making and authorizing such deductions, the arbitrators exceeded their powers, is not concluded by the judgment of the Judicial Committee of the Privy Council in respect to such award. Their Lordships, in answering in the affirmative the question as to whether the award was valid or not, were careful to confine their answer to the 'objections made to the award in the special case;' and it is clear from the notes of the argument that the question as to whether or not the arbitrators had exceeded their powers in dealing as they did with the Common School Fund, was not thought to be one of the objections made to the award in the special case. But I cannot, for myself, see wherein, in making such deductions, the arbitrators exceeded their powers. It may be that in so far as the award may be taken to place the fund in the hands of the Dominion for all time, the arbitrators exceeded their powers, but that would not avoid the award in respect of matters within their powers if the view of their status and position suggested by the Lord Chancellor in 1878 should prevail. During the argument of the special case stated on the award and matters incident thereto, he gave expression to the view that the arbitrators were persons executing a "Parliamentary power;" that they were called arbitrators in the statute because they must have some description; that it was not the same as a private arbitration under a private instrument; and that if what they did was not within their parliamentary power, it went for nothing, but if it was within such power, there was no objection to it."

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

"On the 11th January, 1889, by an arrangement between the Province of Ontario and the Dominion of Canada, the province was debited with, and the Common School Fund credited with, an amount of $925,625.63, that Ontario admitted to have in its hands as arising from collections made in respect of sales of School Lands, and on the 19th of April, 1890, Ontario was in like manner debited with, and the Common School Fund credited with, a further sum of $11,103.70. These two sums are, in determining 'the sum held by the Government of the Dominion of Canada' on the 31st day of December, 1892, to be added to the sum of $1,520,959.29 before referred to, making the total sum so held at that date $2,457,688.62."

"The next question to be determined is, 'the amount for which Ontario is liable' to the Common School Fund. We are not at present asked to state the amount in figures. That would not be possible with the materials before us, but we have to decide some questions preliminary to a final determination of the amount.

"And first I agree with my colleagues whose opinions I have had the great advantage of reading, that Ontario is not liable out of the proceeds arising from the sale of Crown lands, other than the million acres set apart for that purpose, to contribute anything to the Common School Fund. I also agree that out of the moneys collected or received by Ontario on account of the Common School Lands set apart in aid of the Common Schools of the late Province of Canada, the province is entitled to retain six per centum for the sale and management of such lands. I am also of opinion that out of the proceeds of the said lands sold between the 14th day of June, 1853, and the 6th day of March, 1861, received by the Province of Ontario, the province is entitled, after deducting the expenses

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

of management as aforesaid, to take and retain one-fourth of the balance of such proceeds for the Upper Canada Improvement Fund. The Province of 'Ontario is liable,' it seems to me, in respect of moneys received from the sales of school lands made between the dates mentioned for the amount collected, less six per cent for management, and less twenty-five per cent of the balance; and in respect of moneys received from the sales of other school lands the province is liable for the amount collected less six per cent for management. Where sales of school lands made between June 14th, 1853, and March 6th, 1861, have been cancelled and the lands resold, Ontario is, I think, liable for the amount received, less only the six per cent for management. Of the moneys collected by Ontario for school lands sold, Quebec alleges that sums amounting in the aggregate to $9,468.59 have not been credited to the Common School Fund, and Ontario claims that certain refunds chargeable against the fund have also been omitted. I agree, of course, that in respect of these or any other errors or omissions the accounts rendered by Ontario of moneys received on account of the Common School Fund are open to correction."

"Then, with respect to the sum invested in the Quebec Turnpike Trust debentures and the interest due thereon, I agree with my learned colleagues that there is in respect of such debentures no liability on the part of the Dominion to either of the provinces, or on the part of Quebec to Ontario. Whatever sums may be realized from the principal moneys due on such debentures, or from the arrears of interest due at the date of Union should be added to the principal of the Common School Fund, and whatever sums may be realized from arrears of interest that have accrued due since the Union should be apportioned between

Ontario and Quebec in the same proportion as the interest on the fund is apportioned."

"What I have said covers, I think, all the questions now to be dealt with in respect to the Common School Fund, except the claim put forward in the Quebec statement of the case, that the Dominion is liable to Quebec for interest on the moneys that Ontario should have paid into the fund from time to time. The question is of no practical importance and has not been pressed and should be dismissed. Whatever sum Ontario is found to owe to the fund as principal money, should, I suppose, be debited to Ontario in the Ontario account as of the 31st of December, 1892, unless some other date should be agreed upon, and with respect to any interest on such fund, that Ontario may at that date be found liable for, Quebec's share thereof should be debited to Ontario in the Ontario account and credited to Quebec in the Quebec account."

The Province of Ontario gave notice of appeal from said award as follows:

"Take notice that the Province of Ontario, under the provisons of the statutes above mentioned, hereby appeals to the Supreme Court of Canada from the award of the arbitrators herein, bearing date the 6th day of February, 1896, in so far as the same implies or declares any liability by Ontario in respect of the Common School Lands or Fund."

"And further take notice that Ontario will, on the hearing of such appeal, limit its contention and except as to so much of paragraphs 2 and 3 of the said award as determines the liability of Ontario."

"First, as to paragraph 2 of the said award, which states 'That the Province of Ontario is not liable out of the proceeds arising from the sale of the Crown lands of the Province other than the million acres of Common School Lands set apart in aid of the Com-

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS

mon Schools of the late Province of Canada to contribute anything to the said Common School Fund.'

"Ontario appeals against so much of the finding in the said paragraph 2 as implies that Ontario is under any liability in respect to the Common School Fund or Lands."

"Second, as to paragraph 3 of the said award, which states 'That subject to certain deductions the Province of Ontario is liable for the moneys received by the said province since the first day of July, 1867, or to be received from or on account of the Common School Lands set apart in aid of the Common Schools of the late Province of Canada.'

"Ontario appeals against the finding in the said paragraph 3 of liability of Ontario as thereby decided."

"And Ontario asks that the Supreme Court of Canada declare that Ontario is not liable in respect of the matters set out in paragraphs 2 and 3 of the said award, whereby Ontario is declared liable, and that there is and has been no liability on the part of Ontario in respect of lands in Ontario known as the Common School Lands, or in respect of moneys received or to be received by Ontario from or on account of Common School Lands."

"And Ontario further asks that the said award be varied accordingly, or otherwise amended as the said Honourable Court may deem necessary and proper."

The Province of Quebec also appealed, the notice of appeal being the following:

"Take notice that the Province of Quebec, under the provisions of the statutes above mentioned, hereby appeals to the Supreme Court of Canada from the award of the arbitrators herein, bearing date the 6th day of February, 1896, made in respect to the Common School matter, in so far as such award permits or allows any deduction from the amount of the principal

of said Common School Fund for the Upper Canada Land Improvement, or Upper Canada Improvement Fund."

"And in this respect the Province of Quebec will contend that under the provisions of paragraph 1 of the award, the principal of the Fund should be augmented by the sum of $124,685.18, and that under paragraph 4 of the said award, the amount of twenty-five per centum referred to in the paragraph mentioned secondly, should not be deducted."

"And the Province of Quebec will ask that the said award be varied accordingly, and amended so as to not permit of any deductions from the principal of the said Common School Fund, for any sums for the said Upper Canada Land Improvement Fund, or Upper Canada Improvement Fund."

The following counsel appealed on the hearing of the appeal:

*W. D. Hogg Q.C.* for the Dominion of Canada.

*Hon. Edward Blake Q.C.*, *Æmilius Irving Q.C.* and *J. M. Clark* for the Province of Ontario.

*N. W. Trenholme Q.C.*, *F. L. Bëique Q C.* and *Hon. J. S. Hall Q.C.* for the Province of Quebec.

On behalf of the Province of Quebec a motion was made to quash the appeal of Ontario from the said award on the ground that it was limited to the question of that province being under any liability at all in respect of the Common School Fund and Lands, a question which, it was alleged, was not raised nor argued before the arbitrators, but came up for the first time on this appeal. The court reserved judgment on the motion, and directed the hearing to proceed on the merits.

Counsel for Ontario were first heard.

*Blake Q. C.*—The first part of my task is to show to your Lordships what was the origin and

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

nature of the Common School Fund, and what was the situation at the time of the passing of the British North America Act, in order that one may discern what effect that statute produces upon the situation, so existing.

The first statute respecting the fund was 4 & 5 Vict. ch. 18, passed on 18th Sept., 1841, an Act to make further provision for the establishment and maintenance of Common Schools throughout the provinces.

It is provided by the second section, that for the establishment, support, maintenance of Common Schools in each and every township and parish in this province there shall be established a permanent fund which shall consist of such moneys as may accrue from the selling or leasing of all lands which the legislature or other competent authority may hereafter grant and set apart for the maintenance and support of Common Schools in this province.

Then it provides that "all such moneys as shall arise from the sale of any such lands or assets, and certain other moneys hereinafter mentioned shall be invested in safe and profitable securities in this province, and the interest of all moneys so invested, and the rents, issues and profits arising from such lands or estates as shall be leased or otherwise disposed of without alienation, shall be annually applied in the manner hereinafter provided to the support and encouragement of Common Schools."

Now, I call attention at the start to that which runs through the whole of these series of statutes. That is, that it was a provision by the legislature of one single province, the province of united Canada, to provide for the establishment and maintenance of a system of Common Schools in the province, and that anything that was being done in the way of a creation of a fund, whether of capital or of income, was for the

purpose of dealing with the Common and Public Schools set up by, controlled by, and capable of being moulded by the legislature of that province.

Sec. 3 provides: That for the establishment, support and maintenance of Common Schools in this province there shall be granted to Her Majesty annually, during the continuance of this Act, the sum of fifty thousand pounds currency, to be distributed among the several districts in the manner hereinafter provided, and such sum shall be composed and made up of the annual income and revenue derived as aforesaid, from the said permanent fund and of such further sum as may be required to complete the same out of any unappropriated moneys which are now raised and levied, or which may hereafter be raised and levied by the authority of the legislature, to and for the public uses of this province, and the said annual grant shall be and be called the Common School Fund."

I call attention to the fact that, from the start and throughout, the provision with reference to this fund was one which, as I shall have to show presently, was not observed, viz., that the annual proceeds of the fund, interest and profits of the fund which it was designed to raise by the sale or rental of lands, were to be applied towards the payment of a sum of £50,000; that at least the grant was to be made up to £50,000 out of the consolidated fund.

Then the fourth section provides that "it shall be lawful for the Governor of this province, by letters patent, under the great seal thereof, to appoint from time to time one fit and proper person to be superintendent of education in this province, and such superintendent shall hold his office during pleasure and shall receive such yearly salary not exceeding the sum of seven hundred and fifty pounds currency as

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

the Governor may appoint; and the duties of the said superintendent shall be:—

"1st. To apportion in each and every year, on or before the third Monday in May in such year, the money annually granted by the legislature as aforesaid among the several municipal districts in the ratio of the number of children over five and under sixteen years of age that shall appear by the then last census of the province to be resident within such district respectively."

"2nd. To furnish the Receiver General of the province for his rule and guidance, with a certified statement or list of the apportionment of the money granted by the legislature under the provisions of this Act, as aforesaid, among the several districts.

"3rd. To certify the apportionment of the public money as aforesaid to the treasurer of each and every of the said districts, respectively, who shall lay the same before the district council to the end that each district council may direct, and they are hereby authorized and required to direct, such a sum to be raised and levied for the purposes of this Act, and within their respective districts, over and above all rates laid for other purposes, as shall be equal in amount to the money so apportioned from the provincial treasury."

The next Act is 7 Vict. ch. 9, and it recites once again:

"Whereas it is expedient to make further provision for the establishment and maintenance of Common Schools throughout this province, be it therefore enacted * * * that the sum of fifty thousand pounds annually, now granted by law for the maintenance and support of Common Schools in this province, shall, from year to year, be apportioned

by order of the Governor of this province in council between the divisions of this province formerly constituting the provinces of Upper and Lower Canada in proportion to the relative numbers of the population of the same respectively, as such numbers shall, from time to time, be ascertained by the census next before taken in each of the said divisions respectively."

That was a difference in detail, but not in principle. The principle of division before had been the number of children between 5 and 16 in each municipal district; the principle of division now is according to the number of the whole population as ascertained by the census.

And then there is the temporary provision because there had been no effectual census in Lower Canada, that until an effectual census was made in Lower Canada there should be a fixed division of the fund. Of course I need not say that that is immaterial, because censuses were taken, and the permanent provision came into operation shortly afterwards.

Then, on the 30th May, 1849, the Legislature determined to increase the amount, and they said it was desirable that the annual sum of £100,000 should be raised from the public lands for the maintenance and support of Common Schools, "and that so much of the first moneys to be raised by the sale of such lands as shall be sufficient to create a capital which shall produce the said annual sum of one hundred thousand pounds at the rate of six per cent per annum, should be set apart for that purpose; be it therefore enacted * * * that all moneys that shall arise from the sale of any of the public lands of the province, shall be set apart for the purpose of creating a capital which shall be sufficient to produce a clear sum of one hundred thousand pounds per annum, which said capital and the income to be derived therefrom shall

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS

form a public fund to be called the Common School Fund."

Then they provided by the second section, "that the capital of the said fund shall from time to time be invested in the debentures of any public company or companies in the province, which may have been incorporated by an Act of the Legislature, for the construction of works of a public nature, and which said company or companies shall have subscribed their whole capital stock, paid up one-half of such stock and completed one-half of such work or works, or in the public debentures of this province, for the purpose of creating such annual income."

And then I call your Lordships' attention to this provision:—Which said fund and the income thereof shall not be alienated for any other purpose whatever, but shall be and remain a perpetual fund for the support of Common Schools, and the establishment of township and parish libraries."

Then they provided "that the Commissioner of Crown Lands under the direction of the Governor in Council, shall set apart and appropriate one million of acres of such public lands, in such part or parts of the province as he may deem expedient, and dispose thereof on such terms and conditions as may by the Governor in Council be approved, and the money arising from the sale thereof shall be invested and applied towards creating the said Common School Fund; Provided always, that before any appropriation of the moneys arising from the sale of such lands shall be made, all charges thereon for the management or sale thereof, together with all Indian annuities charged upon and payable thereout, shall be first paid and satisfied."

Then:—"That so soon as a net annual income of fifty thousand pounds shall be realised from the said

school fund, the public grant of money paid out of the provincial revenue for Common Schools, shall forever cease to be made a charge on such revenue; Provided always, nevertheless, that in the meantime the interest arising from the said school fund so to be created as aforesaid shall be annually paid over to the Receiver General, and applied towards the payment of the yearly grant of fifty thousand pounds now appropriated for the support of the Common Schools;" Provided further, that after the said annual sum of fifty thousand pounds shall have been taken off the Consolidated Revenue, if the income arising from the said school fund shall from any cause whatever fall short of the annual sum of fifty thousand pounds, then it shall and may be lawful for the Receiver General of the province, to pay out of the said Consolidated Revenue such sum or sums of money as may from time to time be required to make up such deficiency, the same to be repaid so soon as the said income of the said school fund shall exceed the said sum of fifty thousand pounds."

And then 16 Vict. ch. 159, sec. 14, provides:—"It shall be lawful for the Governor in Council to reserve out of the proceeds of the school lands in any county a sum not exceeding one-fourth of such proceeds as a fund for public improvements within the county, to be expended under the direction of the Governor in Council, and also to reserve out of the proceeds of unappropriated Crown Lands in any county a sum not exceeding one-fifth as a fund for public improvements within the county, to be also expended under the direction of the Governor in Council."

Then ch. 26 the Consolidated Statutes is the next, and I think the last of these antecedent statutes which is to be referred to. (Here follows the recital and first five sections of the Act.)

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

And then there is a repetition of the provision as to what was to happen; so soon as a net annual income of two hundred thousand dollars, from the lands has been reached, and a happy state of the case which has not arisen.

And then the Governor in Council may reserve out of the proceeds of the School Lands in any county, a sum not exceeding one-fourth of such proceeds, and out of the proceeds of unappropriated Crown Lands in any county a sum not exceeding one-fifth thereof, such sum to be funds for public improvements within the county and to be expended under the direction of the Governor in Council.

That is the condition of things under the statutes at the time of the passing of the British North America Act. And, to the result of that condition of things, as far as the statutes go, I am not for the moment dealing with what was actually done with the moneys, and how the fund which was said to exist at the passage of Confederation was created; but, under the statute I submit the result is there was a legislative provision for the Common Schools of the old province, which schools, under the control of the legislature of the whole province, were public schools, and which provision was necessarily subject to legislative action at any session of Parliament.

That being the state of the case, I now bring up the question to what the actual condition of the assets which are the subject of this contention was on the 30th June. They are to be divided into two great separate subjects. The first is the so-called Common School Fund, a sum certain which is treated as if it had been a sum of money actually in the hands of the old Province of Canada representing the sum which ought to have been collected and invested and put to interest under the statute.

The second is of an entirely different character. It is the sum which represented the purchase money uncollected but due by private purchasers of the million acres of lands which had been almost entirely within nine or ten thousand acres sold, and which purchase moneys were partly paid and partly unpaid. The considerations which are applicable to these two subjects differ, but before I reach the question of how far they differ, I want to present to your Lordships what their state was at the moment. In order to do that, I have nothing more to say at the moment on the second head of that part which consisted of uncollected purchase moneys of lands, and of a few thousand acres of unsold lands.

Something, however, I have to say with reference to the part which constituted what has been ordinarily called the Common School Fund. With the exception of one small investment, which had better probably not have been made, an investment of certain debentures of the Quebec Turnpike Trust, no investments whatever were made of the principal moneys which were collected out of the million acres; they were not invested in the debentures of the province; they were not invested in the debentures of corporations as authorized by the Act. The Quebec Turnpike Trust was a small sum. I may have to mention it for another purpose, but it has been settled, and we are fighting about it no longer.

But, something more was done, or something else; the duty was to have applied the interest from these sales of lands yearly towards the $200,000 a year, and it was only to supplement the deficiency after that application that the consolidated revenues of the provinces were to be or could be called upon. Instead of adopting that course, what was done was to pay yearly out of the consolidated funds the whole $200,000, and

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA

*In re* COMMON SCHOOL FUND AND LANDS

to leave in consolidated fund the whole of the revenues, principal and interest. The book account was kept, and oddly enough no account was taken of the circumstance that that book account which included the interest as well as the principal, could not truly represent a liability of the province towards this fund, so to speak, while it included that interest, or to the extent to which it included that interest, because that interest was applicable towards the payment of the $200,000 a year, and when say $50,000 of interest came in in any one year and went into consolidated fund, and when $200,000 was paid out of consolidated fund under the provisions of the statute $150,000 only really came out of consolidated, the other $50,000 was really under the statute paid out of the proceeds of the lands. Notwithstanding that, this book account, the aggregate of which makes the $1,700,000 odd, remains, which, apart from the question of the Land Improvement Fund, constitutes the fund at the time of Confederation. This book account embraces all these payments of interest, although year after year they really were used pursuant to the statute, being paid into and out of consolidated fund in the payment of $200,000 a year, as far as they went.

The next point is to emphasize before your Lordships this fact, that when Confederation came there was not a shilling in actual hand in specie put in the bank, representing this fund. It was a simple book account like other book accounts, representing not the asset in any shape or form, but only a supposed liability to itself.

There is thus no asset of the Province of Ontario or the old Province of Canada in this regard whatever, excepting the Quebec Turnpike Trust, and I call

your Lordship's attention to the fact.—The 113th section of the British North America Act prescribed:—

"The assets enumerated in the fourth schedule to this Act belonging at the Union to the Province of Canada shall be the property of Ontario and Quebec conjointly."

The fourth schedule being looked at includes the Quebec Turnpike Trust. It was an asset. It was transferred; but, what was called the Common School Fund was not an asset. If it was anything it was a liability. Whether it was a liability or not is the question which is to be considered, but it was certainly not an asset, and there was nothing to transfer whatever in that connection.

Then as to the purchase moneys uncollected, or land sold. This stands for the principal part upon a wholly different footing. It depends upon another clause of the British North America Act, and it is not affected by the increase of Debt Act, or such irrevocable changes as to those to which I have referred. And, in order to ascertain what the position of things was, as constituted by the British North America Act, any difference in contrast to the funds or the lands, one has to turn of course to section 109 which does not merely by implication, but by express language include the sums due upon the lands.

So that it is clear beyond dispute that these lands and these purchase moneys for sold lands within the Province of Ontario belong to the Province of Ontario, unless it can be established that there is a trust in respect to them, or an interest of other provinces in respect of them, and the title of the Province of Ontario still subsists, notwithstanding that, except to the extent of the trust or interest. They are Ontario's, subject to whatever other interest there may be.

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

Then we come to consider that question which the arbitrators had before them in the Indian annuities case, upon which they came to a conclusion which was reversed by this court, whose reversal was sustained by the judicial committee, upon the question of trust or interest.

Perhaps it may shorten things if, before I proceed to consider what the facts were as to that I would look and see what light is to be drawn as to the meaning of this trust or interest from the decisions to which I have referred.

I refer to the case of the Indian annuities (1), and to the judgment of his Lordship the Chief Justice, at page 503 and following pages. His Lordship proceeds to analyse the documents in question in order to ascertain whether there was under them any charge or lien under the surrender of the lands, and he says "there is, therefore, no ground for saying that there was any express charge, lien or trust. Then, if there is any charge it can only be on the principle of the equitable lien of an ordinary vendor of real property, and from analogy to the rules of courts of equity applicable to such liens. I think this argument entirely inadmissible."

Then the judgment proceeds to give the reasons for that, pointing out that the Indians had the highest security, and then discusses the argument upon the Privy Council decision in the *St. Catherines Milling Company* v. *The Queen* (2), and holds that that does not apply as was contended.

We have there light upon the proper consideration to be applied to the question whether there is a trust or interest.

So again in the judgment of Mr. Justice Sedgewick, at page 537 and following pages.

(1) 25 Can. S. C. R. 444. (2) 14 App. Cas. 46.

The Privy Council judgments are to be found in the Appeal Cases for '97. Counsel referred to pages 210, 211 and 213

The ground taken by the Chancellor is: (The learned counsel quoted from the Chancellor's judgment at pp. 617-621 *ante*.)

Then, following out the general line to be traced in the reasoning which I have just read, my first argument is that it is an entire misconception of this whole case to speak of there being in the time of the old Province of Canada, any trust in this matter, or any interest other than that of the province in respect of these lands.

I say there was none whatever in respect of the fund, in respect of the lands, in respect of the purchase money; there was no trust, there was no interest. But, I say secondly, if you are to assume a trust or interest, that trust or interest was such in its nature as was by Confederation, by that radical change of conditions which took place in the very subject matter, not merely destroyed, but rendered impossible of any replacement, for after that day there never could be a common school of the old Province of Canada. Such a thing was impossible and rendered impossible by the Act.

Now, my lords, I proceed to do what in the course of the arguments on these appeals I may often have to do, to argue upon the hypothesis that I fail in the argument which I have just been addressing to you. I proceed to invite your Lordships to consider, because it is very material, if there was a trust or interest: What was that trust or interest? And, I will state to your Lordships why it becomes material, because we have a major and a minor controversy. The major controversy is as to whether there is any trust or interest, in which case we contend at any rate

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

with reference to the land, and subject to the considerations to which your Lordships has adverted, as to the fund, it is Ontario's. Then, there is nothing to divide. But, they contend that not merely is there a trust or interest, but that the division of that trust or interest has not been effectual, and that the true division of that trust or interest ought to be something different. They contend that the division ought to be according to the population at the late province of Canada as it stood in the year 1861, being the last census before 1867.

Now, their whole case rests upon the proposition that there was a trust or interest, and I am now in a very few words about to present to your Lordships what seems to me to be the unavoidable conclusion as to what the trust or interest was, if there was one at all. Because, it seems to me that that renders it impossible to go outside the propriety upon that theory of the case of the award of 1870. I have not yet got to that award, but I refer to it as indicating the pursuance of a course which, if the arbitrators had this matter within their power, was the only course which they could equitably and justly have taken.

I ask then: What was the trust or what was the interest? In order that there may be a trust or interest, one must assume of course a *cestui que trust* at any rate, and the power to create a trustee. One must assume an interest in some other than the proprietor of the land. How was this trust or this interest created? It was created, admittedly, only by the statute. What in respect of the question of apportionment of the fund—whether the apportionment of the principal, when authority exists in anybody to apportion the principal—or in the apportionment of the income which alone was contemplated by the trust, was the provision? The provision which with singu-

lar inconsistency Quebec sometimes asks you to speak of as a sacred and perpetual trust to be rigidly observed through all the variations of time and changes, political and otherwise. And, what was it? It was a provision that the money should be divided between the two territorial divisions of the one Province of Canada, yearly in proportion to the population as ascertained by the last preceding census. The fund itself to remain forever. The yearly fruits of the fund to be divided in this way forever. That is the provision. I need not read again the clauses of the Act. I do not suppose it will be disputed that that is in truth the provision.

Now, I want to know whether, if there be a trust or there be an interest, that trust or interest can be anything other, anything greater, anything less, than the statute which created it disclosed. I have shown I think that there is nothing, but, if there be something it is that which the statute shadows forth, and the statute shadows forth a perpetual fund, divisible year by year between the two territorial sections of the old Province of Canada in proportion to the population of each of those sections as ascertained by the last preceding census.

Now then I pass from the condition of things as it stood upon their hypothesis at the period of Confederation to the effect of the award of 1870.

And I may be permitted to make a preliminary observation with reference to that award, which is that I, for my part, am not disposed for a moment to suggest any difference of opinion from the judgment of the Chief Justice of this court in the Indian Claims Case, as I understand that judgment with reference to the general view that ought to be taken upon the subject of this award.

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

I go to the main question with reference to *intra* or *ultra vires* with reference to this matter.

The theory, as I have stated, on which Quebec must rely, on which it does rely, is that there was a trust. If so, the trust must be executed, and I do not think it is pretended that in any other instance, and if not in any other, why in this, the arbitrators had power to declare or decide a trust at all. The lands are the lands of Ontario under the Act, subject to whatever may be the trust, or interest of other persons. The arbitrators were not to determine what those trusts or interests were, or how they were to be administered at all. That was left for the law, or for convention, or for statutory arrangements between the parties; but it was not left for these arbitrators.

The Province of Quebec has claimed that the right of that province depends in respect of the Common School Fund, not upon this award at all, but upon prior statutes, and upon the British North America Act alone. This is important in view of the situation in which we now find ourselves on both sides.

The Province of Quebec has filed several documents which indicate what its present relation to this award is.

Amongst them is first, the case before these arbitrators in which Quebec submits that whenever it can be shown upon any other objection, that is to say, any objection other than those made in the special case, the award is contrary to law, and that it is invalid, that it is the duty of the present arbitrators so to declare.

Our contention is that there being in truth no trust, the award of 1870 could not and did not create one. We say that there was in this respect either a trust or not a trust. That the statute had prescribed that the lands were ours, subject to existing trusts

or interests, and that those arbitrators could not either create or define trusts; but, that if the first award could create it, it could do it only according to the terms, which are not division, but perpetuity, and, as I have said, division of the income according to successive censuses. That is the thing which the first award has attempted to do. That was the only thing that could be done. But, as I have said, the function of those arbitrators was limited to division or adjustment, and the thing which was the only thing that could be done in this regard was a thing which they could not do. But, if contrary to all that, it should be held that the arbitrators had power to deal with the trust, and had power to make the appropriate declaration with reference to a trust, then I contend with the utmost confidence that if it is granted that they had the power, and if it is held that this was in point of fact, or that they had power to make it, a trust although it was not a trust then, that what they have done is literally to comply with the terms of the trust, that is to say just as literally as upon the theory of its continued existence it would be complied with. I say it cannot be complied with literally, but upon this hypothesis these objections have been overborne, and the arbitrators have adopted the cy-près doctrine, and made that as near as could be, as they were bound to make it as near as could be and in respect of the capital, perpetual, and in respect of the income being divided, and in respect of the division of the income being in the varying proportions to be found by the censuses, they have just followed the terms of the award, and if they had power to deal with it at all, they had power to deal with it in this way.

Then let us look at the award. Sections 7, 8, 9 and 10 are those which apply to this matter. Of these the 7th and 8th deal with the Land Improvement Fund, and I do not touch the other at this moment.

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

First of all by the 7th, they take $124,000 out of the Common School Fund. And by the 8th, they deal not with the Common School Fund as it was, but the residue of the Common School Fund after that deduction, so that assigns to Ontario $124,000 out of the supposed assets of $1,700,000, and then they proceed to deal with the remainder of that fund. Their award is with regard to the remainder only as to its apportionment. Then, how do they deal with it? That it shall continue to be held by the Dominion of Canada, and the income realized therefrom, from the 30th day of June, 1867, and which shall be hereafter realized therefrom, shall be apportioned between and paid over to the respective provinces of Ontario and Quebec.

Then I read sections 9 and 10 of the award.

Now, as I have said, I should have pressed your Lordships very earnestly with reference to the question of the book accounts. The proposition that I have advanced as to the actuality of that, and as to the possibility of adding to the public debt of the province in the way in which it was done, that they had no power at all, but I argue that if they had a power, that there can be no doubt whatever that their disposition is final. If they had power to deal with it in this way, they have dealt with it finally, and there is no reversing it; I cannot contend against that at all.

Then as to the other parts, 9 and 10, I argue as before, that the question whether Ontario lands were subject to any trust is one of law disposed of by the British North America Act, and that the arbitrators had no power either to annul or to create or to change any trust or interest, and that if some trust or some interest might have been within their power, a trust or interest of such a character that it was not capable of being dealt with by them within their power to divide or

adjust, cannot in the nature of things be within their power.

I should have thought it was only putting it *ex majori cautelâ*, because I could not conceive nor think anybody would ever suppose it was contemplated to hand over to the province, beneficially, the lands which had been sold to somebody, and the purchase money paid, and all that remained was getting out the patents. They handed them over as they were, subject to the existing interests and rights of other people; and, it expresses that which I think would have been implied, and I do not think it expresses anything more.

Therefore our suggestion is that this was beyond the power of the arbitrators, and therefore remained an open question. And, endeavouring as far as I can to combine the different links of the argument, which apply to one thing at the same point, our secondary suggestion is that if it be held that it was within the power of the arbitrators, that there is no dispute whatever that it was to be treated as an existing trust, and on the theory that it was an existing trust, they did as near as possible apportion.

Then I come to a different allegation, which has to do with the state of things created by the award, which is, that the province of Ontario is bound because Mr. Treasurer Wood who represented the province at the time of the arbitration thought this was a trust and said so to the arbitrators.

It is well known that the public is about the worst served subject, and that it is in the public interest that the public, and high political organizations, should not be bound by defaults and negligences and admissions without authority of those who have charge of their business. I believe that is a sound view. It tells enormously against me in the argument I shall

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

have to address to your Lordships in answer to my learned friend's appeal, but it is in my favour upon this argument, and having my choice of which attitude to take, I have the satisfaction of taking the attitude which I really believe is the sound one, except with reference to the increase of Debt Act; there you had other provinces who were not before the court, there you had a great settlement by statute—short of that I do not see what this long array of letters, correspondence and Orders in Council have to do with the case. The case seems to me to present very clear and simple propositions, viz.: that if the thing be within the power of the arbitrators, it is not open here, if not within, it is open and you have to decide what has to be done. So that if Mr. Treasurer Wood expressed the opinion before the first arbitrators that this was a trust, and suggested to them the way they should deal with it, he would not be making any concession which could bind the province. He might have been right, or he might have been wrong in his law. If wrong I do not think the province was bound, and I do not think his concession conferred jurisdiction.

The facts, of course, were not in dispute at all. So, again, as to the mode of dealing by the arbitrators which he there suggested should be taken. That is as to the mode of making the trust perpetual and dividing the income, ordering the income to be divided instead of dividing and adjusting the whole fund. If that was beyond their power his concession did not bring it within, and that view is put very prominently by Chief Justice Casault, although I very much quarrel with the inference, it seems to me, His Lordship draws from that view.

Then all is therefore open. Because there was no trust nor interest, because there was no power in the arbitrators to declare a trust, to do more than divide,

and they have not divided and could not divide, and therefore they could do nothing.

Well the next stage is the Privy Council judgment, which I think does not affect the decision on either point of view, and I just pass it by with that statement.

Now, I want to make a general observation. Although, as I have said, I argue that it is not material what was the attitude during this long series of years of these two Crowns towards one another, I have to point out what appears to have been their general attitude, which is explanatory I think of a good deal which might otherwise be difficult of explanation. It is well known of course that the province of Quebec repudiated the binding force of the award altogether, and that after a considerable time it remained in a sort of *impasse*, Quebec said no, the award is bad, and an effort was made to obtain a case, and it failed, and things went on for a number of years as public things do before any arrangement could be made whereby any sort of decision could be arrived at upon the points upon which Quebec contended that the award was void. That state of things lasted for a good many years until shortly before the reference to the Privy Council. During that interval different suggestions were made by the authorities. There is one letter to which I wish to refer of the then Attorney General and the Prime Minister of the province of Ontario to the corresponding authority I believe of the province of Quebec dated 10th of June '73, in which he argued out the question at great length as to the proposition which Quebec insisted still was the true proposition, the true *ratio decidendi*, and made suggestions that for peace sake Ontario would be prepared to do so and so, and that it would be as beneficial or more beneficial to Quebec than their proposition. He failed to persuade

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS

his adversary, as I am afraid frequently happens. Then on the 12th September 1876, is a rather important letter of the Secretary of Ontario, showing the attitude of the province.

"Under the award several hundred thousand dollars are payable by Ontario to Quebec in respect of school lands in this province realized by this Government since Confederation, but, if the award is not acted upon there would be a question for discussion and consideration, whether Upper Canada should not retain the products of all its own school lands."

"These moneys, for these and other reasons, have been retained until either the award is accepted or a new settlement made; and I am to say that this Government is very desirous of avoiding further delay in the settlement of this and all other matters between the provinces."

Then, not very long after that came the reference to the Privy Council, and the appearance of Quebec and of Ontario, and the decision against Quebec upon the points submitted in this special case.

Now, I think that the fair result of the correspondence was that Ontario was willing to accept the award on the understanding which it entertained, and which it was justified in entertaining from the course of Quebec, that Quebec did not voluntarily accept, but for the decision of the Judicial Committee was ready to act upon the award, and that both parties for a long time occupied that sort of relative notion. Quebec fancying Ontario was ready to accept the views of the award without raising any question as to the Common School Fund, Ontario fancying that Quebec was ready to accept the view with reference to the Land Improvement Fund, not as to the $101,000 which was, as was contended, to come out of Crown lands, with which the arbitrators did not deal in terms,

although we contend they did impliedly. That is an outstanding question which you have not before you, and which was really the reserved question in this award which we contend. I say that was the general attitude with the exception of that $101,000, being 20 per cent on the sales of the Crown lands, as to which the arbitrators had not in terms dealt, as to which Quebec declined to accede to any method of disposing of the question, and as to which it is not to be disposed of under this.

Then we come to this reference, and to the action under this reference—I am reserving the minute discussion of what the terms of the reference are for a moment, because I deal with the general conduct—then it turns out in that course that the province of Quebec wants to bind Ontario to the award as to the Common School Fund, in so far as it is an acknowledgement of liability, to hold itself free to contend that the award is void as to the Common School Fund altogether and that the division prescribed by the award should be replaced by a division more favourable to the province of Quebec, to tie Ontario by the hands and say you shall not say a word against the award about the Common School Fund, but we say that it is all open and free for us to contend that it is a bad award, and that in truth we ought to get a great deal more for it. That is the condition of affairs into which the situation had grown before the arbitrators made the award which is now under appeal.

As I have said to your Lordships in my answer to the motion to quash, the conclusive answer to the suggestion that this was not directly disputed before the arbitrators, the point in respect of which we now appeal, is in their certificate. If the pleadings, so to speak, the statement of the case, was defective, if there was acquiescence or admission, it was perfectly com-

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

petent to the arbitrators to have called the parties before them and to have said, we consider that such and such things are open for argument, and ought to be argued. What has been done is that the arbitrators have discussed these questions as to whether there is any liability, and as to what the extent of that liability is under that award. We ask it should be found that it is nothing. But, they contend there must be something found, and if something, we are driven to find this particular amount. We say that the question is absolutely open, because you are to ascertain what the amount of the liability is.

Then upon the reference therefore, and upon the action taken before the arbitrators, and so on, I hold first of all that this is within the reference, and secondly the certificate of the arbitrators that they proceeded upon a disputed question of law is final and conclusive upon the point that my learned friend suggests, viz., that it is being raised for the first time before your Lordships.

He says that this disputed question of law, which the arbitrators have certified was raised before them, is being raised here now for the first time before a court of original jurisdiction.

I cannot conceive that these learned and eminent judges, sitting in as near an absolutely judicial capacity as men can sit, would have entered at great length which they did, particularly Judge Casault, into a point that had not been discussed before them, and points which were not relevant, and which they did not think relevant to the issue, and yet I see them all discussed fully, but my learned friend said, he had no opportunity of saying a word about it, we are going perhaps to look at the notes of the argument, and are going to say that this is not raised, and that is not raised and the other is not raised. Those were all

matters for the arbitrators, and the certificate settles all that.

I open the question from this point of view, and suggest a certificate as showing it is a disputed question of law, and that we are entitled to have that so certified disputed question of law decided; that the language of the reference wholly serves to remit the question. It does not decide the principle upon which the question should be decided. It does not impose an obligation to find a liability if there was no liability. It leaves everything open. There was a question of how much if anything, if nothing the arbitrators should find nothing. The whole suggestion is one alien to the position which I have ventured to propound, that these political corporations, to be bound by fine suggestions of pleading, delay, estoppel, neglect of counsel and so on, and therefore that the whole thing is at large, and upon this disputed question of law, viz.: whether the province of Canada is under any liability in respect of the Common School Fund, and the Common School Fund Lands, we hold that under the British North America Act, and ask your Lordships to hold, it was under no such liability, that there was no trust or interest, that first the arbitrators had no authority to decide it, that it therefore remains according to the common case of both parties, because my learned friend says, and Judge Casault says, that this award in respect of the Common School Fund is void, it remains untouched, and now to be decided, and being to be decided must be decided in accordance with the arguments which are suggested in favour of the view that there was no trust or interest, and therefore that the lands and funds of Ontario belong to Ontario.

*Trenholme, Q.C.*, for the respondent, the province of Quebec:

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS

From the point of view of Quebec, the learned counsel who has opened the appeal for Ontario has introduced into the matter a great many questions which Quebec thinks have no relation whatever to the present appeal. The learned counsel has dwelt very largely upon pretentions put forward by Quebec before the arbitrators. Of all these pretensions none are in question in this appeal.

The solitary question here is this, whether Ontario has a right upon this appeal to have it declared that there has been, and that there is, no liability on her part in respect of these so-called school lands, and of this school fund. That is the question in this appeal. The pretentions that Quebec puts forward in her case before the arbitrators, no matter what those pretentions are, have all been abandoned except the one; but, no matter what they are, can they give jurisdiction to this court to determine that question in favour of Ontario? Do they give jurisdiction in any degree to this court? Surely the appeal of Ontario if it stands at all, must stand upon its own merits. It must stand upon the ground that Ontario has a right to come before this court now and ask this court to determine that there was no liability whatever on its part in respect of these school lands and in respect of this school fund. That is the whole question in this appeal. There is nothing beyond it, except matter being invoked for the purposes of illustration, for the purpose of showing that there was an estoppel, or what was in issue between the parties.

I have already argued that the statute authorizing this arbitration, and the deed of submission, recognize liability on the part of Quebec, and that the plain common sense interpretation of that deed of submission is that there is a liability, and that the arbitrators are simply to ascertain the amount of that liability. The

arbitrators are told, that in the ascertainment of that they are to take into account, not only the fund in the hands of the Dominion but the amount for which Ontario is liable. That admits that Ontario is accountable for something, no matter how small it is; if the liability exists, there is the admission of that liability; and, then if we go further we see that they are to take into account the value of the school lands. Why, that would be an absurd provision to put into a deed of submission if there were no school lands.

There is no question in this submission as to whether Ontario is under any liability or not; that question is originated here for the first time.

With regard to whether Ontario can raise this question before the courts, we maintain in the first place that it is not in the deed of reference, we maintain as we did this morning in arguing the motion that it was not in dispute between the parties, and we maintain also that the arbitrators have really not declared upon this subject at all. All they have done in their award is to recite the enunciation of what had been agreed upon in the deed of submission. They go no further in declaring or establishing the liability of Ontario than what is stated in the deed of submission itself. They simply lay down rules for ascertaining the amount of that fund, and without any declaration or any intention of declaring, that there was liability on the part of Ontario.

We say that Ontario is estopped from bringing up this question in this appeal in the way stated by the admission of liability in the deed of reference, and also by the admission in her answer.

Now, if your Lordships will turn to the case, your Lordships will see the attitude that Ontario has taken with regard to this question of liability, and that there is no denial on the part of Ontario that there is a

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

liability in respect to the million acres of school land. The denial is simply with regard to the Crown lands, the new aspect as it has been called here, the claim of Quebec to have a large sum appropriated on account of the sales of other Crown lands. In all these places we find that Ontario, as in her answer, never raised this question as a part of her answer, as a part of her defence. She has never raised this question that there was no liability on her part from one end of the answer to the other. There is not a clause that could have been struck out before the arbitrators on the ground that it was not included in the reference or for any other reason, because there is no such allegation in the answer. Ontario does say that Quebec has only a right, if any, to this fund under the award.

Has Ontario a right in this appeal to go into that matter? Must not her appeal here stand upon its own merits? For instance, suppose Quebec were to discontinue her appeal altogether, would Ontario have any right to come here and maintain an appeal? What Quebec pretends and all that Quebec pretends in her present appeal is this: that in her appeal, that if it be the case, as there seemed to be some authority in the dicta of the learned members of the Privy Council—if it be the case that the part of the award by which the Improvement Fund is deducted or claimed to be deducted from the School Fund can be separated from the rest of the award, and it is *ultra vires*, it may be disregarded, and that that item representing the Improvement Fund may be considered as still forming a part of the School Fund, but what I maintain is that the pretentions of Quebec have nothing to do with this appeal. This appeal has to stand upon its own merits and Ontario must come here and must show that she is appealing against something that the arbitrators had jurisdiction in; that this matter was before the arbi-

trators; and cannot come here and raise it for the first time, as in a court of original jurisdiction.

The award then of 1870 is invoked by Ontario. She asks to have this set aside. So long as the award stands it seems to me that it is a complete estoppel to Ontario; and especially, as it has not, as I said, been assailed by the proceedings before the arbitrators. She has taken no steps whatever to have this award set aside. Now for the first time she seeks to ignore this award.

We claim that Ontario is estopped, and we think there is estoppel as between provinces which are litigants. We maintain that she is estopped by the whole past course, thirty years conduct, in relation to these matters, not only by the opinions and admissions of Mr. Wood, who appeared before the arbitrators of 1870. Mr. Wood's opinion is there. The Hon. Mr. Mowat, Premier of the province of Ontario, gives his opinion, which is also there. Your Lordships will see that Mr. Wood says distinctly that Quebec has an interest in this fund and in these lands. That was the opinion of Ontario's representative at least at the time of the award, and the lines laid down by Mr. Wood at that time were actually followed, substantially, in the award made by the arbitrators of 1870.

Then in a letter which the learned counsel has quoted to the court, of the Premier of Ontario, Mr. Mowat, to the Premier of Quebec, the court will see that Mr. Mowat says also in the most distinct manner that the fund, including the school fund which belonged to the two provinces before Confederation, belongs to them still. Your Lordships will see the very words used by the Premier of Ontario are these:—

"The various funds from time to time set apart by the Parliament of old Canada, for either section, belong to that section still."

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

That was an admission of liability, but we say Ontario was right in her interpretation of that transaction. She was right in her interpretation then, and she is not right now. Her whole course for thirty years is conformable to that opinion and opposed to the position that she is now taking before this court.

Not merely have we the expression of opinion of individuals, servants of the Government of Ontario, but we have got the same acknowledgements in the statutes of Ontario.

The first statute is the statute of 35 Victoria, in 1872 (Ontario):—

"An Act relative to arrears due upon Common School land sold previously to 1st July, 1867."

Your Lordships will see that this is an act to reduce the price of these lands.

Paragraph 2 of the statute says:—(Reads section.)

Then the next statute is still more important for this reason, that it not only acknowledges the right of the Province of Quebec, but it recognizes the right of the Province of Quebec under the statute, not in virtue of the award of 1870, but it recognizes that Quebec had a right to share in this fund under Consolidated Statutes of Canada, chapter 26. That is 46 Vict. ch. 3.

Then still later. Look at the next statute, 57 Vict. ch. 11 of Ontario in 1894. Here is a statute passed by Ontario since this deed of submission was signed by the parties in 1893; actually, pending the proceedings before the present arbitrators, Ontario passes a statute, which contains in its preamble the same recognition. And then it goes on to make provision for a settlement of this matter, and in all these statutes we have the most formal admissions by this province, even while this arbitration is going on, that the fund exists, and that it exists under the consolidated statutes of

Lower Canada, and that Quebec is entitled to a share of this fund.

We claim that that is an estoppel of the province by admission, and conduct, and that Ontario cannot come now and take the reverse position, especially as these statutes are in strict conformity with the position taken before the arbitrators.

As I say, these statutes are in strict conformity with her whole conduct for thirty years. Ontario collected large sums of this money. She paid over in January, 1889, no less than $925,000 of these uncollected balances on these lands to the Dominion Government, and paid other sums since. She paid large sums of interest to Quebec, $250,000. The provinces have dealt upon the basis that Quebec had an interest, as these statutes state, in this fund. During all these years it has never been questioned before by Ontario until we arrived at the present appeal.

Your Lordships will see that payments have been made between the provinces, based upon this common assumption that the fund exists and that Quebec is entitled to a share in this fund, and did get a share. She was recognised, and was paid a share. That has been the basis upon which the province and the Dominion have acted during all these thirty years.

Now apart from the question of estoppel, we come to what may be called more strictly the *merits of the case*, that is, whether the argument which Ontario now presents, suppose it is open to Ontario to present that argument in this court, which we maintain it is not—but suppose it were, are the arguments that Ontario adduces to maintain her position that there is no fund, no liability, well founded? Quebec maintains that they are not well founded.

The present argument, as I understand it, of Ontario, is that no trust existed or exists; that no fund exists

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

and that no school lands exist; that there are no beneficiaries, no *cestui que trust*, and, that therefore the trust fails, comes to an end. That is the argument of Ontario on what may be called strictly the merits of the case.

I propose to call the attention of the court to a few statutory provisions bearing upon the matter.

First, take this section 109 of the British North America Act itself. That section provides that the lands in each province shall fall to the province, with the unpaid balances on them, subject to any trust or interest other than the province in them at the time.

That very clause, it seems to me, means and implies that wherever there are existing trusts at the time, these trusts are not destroyed, but continued. That clause is not calculated to end or destroy existing trusts, but to perpetuate them. The meaning of that clause is that they are to be continued, because the existing trusts are to be respected.

That is conformable to the other provisions of the B. N. A. Act. For instance, section 129, in the most comprehensive terms, continues all laws and all authorities in force at the time of Confederation, to the fullest extent. There was nothing lost. All the existing institutions of the country, that were based upon law, were continued. They were not destroyed by Confederation.

The same was the case with regard to the executive powers under the constitution. These executive powers were placed in different hands, but there was no loss of executive power. All that existed before Confederation continue to exist after Confederation, only in different hands, according to the jurisdiction of the legislature. Section 12 of the British North America Act, and particularly section 135, is specific upon this point. There was no loss, either of legislative

power, or executive power by the British North America Act, and there was no destruction of the institutions of the country, or no failure of ability to carry out, or provision to carry out the laws of the country by the executive, because it is all covered by those provisions of the British North America Act, and other provisions which I might refer to.

At the time of Confederation there was in force in respect of these Common Schools in Quebec and in Ontario, the Common School Act creating the system of schools in Quebec, 7 Vict. ch 27, embodied in the 15th chapter of the C. S. L. C. That Act was in full force. The schools created under that Act were in full force at the time of Confederation. The schools existed there at the time of Confederation, and by the law which set aside this million acres of land, that is the law and the Order in Council—observe there is a marked distinction between this million acres of school lands and the fund that was claimed out of the Crown Lands—there were no Crown Lands set aside. The statute was passed, but as regards the Crown Lands, was not acted upon, but as regards these school lands was acted upon. The Order in Council was made. The lands were described and defined, definitely established and were set aside for this school fund. That makes a marked distinction. They were appropriated definitely for this School Fund, set aside, which was not the case with regard to the Crown Lands.

Now we come to chapter 15 of the Consolidated Statutes of Lower Canada. This is the chapter under which the schools of Lower Canada were existing at the time of Confederation. It is the law under which those schools still exist.

Now, what did this statute do? This statute was the work of both the provinces. It was the same legislature that had passed the other Acts that passed this

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

ch. 15 of C. S. L. C. This statute, constantly, throughout its whole length, refers to the Common School Fund. The statute is tied up, so to speak, with it, and the system of the schools provided for there, are intimately dependent upon this school fund, as I shall presently point out. It recognises that a part of that fund belongs to Lower Canada. It says so. It agrees with the Consolidated Statutes of Canada in dealing with Lower Canada as an entity, and as entitled to a part of this fund.

For instance, in sec. 99, ch. 15, we have language like this, speaking of what should be done with the balance of this fund :—

"The balance remaining unexpended or unclaimed out of the portion of the Common School Fund, belonging to Lower Canada."

Now, there was some Common School Fund that belonged to Lower Canada. And it speaks in another place of the—"Permanent and additional Common School Fund," the provincial grant being the permanent fund created under the statute, setting aside these million acres of land, and the Order in Council.

Now, I want to call your Lordships' attention to a few other provisions of this ch. 15, which is an important chapter.

Why should we say that no portion of this was vested in Lower Canada schools, if the statute, which was the work of the two provinces united, says that a part of that fund belonged to Lower Canada and to the schools of Lower Canada?

Section 27 establishes, following 7 Vict., this system of schools in Lower Canada under commissioners and trustees. Sections 53 and 54 declare that these commissioners and trustees shall be corporate bodies.

Section 99, which I have just cited, states that a portion of the fund belongs to Lower Canada.

Sections 14 and 95 deal with the establishment of Normal and Model schools and appropriate a certain portion of the fund for their support.

Then section 64 provides for the case of donations and gifts for the endowment of these schools by private individuals. That was not an exclusively public system. It was a system in which individuals were encouraged to make gifts and endowments. Section 64 provides for that, and so does section 60, subsection 2, and also section 115 recognizes that some of the schools that were being conducted under this statute were not public property, and as a matter of fact all through Lower Canada, where schools existed prior to the establishment of these public schools, they often existed by the joint efforts of neighbours, and when this system was established these schools handed over their school property as a contribution, dependent upon this very statute, dependent upon this provision that had been made by the Parliament of Canada for the support of the public schools of the country.

More than that. Poor scholars and poor school districts were to be assisted out of this fund. Poor scholars were to be educated without any charge, and there was local assessment, corresponding to the portion of each municipality, in this fund, and poor scholars had to be educated free in these schools. It was imposed upon them as a condition.

Your Lordships will see how distinctly these schools of Lower Canada are recognized as having rights in this fund. This fund is spoken of as belonging to them. See sec. 88.

The Lower Canada Common School Fund means this fund. A portion of this fund belonged to Lower Canada. Not the portion raised by local assessment, but the portion of the fund belonging to Lower Canada of this Common School Fund Sec. 88 says:—"And

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

the superintendent shall deposit the said sums in such bank as the Governor in Council may direct, and shall apportion the same according to law among the municipalities, and shall pay to the school commissioners and trustees of dissentient schools the respective shares belonging to the municipalities." That is to the several municipalities. They formed corporations. Every one of these were corporations just as much as the University of Toronto. There were more of them, but they were existing corporations, declared perpetual. They could incur obligations, and could sue and be sued. They were legal entities, and these were the beneficiaries of this fund. Why, if there was one set of institutions more than another that Confederation was careful about preserving, it was the right of these schools—the schools of the country. Schools of the minority were represented by trustees who were corporate bodies, and all their rights it surely was the intention of the Act of Confederation to preserve.

Now this appropriation of a million acres of Crown lands was in the nature of a compact between the two provinces. Here was the old Government of Canada setting aside this by mutual consent of both provinces; it was in the nature of a compact between these provinces, and the beneficiaries were the schools of Lower Canada, and the schools of Upper Canada.

There was an understanding between the two divisions of old Canada and there is authority for saying such an understanding as that is valid, to support trusts in equity at least; but here we have, I say, a complete system of schools established by the same authority that appropriated these million acres of land, and throughout this Act Lower Canada is spoken of as owning a portion of this fund, as entitled to a portion of this fund, and the municipali-

ties are the school bodies of Lower Canada, are declared to have rights in this fund, and to be entitled to this fund, and they were perfect legal entities that could be sued and sue.

These million acres of land were held by the Crown, and the beneficial interest in them was in the old Province of Canada containing both Upper and Lower Canada, and the million acres of Crown Lands were appropriated as a school fund for the support of the schools in each division of the old province, that is, in Upper Canada and in Lower Canada. They were not the lands of the Province of Ontario. They were the lands of the Crown and if the Crown appropriated this million acres of land on these occasions from Upper Canada, they might have appropriated lands in Lower Canada for some other objects, and they did actually pass statutes to that effect. For instance, one of the first statutes promoting the construction of the Intercolonial Railway provided for setting aside a large amount of land in the province of Quebec in support of that scheme. And there was nothing extraordinary in the Crown setting aside this million acres of land for the support of the schools in the two sections of the province—nothing that gives any claim to Ontario now, either in equity or in law, in that. They were Crown lands, they were not Ontario lands, nor Quebec lands. They were Crown lands belonging to the whole province, and were set aside for the benefit of the two provinces or the schools in the two provinces, which were the real beneficiaries in the matter. And the terms used to appropriate this million acres of land to the benefit of these schools are exactly the same as were used in appropriating Indian Reserves. For instance, in the very statute of Lower Canada preceding this C. S. L. C. ch. 14, sec. 12, we have a provision made for appropriating lands to the

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

Indians, Indian Reserves, and the language is exactly the same as in the case of this statute. There was authority given to appropriate and set apart lands by Order in Council, for the Indians. Now such reservations were made under the old Province of Canada. The Indians had an interest in those lands at the time of Confederation. In the Ontario lands case the Privy Council laid it down distinctly that there was no necessary connection between control over those lands and an interest in those lands.

Now, the ground I take is this: The language being the same, these lands in each case being set apart and appropriated, the result upon these lands should be the same. Now, in the case of the Indians, it is undoubted that that created a reservation belonging to the Indians. It was an appropriation of those lands to the Indians. The Indians acquired an interest in them, and if the question for this court was whether such Indians had a vested right or interest in those lands which had to be respected under section 109 I imagine the decision of the court would be very different from what it was in the case of the Indian annuities where the obligation of the Crown was a personal obligation, where it was held there was no lien whatever on the lands; but here the lands are set aside and appropriated to the Indians, and they give an estate to the Indians, an estate that this court would respect, and so, if the lands are set apart and appropriated as a school fund, it gives to the beneficiary of that school fund an estate and an interest. That was the condition of affairs at the time of Confederation. Now, did a change of legislative control over the Indians, and over these Indian lands—did it in the least degree affect the rights or interests of any parties to this land? Not in the least. The old Province of Canada had the legislative control over

these Indian lands and over these Indians, and that legislative control passed out of the hands of the old Province of Canada to the Dominion. And the Privy Council held that this change in no way affects the right or interest of any party. The Indian rights remain. In other words, the Dominion took over the Indians and the Indian lands and the Indian fund, everything belonging to the Indians. They took it all over into their hands just as in this case. Quebec and Ontario took over the schools and took over the property of the schools, with all the attendant rights belonging to these schools, just in the same way, and we might just as well argue that because the old Province of Canada has lost its control over these Indian lands and these Indian funds, there is some change of interest; there is no change of interest. The legislative control is no measure and no limit to the rights of the parties under our Act of Confederation. The idea was to perpetuate all rights and all obligations, and when the two provinces took over the schools they took over all belonging to these schools, they assumed the burden of these schools, and they assumed it as heirs of the old Province of Canada, and with all the rights, all the obligations, except the one of the annual grant from year to year, but all permanent existing trusts passed, they were transmissable obligations and rights, and they passed to the new provinces as successors in that department of the old Province of Canada. Therefore I think that the effect given to this Indian Act is applicable to our case.

Now another point is this. It is argued there is a difference between the Indians and the schools. As I show to the court the schools were capable of having rights just as much as the Indians. This action of the old Province of Canada in setting apart and appropriating this million acres of land, was done in favour of

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

two distinct and separate systems of schools. There was one distinct and separate system existing in Upper Canada and there was another existing in Lower Canada under totally different statutes. Now it was in favour of these schools respectively that this appropriation was made of this million acres of land. It was not schools of the Province of Canada in any other sense than it was in favour of the system of schools existing in Lower Canada and in favour of the system of schools existing in Upper Canada, which were distinct and different from schools under different Acts.

Ch. 26 of the Consolidated Statutes says:—

"The said sum of $200,000 annually shall from year to year be apportioned by order of the Governor of this province in council between Upper and Lower Canada, in proportion to the relative numbers, &c."

Now there was a portion of that fund affected in favour of Lower Canada; if it was not defined it was capable of being easily defined. Lower Canada's share was assigned to her and permanently assigned to her by this statute.

Now, a division is made of it permanently, I claim, by this statute, and also by the subsequent statute, the School Act of Lower Canada, C. S. L. C. ch. 15. That apportionment is recognized. In section 99 of that School Act of Lower Canada we have the language used by the same legislature that a portion of this fund does belong to Lower Canada. They use the words ,'belonging to Lower Canada." Therefore there was a definite portion assigned to Lower Canada, and there was a definite portion vested in Lower Canada as a distinct division of the old Province of Canada, and that language is used, I say, by the same legislature throughout this School Act of Lower Canada; not only is it declared to belong to Lower Canada, but the statute, 15 Vict., goes further; it creates all the

machinery, and all the provisions necessary to carry that apportionment onward down to the ultimate beneficiaries, the schools of every school district in Lower Canada, and these school districts are declared to be entitled to a certain share of this fund, provided they comply with the conditions on which it is granted. They have to raise a corresponding amount by local assessment. The schools were instituted and all the machinery was provided. I call your Lordship's attention to the machinery that was provided.

Section 24 of the School Act says "it shall be the duty of the Superintendent of Education—now that Superintendent of Education is styled in the previous section 'The Superintendent for Lower Canada,' showing a keeping of the distinct system—to receive from the Receiver General all sums of money appropriated for Common School purposes, and to distribute the same among the school commissioners and trustees of the respective municipalities according to law." And in proportion to the population of the same as ascertained by the then last census. Then section 88 says something more.

Now, not only does the same legislature say a portion of this belongs to Lower Canada, but that it belongs to the school municipalities—to the municipalities they represent.

Section 94 carries out the same idea.

I will have to call your Lordships' attention to this, that these were not exclusively supported by public funds. Sec. 94 provides that the money shall be divided among the several school districts in the municipalities in proportion to the number of children between seven and fourteen.

Now we have got the complete machinery for carrying this fund on and vesting it for the benefit of every school district, and it is vested in the school commis-

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

sioners and school trustees of these schools by the Act and by the same legislature. Now, the language of the statute is that the schools are entitled to this. For instance in section 90 we have language like this:—

"To entitle any school to its allowance out of the general or local school fund, it shall be requisite and sufficient," to do the following things.

Now, then, the school was entitled to a share of this fund, if it complied with the requirements. It had a legal right and a legal status to enforce its right to this fund if it complied with the requirements. Sections 96 and 97 carry out the same idea.

Now, there are reasons for which the Superintendent of Education may refuse, and without which he could not refuse. He was bound to pay it over to these schools. And therefore we have the complete machinery, and we have the language used throughout here that the municipalities owned this fund, and that if they comply with certain conditions they are entitled to have their share of that school fund.

Now we come to the next point: What was this fund? I propose to direct attention to that point: What was the nature of this fund?

The same statute, ch. 26, sec. 5, embodying what had gone before, says this:

"And the said fund and the income thereof shall not be alienated for any other purpose whatever, but shall remain a perpetual fund for the support of Common Schools and the establishment of township and parish libraries."

Now, there is a distinct and clear declaration that this fund is inalienable. Section 3, subsection 2. That is as clear a declaration that this fund is inalienable and permanent, the public faith pledged to that, as clear as anything can be, in favour of any person having an interest in that being permanent.

Now, what I say is that every person having an interest in the public faith being kept in that declaration, can ask that that be carried out under the circumstances, especially when the Government did undertake to carry it out. They may not have carried it out in the strict letter of the law, but they did in the spirit as Mr. Wood says. This fund was always behind the annual grant, and this fund was allowed to accumulate in that way. The law did not say that the Dominion Government were absolutely obliged to invest this in other securities than their own; they might invest in their own debentures under the statute. Instead of that they invested it in their own indebtedness. It was their own debt anyway. If they chose to ignore a minor part like that, they had a perfect right to do it, to treat it as a debt due by them. It would be a debt due by them if it had been invested in the debentures of the debt. Behind it stood this permanent fund, this million acres of land, and the proceeds of what had been sold of these million acres of land. That was the nature of the fund. It was a permanent endowment for the Common Schools in the Province of Quebec as regard the portions assigned to the Province of Quebec, and for the schools in the Province of Ontario as regards the portions affected by Ontario—I mean Lower Canada and Upper Canada.

Now let us see what it was an endowment for. It was not the sole support of the schools of Lower Canada.

The School Act, C. S. L C. ch. 15, says it is:—

"An Act respecting provincial aid for superior education—and Normal and Model Schools."

It is a permanent endowment in aid of the Common Schools. It is not the sole course of support of these schools, nor anything like it, because there were local

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

taxes and private contributions to these local schools that made the Government grant a minor portion of the support of these schools necessarily. Why, the schools were nearly all built by local assessment and local taxation by different localities, places building their own schools, it was all done by local effort, and not by this public fund. This public fund is only in aid of the Common Schools. It was a public endowment in aid of the schools mentioned in the Act. It was simply a perpetual inalienable endowment in aid of the system of schools mentioned in the statute.

Let us see now what these schools were—these beneficiaries that are said to have been extinguished at Confederation.

Now, in sec. 27 of the School Act, C. S. L. C., ch. 15, we have got the provision under which these schools were established, and your Lordships will see that we have got the divisions between schools of the majority and the schools of the minority ; the schools of the majority are the schools managed by the Commissioners, the minority those managed by Trustees.

Now what were these Commissioners and trustees? I call your Lordships' attention to section 53 of the same statute. There were a set of School Commissioners in each municipality, they were elected, I may say, by the people of the locality, the municipality, under the statute. They were not appointed by the Government except to fill vacancies, and they continue so to this day with some amendments.

This sec. 53 constitutes them corporate bodies.

Then the next section declares that they shall not become extinguished by failure to appoint trustees. The corporate body shall not become extinguished. They are made perpetual.

Now as regards trustees, they too were made a corporate body and given the same powers as the Commissioners. I refer to section 57, subsection 3.

Now, both these were corporate bodies, created by the State, but elected, managed by local electors, residents in the school districts and proprietors, and they were made perpetual corporations, and they were not purely public, so that the State could wipe them out when they liked, and take the school property and treat the whole thing as if it belonged to the public, and as if no one else had right to these schools. They were not of that character, and the statute does not show to us that they were of that character. For instance, there were local assessments raised.

Now, my argument is, if there was nothing but the local assessments, each school district could assess itself for the erection and maintenance of its schools.

Now, surely where a locality had assessed itself heavily and built a fine school house at the local expense, it cannot be pretended that no faith of the public was pledged not to destroy or nullify that property. That created an interest distinct from the State. There were local rights and local interests, and it was by local contributions, either by way of special assessments or voluntary contributions, because the statute provides for voluntary contributions to erect these schools and support this system, instead of local assessments, and I say this created an interest that took them out from being mere agencies. These schoolhouses, erected in that way, we could not treat as belonging to the State and ignore these local rights and interests. To this day they belong to these local school corporations. I say that created an interest that took them out of the category of beneficiaries that disappeared with the change of the old governments. It would be an act of vandalism to step in and treat the whole thing as if it was public property that could be swept away without affecting any interests that ought to be protected.

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

I call your Lordships' attention to section 64 of the statute. I am speaking always of the statute, C. S. L. C., ch. 15:—

"It shall be the duty of the school commissioners or trustees in each municipality:—

"1. To take possession of lands and school houses, acquired, given to, or erected by the school trustees or commissioners, and to which the province may have contributed by virtue of any former Act or by the royal institution." And so on.

The province may have contributed. Here it is recognized that there are school houses to which the province is only a contributor, coming under this system, and under the management of these school trustees. Surely there were private interests there that ought to be respected. Then further:—

"To acquire and hold for the corporation, by any title whatsoever, all real or personal property, moneys or income for the purposes of education, until the power hereby given be taken away or modified by law, and to apply the same according to the instructions of the donors."

Now, there is an express provision for dealing with gifts—private endowments.

Then section 60, subsection 2, provides that the secretary-treasurer shall give security, not only for the funds he receives from the school, the local assessments, but from these contributions or donations paid into his hands for the support of the schools.

Now, we do not know to what extent it has gone, as I have said we had no power to go into this question, but the statute makes ample provision for these schools being anything but mere public schools. There are private interests here that ought to be respected, and that take these out of the category of

being mere agencies of the State—local assessments and private contributions.

I think the legitimate consequence of the ground taken by Ontario, is that all these school properties have been confiscated practically to the Crown; because the title of the schools to this grant, it seems to me, stood upon the law quite as much as the title to these school properties.

On this question of what creates an interest that the State must respect, I might perhaps be permitted to call your Lordships' attention to Cooley on Constitutional Limitations (6 ed.), at pages 253 and following, and page 328 and following.

In the United States, of course, we understand perfectly that the individal states have not the same unlimited power of legislation that our provincial legislatures have—the same omnipotent power, so to speak, within their own sphere. There is a limitation on their powers. They cannot impair the existing obligations or contracts, but the argument I think might be used, that where in the United States a State could not change the position without violating the provisions of the Constitution, that there is an interest there that ought to be respected; that there is an interest there that under system ought to be respected, an interest in respect to supporting a trust, and I think the court will see from Cooley and the authorities cited by Cooley that unquestionably these schools are in that position where they could not be treated as mere agencies of the Crown or of the Government.

Another point is this. Not only have the Dominion, Ontario and Quebec, and all the provinces in fact recognised this fund and acted upon it, but I maintain that the Imperial Parliament itself has recognised that this fund belongs to the two provinces, and I maintain that they have done that in assigning the

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

Turnpike Trust debentures to Ontario and Quebec as their joint property. That was a part of this fund. It stood on no better ground than any other portion of that fund.

The Imperial Parliament has recognised the joint title of Ontario and Quebec in that fund. The reason why the rest of the fund was not charged was its anomalous position. It is explained I think in the basis which the parties laid down for the dividing of the assets. This is from the principles upon which the statement of affairs of June 30th, 1867, is to be revised in preparation for the arbitration between Ontario and Quebec.

Now this feature of it was accepted, was acted upon by the arbitrators, and I point out to the court was accepted and in fact has become *chose jugée* against Ontario:

"The investments for trust funds are to be deducted from the capital of the funds which are invested in them, and the unpaid interest, which has been allowed to the funds and charged against the Quebec Turnpike Trust and the City of Hamilton on these investments, are to be similarly deducted from the corresponding income funds, the investments themselves, with the coupons being handed over to the provinces interested in the funds, but as Ontario and Quebec have a joint interest in the Common School Fund, the investments for that fund and the accrued interest thereon must be handed over to Ontario and Quebec conjointly, to be dealt with by the arbitrators"

Now all parties have acted upon that, the two provinces, the Dominion, and all provinces in fact. It was the basis as it were, of the legislation which took place regarding the public debt. Who will say that this statement of affairs did not influence that legislation, and that it would probably have been different

had it been known that Ontario was going to receive the whole of this large fund that she is now claiming? Who will say that that did not influence the Dominion legislation in the settlements of affairs between the provinces? Therefore, I maintain that by the Imperial statute itself the interest of Lower Canada in this fund is recognised and that it has been accepted by Ontario.

Now, Upper Canada received funds that it seems to me on its own principle it had no right to receive; like the Upper Canada Grammer School Fund. There are a large number of funds for the municipalities of the province, at the time, that stood just on the same principle. Many of them were not invested at all. Most of them were not, and yet the existence of these funds has been recognised; they have been paid over, even payments to the municipalities since Confederation. Why should Upper Canada pay over any portion of this Improvement Fund to the municipalities if the municipalities became extinct?

Now there is another point upon which I wish to speak. The court will see the position that Ontario took with regard to the award of 1870 in answer to the claim of Quebec.

"Ontario denies that Quebec can re-open the award of the 3rd September 1870 in this arbitration in respect of the Common School Fund."

"Ontario considers that the award was not just to Ontario, nor in accordance with the spirit or intention of the British North America Act in giving Quebec any share of the Common School lands, or the proceeds of Common School lands, which are wholly situate in Upper Canada, that Quebec was no more entitled to a share of these lands than of other Crown lands in Upper Canada, but Ontario accepted the award as a whole, and the Privy Council decided that the award

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

was a valid award and Ontario objects to the same being opened for the purpose of enabling Quebec to have some points reconsidered of which Quebec may suppose there is a chance of the arbitrators taking a view more favourable to Quebec than that taken by the first arbitrators."

Now, Ontario objects to open this award, and I think she had good reasons for considering the award binding on her at least, because before the arbitration of 1870 your Lordships will see that Ontario took distinctly in her written answer before the arbitrators the position that these lands belonged to her, the very position that she is seeking to take in this appeal. Now that was answered by Quebec and that issue was before the arbitrators in 1870, and the arbitrators made an award against the pretentions of Ontario. That award of the arbitrators was never appealed against by Ontario.

Now, if the arbitrators were within their jurisdiction there, and it was not clearly *ultra vires*, that is binding, and we claim it is binding on Ontario because she has accepted it in the most formal manner by statutes, and every other way. Surely it is *chose jugée* against Ontario. She never appealed against that feature of the award and never appealed against it at all. It is true that Mr. Wood when he came before the arbitrators with his oral arguments, that he did not take that position, but whether that award was given against Ontario upon contestation or upon confession it does not make any matter, it is equally a judgment binding upon Ontario, and she does well to say she accepted the award because it is an award she cannot help but accept.

Now I may say to the court that Quebec will not believe, is not prepared to think, that your Lordships will reach the stage that you will feel it necessary to deter-

mine upon the merits of the case itself, as if it were free for Ontario to raise this question of the extinction of the beneficiaries. I believe your Lordships on consideration will see that this question is excluded on every ground; excluded by the very terms of the reference; excluded by the fact that it was not placed before the arbitrators; excluded by the fact that the arbitrators have not passed upon it; excluded by the fact that Ontario is estopped in the most complete way; I believe your Lordships will say that you will not find it necessary to pass a decision on the merits of the case, which merits we have not been able to discuss here as I have stated, for the want of proper evidence and information.

I do not think your Lordships will say that there is any jurisdiction given to this court, if the arbitrators had not jurisdiction; if it was not a subject that was within their jurisdiction, that the arbitrators could not give jurisdiction to this court by their finding.

Mr. Justice Gwynne asked me yesterday whether the subject of liability of Ontario had probably been discussed by the arbitrators. I have no doubt it was, because Mr. Chancellor Boyd discussed it, and Mr. Justice Casault discussed it, and Mr. Justice Burbidge says that he has the benefit of reading the opinions of both of these arbitrators.

Now if your Lordships will refer to Mr. Justice Burbidge's remarks at pages 652, etc., etc., *ante*, I think your Lordships will see conclusively that this question has never been discussed by Mr. Justice Burbidge, and that it is not part of the ground of his award. He professes to have dealt with all the questions which the arbitrators considered they had to deal with, and there is not a word in all his remarks in which he discusses this question, whether there is any liability on the part of Ontario or not. He speaks of a liability in this way, and that way, but nowhere does he speak of

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

liability in the sense in which it is brought up by this appeal, the question of whether there is no liability whatever, and he is citing these clauses of the deed of submission, it seems to me, to show why he considered those clauses excluded that question, and he did not deal with the question in his opinion, and his opinion is the opinion of the arbitrators in this case, because without him the award could not have been given in the case.

One other point, and I will not trouble your Lordships longer in this case.

I want to call your Lordships' attention again to the statute of Ontario of 1894, 57 Vict. ch. 11. This is a statute to which the Crown is a party, binding upon Ontario, and passed in 1894. Your Lordships will remember that the Deed of Submission was passed in 1893. These arbitrations were going on in 1894.

Now, what are the points stated in this statute?

"Whereas this province is interested with the Province of Quebec in a fund commonly called 'The Common School Fund,' existing under the provisions of Chapter 26 of the Consolidated Statutes of Canada."

They admit it exists under this statute.

"And whereas this fund originally consisted of one million acres of public lands situated in the Huron tract in the Province of Ontario."

That was the fund.

"And whereas at the time of Confederation a large portion of the said lands had been sold and partly realized by the late Province of Canada, for the purposes of the said fund, and the proceeds thereof passed to and are still in the possession of the Dominion of Canada, to the credit of the said Provinces; and whereas since Confederation this Province has sold some of the remaining portion of the said lands, and collected amounts, both on account of the price of such

sales, and on account of the balances remaining unpaid of sales made prior to Confederation;"

"Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:"

1. "The Lieutenant Governor in this Province in Council is hereby authorized to agree with the Government of the Province of Quebec, upon an amount to be paid by this Province for the acquisition by it of the uncollected balance of the price of the lands mentioned in the preamble of the Act, and for the payment by this Province of what may be considered the value of the lands remaining unsold."

2. "It shall be lawful for the Lieutenant Governor in Council to enter into an agreement with the Government of the Dominion of Canada and that of the Province of Quebec respectively, for the purpose of effecting a final division and distribution between the said provinces and final payment of principal of the said Common School Fund, and to enter into such an agreement with the Dominion of Canada and the Province of Quebec as may be necessary for the division, distribution and payment of the said principal, and for granting and giving to all parties concerned such receipts and discharges, and signing such deeds as may be necessary in the premises."

Did Ontario at that time understand that this question of whether there was any liability for this school fund existed or not? Could Ontario have believed that in the Deed of Submission she had submitted the question whether she was liable for these very things which she acknowledges her liability in this statute, and for which it provides? Could she have believed it? Could the province of Quebec have believed it? Is it possible in the face of this statute, and the corresponding statute on the part of Quebec, that the Pro-

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

vince of Ontario could have believed or intended any such thing, in the face of such a statute at this? I maintain your Lordships will never reach the stage of being called upon to decide this question on the merits; that the appeal does not lie, under all the circumstances of this case.

*Hall Q.C.* follows:

I propose to be very brief in dealing with this question. But what I would like to do is to put before the court, if I can, at the various stages, the circumstances of how this fund has been dealt with by the parties, in order to show the action of the parties, and how far the parties are estopped now, or how far it may be included in the deed of submission.

In the reasons offered by Mr. Chancellor Boyd, he attached apparently a great deal of importance to what might have been the wording of the constitution of these schools and the inference that from the wording of the statute that these are called Common Schools of the province of Canada.

Now, a mere examination of the preambles and the titles of 4 & 5 Vict. ch. 18, 7 Vict. ch. 9 and ch. 26 of Consolidated Statutes of Canada, shows that those schools are schools in this Province. Not schools belonging to the Province of Canada. And, this statute, C. S. C., ch. 26, recites in section 1, that the land was set apart for Common School purposes. There is nothing in the language, and if you refer back to the preambles of the others, to the statutes to which it refers, there is nothing to show that these were Common Schools which might be said to be exclusively the property of Canada, but they were Common Schools throughout the province, and it was a Common School fund for a Common School purposes, and it designated throughout the provinces, although

it might have made a more limited designation than that as regards territory.

Going on then to the second point in connection with section 1, and which the province of Quebec has always maintained, it is this, that by 12 Vict., ch. 200, and by the Order in Council, and by this chapter 26, these million acres of land were adequately appropriated, taken out of the Crown's domain, and set apart and belonged to the Common Schools throughout the province of Canada. We say they no longer remain Crown lands, and the description and the designation given throughout by the late Province of Canada to these lands calls them school lands, and we not only say that by that section or chapter 26 that they had been appropriated and set apart, but your Lordships will see that that section provides that the Commissioners of Crown lands, under the authority of the Governor in Council, administers them and collects the proceeds, and pays these proceeds into the Common School fund for these Common Schools. There was an absolute appropriation, instead of a million dollars in cash, and if we were discussing it on the basis of a million dollars in cash, there would not be any difficulty at all. Instead of that the Province of Canada gave one million acres of land out of the Crown domain into the hands of the Commissioner of Crown Lands as a sort of administrator or trustee, and he was to sell these lands and put every dollar of the cash into the Common School fund for the benefit of the Common Schools of the province.

It must be borne in mind that under two distinct statutes there had been created the Common Schools for Upper Canada and the Common Schools for Lower Canada. My learned friend who preceeded me has given you the consolidation of the legislation as

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

regards Lower Canada in Chapter 15 of the Consolidated Statutes of Lower Canada.

Now, there was the corresponding or almost corresponding legislation to be found at chapter 64 the Consolidated Statutes of Upper Canada, providing for the Common Schools and their management and the disposition of this fund and of the remainder, the creation of corporations, but under these Common Schools, who had power to sue and be sued for Upper Canada, with a superintendent of education for Upper Canada, with a local board of education for Upper Canada, and with provision made that the superintendent of education of Upper Canada drew from the Receiver General the portion of the grant of this Common School Fund.

Now these two statutes,, C. S. U. C, ch. 64, and C. S. L. C., ch. 15, were in force on the 1st of July, 1867, and continued in force for years afterwards, and as regards the Province of Quebec—I cannot speak so definitely for the Province of Ontario—they are in force yet, but they have gone into the revision of 1888.

Now, there was the constitution then of the fund, and the constitution of this corporation, and these Common Schools, as of date of Confederation, 1st July, 1867, and at that time there was the $1,645,000 in cash, and while it is quite true that the late Province of Canada did not invest that money in the public securities, they used it for their own purposes, for all we know, but it remained there, not what my learned friend who opened for Ontario said, a mere book account, and a mere nonentity, that could not be touched. Every dollar of that $1,645,000 represented cash or the interest that should be added to it, and was a solid, substantial fund at Confederation.

Now, after Confederation came the arrangements that were made for the arbitration under section 142

of the British North America Act. And the object of the few remarks I wish to make on this point is to show that before the arbitrators of 1870, the question of this Common School lands was referred to them for division and adjustment by all the parties.

Now if your Lordships can take up the principles as enunciated in what we call part 3 of this long book, page 9, which is headed: 'Principles upon which the statement of affairs of June 30th are to be made up in preparation for the arbitration between Ontario and Quebec."

Now at page 9, one of these principles sets out this:

"The lands in each province were surrendered to them, subject to existing trusts, and the Dominion is bound to see that the trusts are executed. A very large sum, upwards of $1,700,000 remains outstanding on sales of Common School Lands, situated in Ontario, but in which Quebec has a joint interest, and the apportionment of this asset must be left to the arbitrators."

Now, in so far as any concurrence could possibly have been given to that, Mr. Wood who was then the treasurer, and acting on behalf of the executive of Ontario, expressly in his letter consented to that. When some difficulties arose between the parties, Ontario, Quebec and the Dominion, with reference to what statement should be presented before the arbitrators in connection with the debt of Canada, a conference took place at Montreal. Now, we submit that the parties are bound by this conference and in that conference there were representatives of Quebec and of the Dominion and of Ontario. Your Lordships will see that the treasurers of Ontario and Quebec agreed to the fairness of these principles, and in connection with these principles the Dominion passed an Order in Council and a statement of the debt of the late Province of Canada was made up and submitted to the arbitrators in 1870.

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

Now, as my learned friend Mr. Trenholme stated, when the parties in 1870 were before the arbitrators submitting this question of the School Lands, Ontario in its written and printed statement before the arbitrators, which we say must be taken as an Act of Ontario, following up the conferences that took place leading to this arbitration, raised the question that there was no trust in connection with these lands, and that she was entitled to them all. Well, good, bad or indifferent Mr. Wood orally said "I think Ontario is liable. I think," he said, "that I should do violence to the statutes, if I could have taken them away from the Common Schools which still existed." I think he was right. Ontario submitted that question to these arbitrators in 1870 and the arbitrators decided against that. It was a question of law the arbitrators had a right to decide. Ontario has never appealed from that. From 1870 down to the present argument, or rather perhaps I should say down to the rendering of the judgment of Mr. Justice Boyd, there has never been directly or indirectly any suggestion or act of Ontario but that this award of 1870 was valid, and that they had to carry it out.

We come now say to the year 1878 when the Privy Council rendered their award, and your Lordships will see from the quotations I have given in the factum of the joint case before the Privy Council, the counsel for Ontario, the Attorney General for the time being, contended that the award was perfectly good.

Now, we say, not having appealed from the award of 1870, having stated before the arbitrators in 1870 the question which they are stating now, they are *chose jugée* as to the question of liability, and the arbitration is absolutely at an end and Ontario is without a right to go any further. And I would go so far as to say, if there was error on the part of the arbitrators at

that time in the disposition of that Common School fund, that as regards Ontario, by her minister, by her legislature, by every act that it was possible to conceive of having been done, she has acquiesced in the award, and made it a good award.

Your Lordships will see that from 1879 to 1887 Ontario paid direct to the province of Quebec $250,000 in various sums as interest on Quebec's share of collections on the Common School lands made by Ontario and which Ontario had kept in her pocket up to that time.

Can there be any more direct admission? Could we ask for any other circumstances that would operate as an estoppel, as great as that? Taking $250,000 out of the public funds of the province passed through their public accounts, and passed through their estimates, passed under the review of the legislature, not one isolated act, but going over six different years; recognising Quebec's interest in the Common School fund after Confederation, recognising Ontario's obligation to pay interest on that, and Ontario actually paying the interest to Quebec; that is, to 1889.

Now, that brings us down to 1890, and it, practically speaking, terminates the recital of acts by means of payments of money.

Your Lordships will see from the correspondence, if you went into that, after the confirmation of the award in 1878, the Treasurers of Ontario and Quebec and the Finance Minister got together and they commenced this legislation. What for? To divide the principal and the income of this fund. All parties admit that they were bound by the award of 1870 as regards this being a trust, as being a fund, and an asset—first of all an asset belonging to Ontario and Quebec, and as being a fund which rightly or wrongly had been declared by the arbitrators of 1870 to go on in perpetuity, and the correspondence shows that all parties,

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

both Ontario and Quebec, felt bound by it. They met together in 1883, and there is a statute by Ontario, and a statute by Quebec, to arrive at a settlement and a division of this fund, to permit Ontario to buy or to pay Quebec a certain sum of money for the outstanding balance for the lands unsold.

Then we come to 1890 as a matter of legislation, when these various acts of payment of moneys by Ontario took place. The last item was $11,000. In 1890 they introduced the legislation under which this present arbitration took place. At that time Quebec had repealed the Act of 1883 by substituting an arbitration Act as it is called, and it was found that as regards the division of the fund Quebec was without authority.

In 1891 Quebec, the Dominion and Ontario, each one of them passed Acts recognizing again everything that had gone before, recognising as clearly as can be recognised by words, as Mr. Trenholme has put it, that the principal of the fund ought to be divided, that the parties hands were tied by the award of 1870 which said it must go on forever, and they adopted legislation to do it.

Now, that is concurrent legislation. It is not legislation of a private individual. It is legislation we may say of the Crown, Quebec, Ontario and the Dominion.

Now then we come down purely to the question of the deed of submission of 1893. I do not think that any construction can be put upon it further than that the parties who signed that and the Lieutenant-Governor-in-Council of the province of Quebec who approved of it, believed and could only believe that what he was agreeing to submit was the amount of a fund that every one had recognised and admitted. The deed is signed and the parties go before the arbitrators.

Quebec makes this claim which is printed in the joint case. That says, that we are entitled in the making up of this amount of this principal of the Common School fund—we are entitled that you should take as cash on hand what the Dominion have got; we say Ontario must render up an account of these remissions she has made; if any remissions have been made for improper causes we wish to investigate it.

The parties there clearly recognised there was a fund, composed of the amount at Confederation, of the value of the proceeds of sales of land since, of the value of lands remaining unsold, but of course as against these general amounts there might be some legal deductions in connection with the existence of the fund, but there never was a suspicion that there was no fund. And, I say that the language cannot possibly convey that, but that the language conveys that there was a fund composed of the amount on hand at Confederation, of the cash received by the Dominion since, of the cash in the hands of Ontario, of the value of the lands remaining unsold, and it was that amount that the arbitrators were going to divide, and it was that claim that Quebec formulated there before the arbitrators. We did formulate a claim with reference to the division of the fund and income about which I will speak in one moment.

Now, what was the answer of Ontario to that? I challenge my learned friends to show in their answer that they filed to that claim, and which is what we argued before the arbitrators, which must be taken to be the line or the action of the parties—not one word—not only not one word that there is no liability since Confederation, but line after line that Quebec cannot re-open its award, this award of 1870 must stand, Quebec's rights are bound by that award of 1870. That is what we argued on behalf of Quebec. That was the contest before the arbitrators.

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

To sum up in a few words, the contention of Quebec is that as regards that Common School Fund, all parties have accepted the award of 1870, less the contention that Quebec will make in this counter appeal; in all other respects the award of 1870 has been followed in every particular; not only in the clause regarding the Common School Fund, but the other, and as regards the Common School Fund all these acts have been done by the legislature, by the officers, by the executive council, by the premiers of Ontario and Quebec, and it brings us then down to this question:—Is it possible that Quebec, with all these views or acceptations on the part of Ontario before it, with the circumstances of the award of 1870, ever thought by the deed of submission it was putting in doubt again or putting before the arbitrators the question whether there was a trust? The circumstance of it never being mentioned before the arbitrators in the answer of Ontario, seems to Quebec to be absolutely conclusive that this court would not for a moment allow Quebec, or allow any litigant to be taken by surprise in a matter so serious as this, not only without any opportunity of making evidence on a point that might be obscure, but being called upon to make evidence and to support its claim before the arbitrators, Ontario claiming that the award of 1870 was good.

We contend that the motion to quash the appeal should be granted, and certainly that on the merits there is no foundation for the present appeal, and it is not included in the deed of submission.

*Blake Q. C.* in reply. The question whether the award is *extra* or *intra vires* is a question which certainly was brought by the Province of Quebec on discussion before these arbitrators, and not merely was it brought up, but it is still in that portion of this whole matter which remains at present unargued,

insisted upon. It is also insisted upon with reference to one or two points upon the matter which is now before your Lordships. The question whether Ontario under these circumstances is to be prevented from affirming on its part that some class of contention with reference to the award which Quebec proposed to affirm and insist upon on its part, is the question which is laid before your Lordships at the opening. That is the ground upon which I put the case.

As one of your Lordships has observed, it would be monstrous to suppose that if in point of fact this award is bad in respect to its dealing with this fund, bad as *ultra vires*, the Province of Quebec should be permitted to insist upon that for the purpose of inducing a different adjudication upon the subject from that which the award of 1870 prescribed, and the Province of Ontario should not be permitted to affirm that same proposition with all its results and limitations on its side. That is really the contention which my learned friends bring forward.

Now I repeat with conviction the view that the attitude of Quebec upon the points which are set up in its case, are being prosecuted in the appeal, are points which touch in the different aspects in which I stated them in my opening, the question of the *extra* or the *intra vires* of the award of 1870 with reference to this matter, and I re-affirm as a proposition indisputably that it is utterly impossible for Quebec to maintain those positions without Ontario being absolutely free for its part to say—well, if the award is null and void it is so for us as well as for you; you cannot affirm that we are bound by it and that you are not; you cannot affirm that these things which were *extra vires* of the arbitrators as you say, and which affect the whole of this portion of the award, still leave it binding to the extent to which it touches us. The whole question is open.

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON-SCHOOL FUND AND LANDS.

If the award in this respect, on points not separable, is *ultra vires*, it is *ultra vires* as a whole with relation to the subject matter of the Common School Fund out of which was carved the Land Improvement Fund.

Now, my learned friends say, and say with justice, that there was a general action of both the parties to this discussion for a very considerable time based upon the theory of the validity of the award.

I maintain that the conclusion is that it might be fairly stated that the parties thought, in their action, that Ontario was seeking for the carrying out of the award of 1870 in all its particulars, and that in the transactions which it entered into later on, such as my learned friend has alluded to, the transactions namely with reference to the payment of money to the Dominion, with reference to the payment of money to Quebec, with reference to the Land Improvement fund itself, as we will show in full detail when we come to deal with that, it was upon the idea that Quebec, which had up to the time of the Privy Council decision litigated the validity of the award, after that time was not disputing the validity of the award upon these subjects.

I say, speaking for the Province of Ontario, that in my opinion a fair and reasonable view, taking the whole of the correspondence, legislation and everything, would have been to say both parties understood when the submission was made that the award of 1870 with reference to both the Land Improvement Fund and the Common School Fund which the Land Improvement Fund was carved out of, was to stand, and that was what was being done, but I cannot understand how the province of Quebec can set up for itself the right to dispute those fundamental bases, as far as it is concerned, and to say that we are bound. Is this ratio of division to bind Ontario when it does

not bind Quebec? Is it to be *intra vires* as far as Ontario is concerned, and *extra vires* as far as Quebec is concerned?

The position seems to me impossible to state without the very statement being its actual refutation. You cannot make it good and bad at the same moment. You cannot make it good for one of the parties and bad for the other. It is said Ontario did not appeal. Certainly it did not appeal. Ontario did not say the award was *extra vires*. Its silence on that subject does not debar its right to say that it is *extra vires*. Certainly silence does not bind and make the award good for one and bad for the other. It cannot be that Ontario shall be bound by the award, although it is *extra vires* and beyond the powers of the arbitrators a nullity as far as the province of Quebec is concerned.

Now, allegations have been made by the learned counsel who opened for the respondents that there was a disadvantage because they had not some evidence, but I did not hear any very tangible statement of any evidence that was missing, or any suggestion, On the contrary, the learned counsel asked your Lordships to infer from the statement in the statute that there existed those corporations and those private schools and those donations, which were suggested by the statute. I agree that that is a fair inference. It is a fair inference that those subject matters to which the consolidated statutes of Lower Canada alluded did exist, and for the purpose of this case they are fairly to be taken to exist, and there is really no foundation for the suggestion that the whole question was not before the arbitrators and is not before the court. The statutes of the Province of Ontario are analogous to the statutes of the Province of Quebec. What binds one binds the other. If this statute for the Province of Ontario dealt

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

with the case in such a manner as to be formal admissions which bind, of course they were not admissions made to the other side. They were in part in connection with the propositions for settlement, which propositions turned out to be abortive, and the reason for their being abortive can be discerned very plainly, for the moment it was made to appear that the Province of Quebec was claiming that the division of the fund should not be on the basis of the principle of the award of 1870, that moment it was obvious that no settlement could be reached at all, and that to refer the question at large from the award of 1870 to arbitrators would be an absurd thing. The province of Quebec contends now that the division ought to be made on the basis, not of the award, because it is *extra vires* as far as Quebec is concerned, though *intra vires* as far as Ontario is concerned—but on the basis of the census of 1861. While that contention is made there can be no settlement or agreement. The law, and those things to which the parties have by themselves bound themselves, is the only way of adjustment.

Now the learned counsel suggested, I do not know whom, as the *cestuis que trusts*, sometimes it was the municipality, sometimes it was the schools, sometimes it was the territorial locality of Upper Canada in the one case and Lower Canada in the other, that were beneficiaries.

My argument will gain no force from reiteration. I only remind your Lordships that the suggestion which I have made was that all these were agencies of the state. The learned counsel alleged indeed that there were persons who had created private schools in the localities before this aid had been given, and that they actually surrendered these valuable properties to the public corporation on the faith of the annual grant and acquired interest. Well, I dare say there were. I have

already said I agree that one must infer from the existence of the statute that there may have been such private schools, and I hope one may exercise a little degree of common sense and one's knowledge of human affairs in such a matter as that, and one knows that those schools that were established in the early history of this country by public spirited individuals privately, before the legislature of the country or the means of the country were adequate to discharge the public duty, were schools established at a sacrifice, and were run at a loss year after year in order that the children of the people of the country might be educated, and there was no question of private right or interest in the way we speak of private property, and that what happened was an enormous relief from the unjust burden that was imposed upon the individual by the general school system which made the ratepayers of the locality and the general revenues of the whole community contribute share and share alike towards the education and instruction of the children of the country.

So that to suggest that the existence in early days of schools maintained at this sacrifice, and school houses built at this sacrifice, is a suggestion of private property, which was handed to the State, upon some theory that the beneficiaries still remained vested with some right or interest which entitled them to assert a special right of their own, seems to me to be out of the question.

Then the learned counsel brought in the Indian. We all know that an Act of Parliament may, by proper phrases, make a conveyance. Lands may be granted by an Act of Parliament, and if land is granted and appropriated for A. B., that this creates a trust for A. B., or passes the land to A. B. according to the language of the Act. The question is whether what was being

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

defined to be created, what the legislature had in view was the assistance of the agencies of the State. Public or Government Schools, in each of these two territorial divisions of the one province were agencies of the State created under the legislation of the State, not controlled by private individuals, except also as creatures of the State who derived their authority from being the elected representatives of the people under the authority of the State itself also.

The learned counsel suggested that the fund was inalienable and remained a perpetual fund. I noted as the first admission that was made that really the fund if it did exist at all, must exist according to the tenor of the statute. That has been my argument to your Lordships. I will just re-state it. If this fund survived the British North America Act, it survived in its entirety, and in accordance with the terms of the statute.

In reference to the position taken by Ontario before the arbitrators, as far as it appears by their case, I desire to cite two lines:

"Apart from the said award Quebec has no right whatever to participate in the proceeds of the public lands of Ontario or of the said Common School Lands received by Ontario subsequent to 1867." I read that to show your Lordships that Ontario then took up the position distinctly that any right that Quebec had was under the award, and if the award is repudiated then of course she has a right to argue that there is no right under any other contingency,

Then in the factum of Quebec before this court is this:

"It is submitted that it is shown throughout the history given in this factum that Quebec's rights are under the original statute which have never been altered."

It is submitted in the same factum :

" That the deductions allowed by the first arbitrators in the award of 1870 should also be set aside as being *ultra vires.*" So that the position of Quebec was that the award was *ultra vires*, while they contend that as far as Ontario is concerned it is to be treated as *intra vires.*

As to the discussion before and by the arbitrators, and to the arguments of the learned counsel who opened the appeal with reference to Mr. Justice Burbidge's remark, I do not think I am called upon to enter into an inquiry as to whether Justice Burbidge's certificate, that the court was unanimous that this was a disputed question of law, is correct or not, still less to enter into a minute examination of his own judgment in order to find whether it did or did not contain elements from which it is to be assumed that the certificate was wrong, and that this was not a disputed question of law. I maintain my learned friend is battling against a certificate of that kind, and that the certificate settles that question.

And then my learned friend Mr. Hall pointed out that the award was *chose jugée* and even if there was error on the part of the arbitrators Ontario had made it a good award. I agree, in so faras it would require a proceeding to set it aside, as I have said often and often, but I say that nothing Ontario has done or said or Ontario has admitted or omitted would make it a good award if it was waste paper from the beginning.

Then amongst these things are suggested a payment of a quarter of a million of interest in several different years. Your Lordships will find that that was claimed upon the basis of the award, and therefore the very things which are now being suggested are things which cease to be of any force or effect the instant it is suggested that Quebec is entitled to repudiate the

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

award of 1870 upon the basis upon which all these payments were made, because the collection of interest has all been upon the theory of the award itself. Then Quebec alleges that she is now entitled to insist that all that is wrong, all those principles are wrong, but that Ontario is bound. By what I wonder? By the award which Quebec says is bad? By that principle of division which is there stated? No, but by some other principle of division to be ascertained by those arbitrators. We must give equal weight to like transactions of both parties, or no weight at all to these transactions, and in giving equal weight what Quebec is now insisting upon as binding Ontario binds herself also.

Now, my learned friend has rightly said that the provinces found themselves tied by the provisions of the award of 1870 which I have strongly contended, if the arbitrators had a jurisdiction to deal with this matter—though they had a wide jurisdiction they might have dealt with it probably in any other way—was the most natural and reasonable and proper way of doing it, namely, carrying out the statutes. They felt themselves tied by it, and wanted to get relief, and therefore they passed certain statutes. They passed certain statutes to get relief from what? From the principle upon which the arbitrators of 1870 had acted? Not at all. But in order to get relief from the consequence of the fund being perpetual, to get hold of the money, and the question of the division of the money was to be in the apprehension of Ontario and in the apprehension of all reasonable men I should think consequential upon the principle which had been defined as the constitution of the fund itself by the award of 1870.

The appeal of the Province of Quebec was then proceeded with.

*Béique* Q.C. opens :—I feel that your Lordships are possessed of most of the facts, and there will remain only to me to call the attention of your Lordships to a very few as bearing on this appeal.

"Your Lordships will find that the notice of appeal of the Province of Quebec states that Quebec appeals in so far as such award permits or allows any deduction from the amount of the principal of said Common School Fund for the Upper Canada Land Improvement Fund, or Upper Canada Improvement Fund."

"And in this respect the province of Quebec will contend that, under the provisions of paragraph 1, the principal of the fund should be augmented by the sum of $124,685.18, and that under paragraph 4 of the said award the amount of 25 per cent referred to in the paragraph mentioned secondly should not be deducted."

Now, on referring to the deed of submission your Lordships will find that the only portions of it bearing on the present appeal, are the following :

Par. 3. "It is further agreed that the following matter shall be referred to the said arbitrators for their determination and award in accordance with the provisions of the said statutes, namely : "

(*h*) "The ascertainment and determination of the amount of the principal of the Common School Fund, the rate of interest which would be allowed on such fund, and the method of computing such interest."

(*i*) "In the ascertainment of the amount of the principal of the said Common School Fund, the arbitrators are to take into consideration, not only the sum not held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold."

Then 5 :

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

"It is further agreed by and between the parties hereto that the questions respecting the Upper Canada Building Fund, and the Upper Canada Improvement Fund, are not at present to form any part of this reference; but this agreement is subject to the reservation by Ontario of any of its rights to maintain and recover its claim, if any, in respect of the said fund, as it may be advised."

I need not say that it was open to either province to consent or not to a deed of submission, to consent or not to an organization of a board of arbitrators, and that the board of arbitrators, or the award must stand or fall on the deed of submission itself, because the parties have decided and had to decide on the questions they would submit to the arbitrators, and what questions would not be submitted.

I think it is incumbent upon me at the outset to show your Lordships what is covered by these words: "The questions respecting the Upper Canada Building Fund," at the date of the submission, and I say I am prepared and am going to show that at the time of the signing of the deed of submission, as appears from the record, the questions that were in dispute between the two provinces, Quebec and Ontario, were the accounts in connection with $124,000.00 and the question which covered the 25 per cent of the proceeds of lands sold from June 1853 to the 6th March, 1861, and collected previous to the time of Confederation. And second, as to whether Ontario would be entitled to retain for the Improvement Fund the 25 per cent of any future collections from these sales made between the two dates, but collected subsequent to Confederation.

And, in this connection I desire to draw your Lordships' attention to the following portions of the record. I might go a deal further back, but I think it is sufficient to commence with 1889. I refer to a letter ad-

dressed by Mr. Shehyn, the Treasurer of Quebec, to Mr. Courtney, Deputy Minister of Finance, dated 4th July, 1889.

"The views of Mr. Robertson were evidently accepted as correct by the Privy Council, as the improvement fund remained in the statement confirmed by them at the sum of $5,119.08 as originally prepared by the auditor of the late province of Canada."

"The arbitrators appointed by Ontario and the Dominion—the arbitrator of the province of Quebec, having resigned—awarded the Upper Canada Improvement Fund to the province of Ontario, and, with reference to the disposition of it the Government of this province has nothing whatever to do."

"If it is proposed in submitting this question to the Supreme Court of Canada to re-open the question raised by Ontario respecting the fund and disposed of by the then Privy Council of the Dominion, the Government of this province protests against the Government of the Dominion sanctioning the submission of such a case to any court."

"The claim of the municipalities for one-fourth of the amount of the sales of school lands and one-fifth of the amount of the sales of Crown Lands made between the 14th June, 1853, and the 6th March, 1861, was twice decided against by the Government of the late province of Canada, first when the fund was supposed to have been abolished by Mr. Vankoughnet's Land Act of 1860, and secondly, when it was actually abolished by Order in Council. The late Mr. Langton, auditor of the late province of Canada, in his report at the time of Confederation on the subject, says:

'In 1860 an Act was passed, which was intended to repeal the clauses which establish the Improvement Fund, and from the date of that Act all further ap-

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

portionment of the receipts towards the Improvement Fund was stopped.'

'It was afterwards discovered that the repealing Act had quoted the old Land Act repealed by its title in the Consolidated Statutes, while in that compilation the clauses establishing the Improvement Fund had been inserted in another Act which remained in force. An Order in Council was then passed in March, 1861, abolishing the Fund, and at the same time a fresh distribution was ordered by the proportion of the receipts from the date when the former distribution had been stopped to that of the Order in Council finally abolishing the fund. In both cases the Governments of the day were guided by the date at which the payments on the land were received, and not by the date on which the sales were made.'

"A statement and recommendation submitted on the 17th September, 1863, to the Executive Council by the then Commissioner of Crown lands sets forth that:—

'The said fund has been regularly paid (with the exception of some few balances that remain to certain municipalities) down to the end of 1859, at which date the then Commissioner of Crown lands considered it expedient to stop further payments to the fund. With this view he omitted on the amended Land Act of 1860 the clause authorizing the creation of the fund, but in March, 1861, it was ascertained that the authority for the fund existed at the date of the Amended Land Act in the School Act, and not in the Land Act, as had been supposed. On the 6th March, 1861, an Order in Council was passed recinding that of the 26th July 1856.)'

"It appears to the undersigned that the Improvement Fund continued to accrue legally, and may be fairly claimed by the various municipalities of Canada West, down to the above date of 6th March, 1861, and he therefore respectfully recommends that the distribution

thereof be made to them accordingly. Signed, William McDougall, Commisssioner.'

And then Mr. Shehyn continues :—

"The arbitrators appointed by the Ontario and the Dominion—the arbitrator of the province of Quebec having retired—treated the Common School Fund as an asset that they had power to divide and apportion in such manner as seemed to them right. They transferred to the province of Ontario as belonging to the Upper Canada Improvement Fund the amount of the sales of the Common School lands made between the 14th June, 1853, and the 6th March, 1861, including $124,685.18, stated to have been received on account of these sales between the 6th of March, 1861, and the 30th June, 1867. The Province of Quebec has always contended that the transfer of any portion of this asset to Ontario, excepting the amount to which Ontario was entitled in proportion to population, was unwarranted and unfair."

"It should be borne in mind that the arbitrators had no power whatever to change in any way the statement of the debts and assets of the late Province of Canada as sanctioned by the Honourable the Privy Council after the conferenee held on the subject between the Dominion and the two provinces."

"Therefore in the award that they made while they unfairly, as Quebec contends, gave to Ontario a portion of the Common School Fund under the plea of transferring it to the Upper Canada Improvement Fund, they really had no power to increase the indebtedness of the late province of Canada to the Upper Canada Improvement Fund, a fact which their silence on the subject of the claim of Ontario respecting the one-fifth of the Crown lands sold as above mentioned, show that they themselves recognise."

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

"The government of this province therefore declined to join in any way in the proposed litigation or to make any changes or suggestions respecting the proposed case which has been submitted."

It is perfectly plain from this, that wrongly or rightly, the Province of Quebec by this letter, puts forth its contention that they were not bound by the award of 1870 in that respect, and that there was no occasion to make any deduction, that the Improvement Fund did not exist, and that there was no occasion to credit to the Improvement Fund either the $124,000, or 24 per cent of any future collections.

Then I refer to Ontario's Order-in-Council of the 25th April, 1888, and Mr. Mercier's draft report to the Lieutenant Governor of Quebec of 24th October, 1888,

It seems to me that these documents show, and clearly show, that at that time, therefore, previous to the signing of the submission, that question was disputed between the Province of Quebec and the Province of Ontario. On the one hand Ontario seems not to be satisfied with the finality of the award of 1870 as to that question, and was demanding that the question be included in a new submission to be made to a new board of arbitrators. On the other hand Quebec was contending that Quebec was not bound by the award of 1870, and was refusing to submit that question to a board of arbitrators.

I must say that when these negotiations took place they were not in connection with the board of arbitrators that were appointed in 1890, they were in connection with another board of arbitrators, or in other words, that the negotiations fell through, but when the negotiations were revived in 1892, and when the submission was signed, it seems to me that there was clearly before the parties the fact that there was in dispute that question between them, and therefore I

say that when the deed of submission excludes all questions having reference to the Upper Canada Land Improvement Fund, that the question in connection with the $124,000 as well as the 25 per cent of the future collection formed part of and included in these questions respecting the Upper Canada Land Improvement Fund which were excluded from the reference, and therefore that the arbitrators had no power to take it into consideration.

Then your Lordships have no doubt noticed that by the deed of submission the arbitrators are instructed to take into consideration, amongst other things, the sum now held by the Government of the Dominion of Canada as forming part of the School Fund. They were instructed not to inquire what the Improvement Funds were, but to ascertain the amount of principal of the Common School Fund, and when doing that to take into consideration, not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable and the value of the lands, and so forth. Therefore it was incumbent upon them to ascertain, as their first operation, what was the Common School Fund which had been transmitted by the old Province of Canada to the Dominion at the time of Confederation, and to ascertain, as a second operation, what amount had been collected since and what remained to be collected. And, as a third operation, to make such deductions as they were allowed to make under the submission. That is, the submissions provided that they were not deductions in virtue of this Improvement Fund which had been taken away from their consideration; Ontario reserving by the submission their right to their claim if they were entitled to make any such claim under that head.

Now, I say that if your Lordships will refer to the public accounts of the Province, as well of the Province

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

of Canada as of the Dominion proper, you will find that at the date of submission the amounts that stood in the books of the Dominion as belonging to the Common School Fund was $1,733,000, less the amount invested in the Quebec Turnpike Trust, $50,000, plus some $30,000 of interest, and reducing therefore the amount at the credit of the Common School Fund in the books of the Dominion to the sum of $1,644,000, but no deduction at all of the $124,000. In this connection I will have to refer your Lordships to the following portions of the accounts.

I take first Exhibit 56 accounts of the late Province of Canada and the Provinces of Ontario and Quebec. These accounts are under the heading of schedule from 1st July, '67, to 30th June, 1882. Second, Province of Ontario accounts for the same period. Third, Province of Quebec account for the same period.

Schedule B of this exhibit contains accounts prepared by Mr. Langton. I will have to call your Lordships' attention to the fact that these accounts that were prepared by Mr. Langton and in which my learned friend may be able to find—not a deduction of the $124,000 as made from the Common School Fund, but a credit of the amount of the Upper Canada Land Improvement Fund, to that amount of $124,000, were prepared at the special request of the Treasurers of Ontario and Quebec for a special purpose, and that they were not the regular accounts of the Dominion.

I refer your Lordships, as far as this account Exhibit 56 is concerned, to Schedule A, page 8 where under date June, 1868, the Common School Fund is entered as $1,733,244.47, and the Upper Canada Land Improvement Fund at $5,100 odd.

Then we have on page 10 of that same exhibit, where the entry as to the Upper Canada Land Improvement Fund is $5,119.08.

In the other account there is no trace at all to be found of any deduction, and I would refer your Lordships to pages 10 and 11 in Roman figures of the paging to the memorandum respecting the unsettled accounts of the late Province of Canada, giving the history and so on. And, in this at page 10 will be found a memorandum without prejudice in which the treasurers of the two provinces propose the preparation of a statement of the various accouuts between them.

This is to explain how this Appendix B. happens to be found in these accounts, and how it came to be prepared in that special way. They were irregular accounts, prepared for a special purpose, at the special request and without prejudice, of the treasurers of both provinces, and Mr. Justice Burbidge seems to have lost sight of that, because he seems to have gone on these accounts.

The ground I take is that this special account did not form part of the accounts of the Dominion, did not form part of the accounts of the late Province of Canada which were continued by the Dominion, and that in this account proper no deduction whatever is to be found, and that they were the only accounts to which the arbitrators should have or were entitled to look.

Again, in Schedule C, of the same exhibit 56, your Lordships will find that $1,733,244.47 as being the amount of the Common School Fund in the hands of the Dominion, and the $5,119.08 as being the capital of the Improvement Fund in the hands of the Dominion. And it is only in the Province of Ontario account, with which surely Quebec can have nothing to do whatever, that the Canada Improvement Fund is credited with the $124,685.15.

Next is an account of the late Province of Canada, and the Provinces of Ontario and Quebec, with the

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS

Dominion from the 1st July, 1867, to the 30th June, 1885. The first one to which I refer is extended only to 1882. This is a continuation of the previous one to 1885, and your Lordships will find in that one again, in schedule A there is no reference at all; it is the mere continuation of the previous account, and there is no reference at all to the Common School Fund, but in schedule B on page 10 of the same exhibit 18, your Lordships will find that the Common School Fund stands at the sum of $1,733,244.47.

The same appears in other accounts in that exhibit.

Now, I might be allowed to refer as a last reference on this subject to the Canada public accounts. Surely this is what should have guided the arbitrators. Here are the public accounts for the year 1892, therefore the public accounts as they stood at the time of the signing of this submission, in which your Lordships will find that the trust fund is stated, Common School Fund, at the sum of $2,582,373.80, and which is made up of the $1,645,644. These figures are not given, but I am giving them for the purpose of showing that the $2,582,373 was the amount of the fund without any deduction for Improvement Fund.

I do not ask, nor do I expect, your Lordships will go into calculations, but this part of my argument is merely intended, and it seems to me an important part of the argument on this appeal, to show that the arbitrators were instructed to take into consideration the amount of the Common School Fund as it existed. Mr. Justice Burbidge seems to have gone on this principle, to say, well, we find it deducted in the account, we find $124,000 deducted in the account, and therefore we had not to make the deduction. It was already made. I propose to meet that argument later on, but now it seems to me that it is a much stronger ground if I can show that Mr. Justice Bur-

bidge, as a matter of fact, is mistaken, and that he has not referred, in basing his statement, to the proper books.

There is no question at all that the arbitrators have dealt with this question of the Improvement Fund, as your Lordships will see by referring to the first paragraph and paragraph 4 of their award.

In arriving at these figures, they have made or taken into consideration the deduction of $124,000, and it is the reason of the dissent of Chief Justice Cassault, who says he is of opinion that the sum then held by the Dominion Government as part of the principal of the said Common School Fund was greater than has been stated by the amount of $124,680, and so on.

I have referred to the correspondence and to the Orders in Council of the Government of Ontario for the purpose of showing that it was well understood that it was a question in dispute between the two Governments as to whether the award of 1870 was binding or not, was or was not *intra vires*, and it was always desired by the Government of Ontario to bring that question before the new arbitrators, and that Quebec was not consenting to it, and if I have succeeded in showing that it was one of the questions in dispute between the two provinces at the time, it seems to me that I may logically say, that all questions having been excluded, that this question must equally be included in the wording of the exclusion as well as the one of the $101,000; and, in connection with this question there was the same reason for Ontario in making the reservation as there was for the other amount, because Ontario did not want to be exposed to have these new arbitrators passing upon the Common School Fund without taking the Improvement Fund into consideration, and as a result of their decision to be open to this contention

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

that they were not entitled to the deduction that had been ordered to be made by the first arbitrators.

I was asked by your Lordships as to whether our position is altered by this judgment, and I think the best test to see whether our position is altered by this award of 1896, and in other words as to whether the present award has passed upon this question of the Canada Improvement Fund or not, is to suppose this: —Suppose that Quebec to-morrow would appeal, would obtain by grace or otherwise, an appeal to the Privy Council from the award of 1870, without appealing from the last award, the award of 1896, would they not be told when they came to argue before the Privy Council that their appeal was insufficient because the question was settled not only by the award of 1870, but it was also settled by the award of 1896? Well, it is what I object to, and it is the only objection—the main point of the appeal of Quebec is, we never consented, and were willing to stand by our position as to the award of 1870; whether we were bound or not by that award we were willing to stand by that award, to stand by our position such as it was made, but we never were willing or a consenting party to submit to another board of arbitrators to pass upon that question of the Improvement Fund, and we say, you have passed upon that fund, you have exceeded your powers, and we object to the award, we appeal from the award only in so far as we have done so. Of course if I do not succeed in showing to your Lordships that in the deed of submission it was stated that all questions having reference to the Upper Canada Land Improvement Fund were excluded—if I do not succeed in convincing your Lordships that this comprised the question of $124,000, the balance of the 25 per cent collections out of the collections to be made, of course I must fail, but I cannot see a reason upon

which that part of the judgment of Mr. Justice Burbidge may be maintained, especially when I show that the Government of Ontario was trying to obtain the consent of Quebec to submit that question again. Why? Because Quebec has repeatedly expressed its opinion that the award of 1870 would not avail, that it was on its face *ultra vires*, so far as that portion of the award was concerned. Now, Quebec was not willing. Quebec was taking that position; in the face of that decision they made a submission, and they say all questions, not only one question; if there was only $101,000 that was excluded, why not refer to that one question? I submit that under the words "the questions," the whole of the questions which were in dispute between the parties at the time are covered.

My contention is to this effect, that the affirming of a previous award or a previous judgment involves dealing with the question. What we expected, what I claim that we were entitled to, was not to have the arbitrators to ignore, to decide against the award of 1870, but to establish, to find out or ascertain what was the Common School Fund in the hands of the Dominion and leaving it, reserving all rights under the award of 1870, or under any other judgment or any other rights in the terms of their reservation as appearing in the reference, but that we have never consented to be submitted to another judgment on the part of this board of arbitration, any more affirming the judgment of 1870, than disapproving of it.

As suggested to me by my learned friend Mr. Hall, the Ontario factum admits that the Land Improvement Fund is entirely excluded; and, I do not think that in the factum as it was filed before the arbitrators that it was limited to the $101,000. There was the admission that it was excluded, and no such interpre-

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

tation as has been put on this by Mr. Justice Burbidge was put by Ontario, and I refer your lordships to page 12 of the Ontario factum where it is stated:

"That Ontario reiterates the objection to the jurisdiction of such arbitrators to deal with the Upper Canada Improvement Fund taken in Ontario's answer, whereby it appears that it was expressly agreed between the different parties that the questions with reference to the Upper Canada Building Fund and the Upper Canada Improvement Fund are not at present to form part of this reference."

I call your Lordships' attention to the fact that the fund is not created by the statute, but section 7 gives power to the Governor-in-Council to create a fund.

Let us assume for illustration that 16 Victoria instead of giving authority to create the Improvement Fund, had created the Improvement Fund, that the statute itself had created the Improvement Fund, and let us assume again that a few years after the passing of 16 Victoria, that is to say in 1868 or 1869, but before the rendering of the award of 1870, the Act of 16 Victoria had been entirely repealed, and that the arbitrators of 1870, losing sight of the fact that 16 Victoria which had created the Improvement Fund had been repealed, had proceeded as they have proceeded, deducting from the Common School Fund the sum of $124,000.00 or the 25 per cent; would it not be plainly a nullity on the face of the award? They were instructed what to do, to divide the common property between the provinces; and if they went under an erroneous assumption that the statute was in existence, which was repealed, their action would have been altogether null for want of jurisdiction, altogether *ultra vires*. That is the only extent to which we are arguing. We have no intention to attack the award so far as it deals with the Common School Fund, but we

say that if there was no Common School Fund that was ever created, or that ever existed, that that part of the award, if it can be separated from the rest, and we claim it can be, must fall to the ground.

Now what are the facts that we have before us here? I have assumed a state of things that does not exist, a statute creating the fund, and the repealing of the statute, but have we not virtually the same thing? We have the fact that the statute only authorized the creating of the fund, but that the Order in Council was never passed to create it, that the arbitrators have assumed that it was created, and on that assumption that they have set aside a fund that had no existence. And, this Order-in-Council, even if it had the effect of creating the fund, never intended to create the fund from the date of the 6th June, 1853, but from the 7th December, 1855, and therefore there is no question whatever, if this Order may be read as creating the fund, that there was no Improvement Fund until the 7th December, 1855, and the award has gone on the assumption that the fund existed and was not set aside, that the 25 per cent was set aside from the date of the 14th June, 1853.

Now I say the same principle applies; that the fact that even if the Improvement Fund was created that the moment it was repealed in 1861, that the repeal was a complete repeal. It was supposed to have never existed from the date of the repeal. If there was a fund, and if it was as is admitted repealed, the repeal was not conditional, was not partial; it was an entire repeal; it was intended to be so, and it was treated as such by the Government of the Province of Canada up to the time of Confederation. The question was passed upon by the executive on two or three different occasions, and it was treated as such, and the reason assigned by Mr. William MacDougall

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

as Commissioner of Crown lands, was that there was a Colonial fund which was intended to take its place.

The position we take does not go any further than that. We did not assail the award of 1870 quoad the Common School Fund. The parties have accepted the award. We assail it merely if it was to be held that this question was not excluded from the reference which I claim is the case, and that therefore, either as the appellant or the respondent, the Province of Ontario has no right to call upon this court to go into that question at all on the present appeal. But, if it is not excluded from the reference, our action is free before this court, and was free before the arbitrators, and we were entitled to call upon the attention of the arbitrators—who were appointed specially for the purpose of establishing and ascertaining what was the amount of the Common School Fund—to establish that Common School Fund, irrespective of any such erroneous deductions for a thing that had no existence whatever.

Now, a word only to make my position clear.. As I understood, from the outset, the first question was as to whether by the deed of reference it was intended to exclude the question—the question not only of the 20 per cent of the Crown lands, but also the 25 per cent of the school lands for the Improvement Fund. That is the first question. Whether it was intended by the parties.

I directed your Lordships' attention at the outset to the fact that it was a question in dispute; it was a question in dispute between the provinces when the submission was signed; that in 1870 or 1873, Quebec went before the Privy Council attempting through Mr. Benjamin to have the very contention that I have raised, taken into consideration; the Privy Council said "the reference does not allow us to inquire into

that question, and we will not pass upon that question." So that there is no doubt at all that at that time it was known to the two provinces that Quebec was disputing the effect of the award of 1870 quoad the setting aside of the 25 per cent out of the proceeds of the Crown lands.

Now, I have called your Lordships' attention to another important fact, that as late as 1889, in the correspondence exchanged between the representatives of the two provinces, the question was stated as one of the questions and was recognized as one of the questions that were in dispute between the provinces.

Now, I have something stronger than that. I have the opinion of Mr. Chancellor Boyd in this case, in this award, and I have something stronger still the undoubted admission of the Province of Ontario before this court in their factum that it was intended by the parties to exclude this question from the reference. And, to make that clearer, I have only to call your Lordships' attention again to our notice of appeal. Our notice of appeal is not raising at all the question of the $101,000, that is the question of the 20 per cent in connection with the Crown lands. It is raising only this question of Improvement Fund.

Well, what is the answer of Ontario in their factum as to that? In the face of this question raised, and it is limited, Ontario reiterates the objection to the jurisdiction of the said arbitrators to deal with the Upper Canada Improvement Fund taken in the Ontario answer whereby it appears that it was expressly agreed between the parties that the questions respecting the Upper Canada Building Fund and the Upper Canada Improvement Fund are not at present to form part of this reference.

If there was an exclusion, I say that the exclusion affects both parties, that it is for both parties and that

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

both parties were prevented from arguing that question before the arbitrators, and that it was not within the province of the arbitrators to enter upon that question or to consider it in any shape or form.

Now, it has been stated by Mr. Justice Burbidge, and, may be, the same difficulty apparently has passed in the minds of some of your Lordships, that it was a difficult operation, that from the fact that they were obliged, that they were instructed to ascertain what was the Common School Fund, that the arbitrators, as of necessity, had to inquire into that question. Well, let us see as to that. It will not be contended that it will not have been open to the parties to agree upon a reference to this effect, that the arbitrators were not to pass directly or indirectly on the question as to whether the $124,000 were to be deducted from the Common School Fund as stated in the first award. Suppose that the reference had read in that way, surely it would have been open to the parties to make a submission in those terms. There could have been no question it seems to me that if the reference or the submission had read in those terms, that the duties of the arbitrators would have been this. They were called upon to ascertain what was the amount of the principal of the Common School Fund at the time of submission as held by the Government of the Dominion of Canada. Well, they would have proceeded to ascertain what was the sum transmitted or handed over by the Province of Canada on the 1st July, 1867, to the Dominion of Canada. They would have proceeded as a second operation to find what was the amount collected since, and they would have had to stop there and to report that this was the amount of the principal school fund, subject to whatever deduction might have to be made by virtue of the award of 1870 or otherwise, and that is the whole of our

contention. We say we are willing to stand, to take our position as our position was before we consented to this last deed of submission, but we do not want our position to be aggravated. If we have to face the first judgment, we do not want to be called upon to have to face the second judgment. The subject matter was excluded from the reference, and we will call upon you, the arbitrators, not to pass upon it, to reserve all the rights of Ontario, either by reason of the award of 1870 or otherwise, all the rights as they may be, but not to go and state and render a judgment—a new judgment which if not assailed, might be binding on us. And, to show to what expedient the arbitrators had to go to proceed in the way they have proceeded, to try in appearance not to pass upon the question, I will have to refer your Lordships to the first paragraph of their award.

On referring to the award of 1870 your Lordships will find that in clause 7 the arbitrators reported thus: "That from the Common School Fund as held on the 30th day of June, 1867, by the Dominion of Canada amounting to $1,733,224.47" there is to be deducted so much. The first arbitrators have held, as was the case, that the amount of the Common School Fund as reported as transmitted from the Province of Canada to the Dominion was $1,737,000.00. Now, if your Lordships refer to the award in question here you will see how it agrees—the first paragraph of the award:

"That the sum held by the Government of the Dominion of Canada on the 10th day of April, 1893, as part of the principal of said Common School Fund amounted to $2,447,688.62 made up of the following sums, that is to say, 1st, the sum of $1,520,959.29 that by the union of the provinces came into the hands of the Government of Canada."

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS

In one case we have it $1,733,000.00, and in the other we have it as of the same date at $1,520,000.00. That is the expedient to which they had to go to appear not to touch the subject matter.

I have stated that Mr. Chancellor Boyd has expressed his opinion to the effect that the subject matter was excluded, and I have only to call your Lordships' attention to his opening remarks.

"So far as Quebec claims to impeach the action of the first arbitrators in their award of 1870, touching the Upper Canada Land Improvement Fund, and as to what they have directed to be placed to the credit of that fund, presently and prospectively, I cannot see my way to interfere for many reasons. For one thing the very subject matter is withheld from our jurisdiction by the terms of the reference."

If the subject matter is withheld from their jurisdiction surely they are not to pass upon it by way of affirming it, because it is passing upon it. They are not to take it into consideration at all.

*Trenholme Q.C.* follows: There appears to have been two views on this subject of the Improvement Fund, as to whether it was excluded or not. Mr. Chancellor Boyd and Chief Justice Casault evidently appeared to think it was excluded altogether from the reference by the terms of the deed of submission. On the other hand Mr. Justice Burbidge appears to be of opinion that it is not this particular Improvement Fund arising out of the school lands; that another item of that fund is excluded, and that the arbitrators have the power to take up this matter and deal with it if necessary incidentally to the main object of the arbitration, namely, the ascertainment of the amount of the debt.

Now, my learned friend's argument has proceeded, on the view that this fund is excluded, but the appeal

of the Province of Quebec, it seems to me, is quite susceptible of being sustained upon either view. The appeal of the province of Quebec is that this Improvement Fund, in arriving at the amount of the School Fund, should be treated as a nullity in either case; whether it has been excluded by the deed of reference or whether it is not, the arbitrators in discharge of their duty in ascertaining the amount of this fund should treat it as a nullity.

Now, the authorities or citations that will be made in support of either of these views,—that is whether it is excluded or not from the record—are, I think, somewhat numerous. There is a good deal to support each of these views. There is a good deal to support the view of Mr. Justice Burbidge that the Improvement Fund that was excluded—the questions respecting the Improvement Fund—were the questions respecting the $101,000 and the Building Fund. There is no doubt about that. And it cannot be stated that Quebec has been perfectly consistent throughout in saying that this $124,000, which is the item in question now —in maintaining that that is an open question, that that was not settled by the award, because there is an Act of the Province of Quebec passed in 1883, 46 Victoria, of record here—in which there is distinct recognition it seems to me by way of recital at least of the right of Ontario to this deduction of 25 per cent. That Act, however, was repealed in 1888, before this submission came up. It was not in force at the time the deed of submission was entered into between the parties. It had been set aside.

And then there is correspondence between the Honourable Mr. Mercier and Sir Oliver Mowat, premiers, in which we cannot pretend it is not apparent, that Mr. Mercier was disposed to accept the $124,000 and that he looked upon "questions in dispute" as the $101.000.00 and the building fund also.

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

Now, we do not pretend that the position of Quebec has been perfectly consistent throughout upon this question, but as the learned counsel for Ontario said in his opening remarks, these were simply abortive attempts at settlement that were not carried out, were not acted upon, and I think if we want to arrive at what the parties really must be supposed to have considered in dispute, we must see what their language was at or as near as possible to the time they entered into the deed of submission, and while that deed of submission was being acted upon between them.

Now, if we take that, another matter may arise, and the parties may take a totally different view upon the subject. I may say as regards Quebec there was this, if any excuse is required for inconsistency in this matter, that there were changes of administration, changes of public men who were dealing with this. It is quite evident on the face of this record, that these public men had not a full grasp of the whole subject in connection with this, in many cases being new to their positions. Ontario had a decided advantage in the unity of administration and direction of this matter, and was consistent throughout in acknowledging the fund as we said, but Quebec had public men at that time who did not understand this and hence this would account for the inconsistency ; but whatever inconsistency there was, I say it arose from attempts at settlement that were abortive. But the language of the parties used at or nearest before they entered into this deed of submission, and which they were acting on this deed of submission—that language I think is most properly invoked in order to show what the real intentions of the parties were.

Now, from that point of view, the court will see that the position taken by Quebec in the letter of Mr.

Shehyn, in 1889, is the position of opposition to this $124,000. I maintain that the Province of Quebec takes the position that this $124,000 should not be allowed. I maintain that that was in dispute—all that $124,000, and that was almost immediately before the submission was entered into.

Then, we come to the deed of submission, and I suppose as a rule all that the parties have been negotiating about before is generally supposed to be summed up in that deed of submission, just as whatever private parties may agree to in a private contract is summed up in the terms of the contract, and if we take that deed of submission on its face it seems to me it excludes these questions. There is no exception there made, and Chancellor Boyd and Mr. Justice Casault say "it seems to me to exclude these questions."

If we go back to immediately after Confederation when the movement was set on foot to adjust the liabilities and assets between the provinces, we find that statements are made out by the Dominion executive exhibiting all the different items of liabilities and assets, and made out for the purpose of placing the case before the arbitrators. We find that conferences took place between all the governments; that extensive correspondence took place, and in these first statements and in the statements that the Dominion put before the arbitrators, simply a balance of some $5,000 odd put down as constituting the balance due to this Improvement Fund, and the $124,000 does not appear at all; and Mr. Wood, in his own statement, in his own letter first takes exactly the same position on behalf of the province of Ontario. Subsequently Mr. Wood puts forward this claim in his written claim before the arbitrators; when Quebec was not there he urged this claim, and

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

it was allowed by the arbitrators, but here we have the position of Quebec and we have the Treasurer of Quebec protesting against this item, and we have him protesting constantly and the award in 1878, after a long series of protests, was carried to the Privy Council upon a statement of [the case under which it appears that Quebec understood she had a perfect right to raise this question, under the general question as to whether the award was valid or not. That appears to have been the opinion of the counsel then employed on the part of Quebec to prepare the case, I suppose; at any rate he appears to have tried to urge that view before the Privy Council, and Quebec did bring up this very question. She tried to urge this and other questions before the Privy Council, but it appears their Lordships took the view that they could not decide the merits of the case.

If that is the case, then we say that the arbitrators should not have dealt with it as they have dealt with it in this award; they should not have put the sanction of their own approval upon that deduction and Quebec should not be prejudiced by having the sanction of the present arbitrators put upon that; and should not be put in a worse position than before in respect of that award. And it was quite competent under the statute which gives your Lordships jurisdiction here, which gives your Lordships the right to substitute the decision, as you did in the Indian annuities case—the decision of this court for that of the arbitrators who have decided—and to put the judgments or the matter in such a position that Quebec will not be prejudiced by what the present arbitrators have done or said in respect of this deductions in respect of this Improvement Fund, in their present award.

Now, I wish to say this, that whatever view is taken of this matter, unless this Improvement Fund is a

nullity, and unless we can invoke that in the present case consistently with the maintenance of the award of 1870 as a whole, I do not think Quebec can succeed in her appeal. The main object of the arbitration was to ascertain the amount of this fund. Now, did not that larger object naturally include every minor detail that was necessary to arrive at that conclusion? We might argue that that is the case, and if they came to an item that had been deducted from this fund, and that this item was a nullity, would not the present arbitrators in arriving at that fund have a right to say we find this nullity to exist as regards this item. There is a great difference between whether it is absolutely null and void, or whether it is a mere voidable thing, just as it is in the case of contracts. A contract may be an absolute nullity. No court would give a judgment on something that has no existence; but a court might well refuse to set aside a transaction that was simply voidable, which might have been set aside for grounds, but if this fund had absolutely no existence, if it was a nullity in point of law, then we say that the arbitrators had a right to say so, whichever view is taken, and had a right to ignore that item as an item to be carved out of the fund.

Now, the learned counsel who spoke for Ontario, spoke of the indecency of Quebec putting forward a claim to attack this award while denying that Ontario could also do the same. I think it is easy to shew that Quebec is not open to such a remark as that, and if it was necessary to make any such remark upon the litigation of this case, that it could be made with much better effect with reference to the appeal of Ontario in this case, where she has sought, without any warning to Quebec, to raise such a question as she has raised in her appeal; but, I want to shew now that the position of Quebec is not open to any such

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

remark. I want to show that the position of Quebec has been *bonâ fide* throughout this matter, and I begin here: When this matter came before the Privy Council on the award of 1870, consistent with all she had done before, and protesting against the award in this respect, it was raised there, and the Lord Chancellor in the Privy Council gave expression to remarks, laid down as it were rules.

It is the principle enunciated by the Lord Chancellor that we maintain Quebec has acted upon. I will call your Lordships' attention to one or two passages in that connection to show the idea under which Quebec has been proceeding in this matter. The idea that Quebec has had of her right to question this Improvement Fund as a mere nullity, and the authority which she cites, existed in the remarks of the Lord Chancellor in that appeal case. Here is what the Lord Chancellor says. "If it was not within their parliamentary powers, it goes for nothing." Now that would apply to the Improvement Fund as much as to any other item.

Then again he says: "If they do anything more than they are authorized to do, it cannot have any possible effect."

Then if it cannot possibly have any effect, when the question came up of ascertaining the amount of this School Fund, could we not say, the arbitrators here did something which was an absolute nullity, they acted as if there was a fund that existed that had no existence; can we not say that too, consistently with what the Lord Chancellor says in another place, when it is sought to enforce that part which is a nullity, that the Province of Quebec could resist it?

The two points that we submit are these. We say in the first place, taking the view that it is excluded, the view taken by Mr. Chancellor Boyd, and in the Ontario

factum, and Chief Justice Casault—we say then that the present arbitrators have dealt with the matter, and have put us in a worse position by their award, and that we should be protected against that. If the other view is taken, that it is not excluded, and that the arbitrators had, as Mr. Justice Burbidge says, incidentally a right to go into this question, then we say that the award is bad in allowing the deduction of $124,000 and in allowing Ontario to make the deduction from the sums which she collected for sales between those dates.

*Hogg Q.C.* for the Dominion :—The Dominion is not, as your Lordships have mentioned once or twice, really interested in the contention existing as between the several provinces but the Dominion is interested in maintaining the award of 1870 in its integrity. The present award, the Dominion submits, should also be sustained. The Dominion is satisfied with that award, because it carries out and was intended to carry out what was arrived at under the award of 1870.

Now, just a word or two with reference to the award of 1870. I submit, first of all, that no question can arise in this appeal as to any isolated amount in that award, that is, that it cannot be attacked in any way for the purpose of shewing that an amount should not have been awarded. The award of 1870 was made under the 142nd section of the British North America Act. What the arbitrators had to do under that statute was to adjust and divide the assets, credits and liabilities. What they did do, so far as this particular fund is concerned, that is the Common School Fund, was, I submit, to adjust that fund, to ascertain it, and to adjust as between the provinces amounts which they thought under that statute should be placed in one fund or another. That is, they ascer-

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

tained that there was $1,733,000 of the Common School Fund, and they, amongst other things, said, we will place to the credit of another fund $124,000, thereby it may be said either dividing a liability, or adjusting an asset. These so far as the Common Schools were concerned, were assets. So far as the Province of Canada was concerned at that time it was a debt or liability; so that they must have either considered under the 142nd section that they were adjusting an asset or dividing a liability, but whatever may have been the reasons that actuated the arbitrators of 1870, there is do doubt about this, that they were the statutory arbitrators, they were the final and supreme forum for the purpose of making this award. There is nothing in the 142nd section which gives any right of appeal or any right to question—that is as a matter of law—what they can do. In other words, the award which is made under the 142nd section becomes as much a matter of law as the 142nd section itself. It is binding, and therefore cannot be interfered with or questioned or criticized afterwards.

The short history of it is this:—In 1870 the arbitrators were appointed to divide the assets and adjust the liabilities and credits. They did to a certain extent. There were a large number of items particularly these referred to in schedule 4 of the British North America Act which were not dealt with, and what was intended by the submission of 1893 was to take up, and to take up upon the same principles and rules that guided the arbitrators of 1870, and finish, the business which had been left unfinished by them. So much is that the case, that in all the matters that have come before this board of arbitrators, those principles and rules which govern the ascertainment of the account are being constantly referred to, and have been made the rule of guidance

both of counsel in arguing the cases and by the arbitrators who sat to decide upon these questions. These were the rules and principles that are in the long book, that were submitted to a council of all the representatives of the different Governments of the time, that were decided upon as the rules and principles to govern in the ascertainment of the account in 1870, and they are the rules and principles that are governing to-day this arbitration.

That is another reason why I submit that what was intended by this submission to arbitration was to carry out what was left undone, being thoroughly understood, agreed, as I say, by acts, statutes, Orders in Council and correspondence in every way that it was possible to conceive an award being adopted, and to continue the settlement of those accounts and to complete it under the statute of 1891.

It seems to me that what was said in the Indian Case is just as applicable and may be applied to this case just as strongly as it was to that, and probably more so, because all the acts of the parties, the provinces accepting the interest from time to time, dealing with the Dominion upon the basis of the award, the Dominion paying it over, publishing their accounts from year to year, their public accounts containing these items, the acceptance of these amounts by the provinces, is the strongest possible evidence of the interpretation which the provinces themselves must have put upon that award, and therefore it should not be disturbed, and I repeat the words of his Lordship the Chief Justice in which he says the award of 1870 must be conclusive upon all the parties to it, it has stood for 25 years, unimpeached except upon the points referred to the Judicial Committee, and to re-open it and disturb one of these provisions upon which other dispositions may have depended, would not only be

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

most unfair, but would be a proceeding without legal warrant, statutory or otherwise. There is no doubt that award cannot be impeached. There is no court of appeal. There is no method of impeaching that award, and I submit that the award should be maintained.

*Blake Q.C.* for the respondent Province of Ontario: —I must begin by saying in answer to an observation that was made by the learned counsel, that I have no intention of criticising the conduct of counsel at present concerned or heretofore concerned in this case. I suggested that it would be an indecent result that Quebec should be able to insist upon, on the one hand holding this award as the award of 1870 a nullity as far as it was concerned, and at the same time shut up the province of Ontario and say that it was bound by it. The learned counsel, before and now, have acted upon their instructions and are not exposed to any criticism, but I must repeat my observation with reference to that result.

As far as I can judge it is rather recoiled from now, and there is a greater degree of tenderness with reference to the award of 1870 in the latter part of this discussion than might have been expected from the language used on former occasions.

Now, your Lordships will observe that upon this appeal my argument is entirely from a different standpoint in one respect than the argument before, because this appeal becomes material only upon the theory that my appeal fails. If my appeal succeeds, there is no fund out of which the Land Improvement Fund can be formed, and it is immaterial what happens to it. It is only then upon the theory that my appeal fails that it becomes material to consider this question.

Upon that theory I must assume that there was a Common School Fund, or that there must be held, for

the award of 1870, to have been a Common School Fund, which was an asset to be divided and apportioned, and if so there was a jurisdiction. If there was a jurisdiction, as Chief Justice Casault himself observed in the long and able judgment which he delivered, it was entirely within the power of these arbitrators to have divided the asset in any way which they pleased between the provinces. It might have proceeded upon a mistaken assumption that facts existed that did not exist, that Orders in Council had one interpretation or the other, or statutes had created the fund instead of only authorizing the creation, but it was within their power to determine that one dollar or a million, should go to the one province or the other; so that learned judge points out with clearness, that he is only able to sustain his objection to this particular action upon the ground that it is excluded from the reference, or upon the ground that the action of the arbitrators themselves was *ultra vires* because they had only power to divide, but as to their power to apportion in any proportion which they deemed just, however unjust it might be upon any assumption which they made, however unjustifiable there is no difficulty.

Well, if so, what was the result? Let us get at the state of facts which was created, which was created by the award of 1870, that there was carved out of the Common School Fund, the sums mentioned in the award of 1870. It was taken out. Mark the language of the award of 1870. The arbitrators began by carving out of the Common School Fund what they say really does not belong to it, the $124,000, and they deal with the residue only.

Now, that is what is done. Was it right? I believe it was right if they had any power to act at all. As I said before, it was the nearest and the most accurate perpetuation of the fund which they as-

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

sumed to exist which the wit of man can devise. Right or wrong was it done? It was done. Done conclusively and produced a new state of things. That it produced that new state of things depended upon the validity of the award as a whole, and whether the award as a whole was a valid instrument in view of the objections taken by Quebec, remained uncertain until the period of the decision of the Privy Council. That decision, although it partakes of the characteristics which have been referred to, having regard to the fact that there was no tribunal in the world before which the question could be raised, of course did practically and substantially end the matter, and was assumed to end the matter to the extent to which it went, of course that is to say dealing with the objections taken by Quebec in the special case.

My learned friend Mr. Béique flung a pebble at the award, but he expressly said I am not going to attack the award. Since then there has been, with the usual inconsistencies that characterise the parties in this case—there has been a little more mud flung at the award, but, after all doesn't it come down to this, that it is impossible to contend that there was other than an error in judgment? My learned friend says they wrongly construed the statutes and the Order-in-Council, and he says they assumed things to exist which did not exist, and they came to a wrong judgment. That is not a question of *extra vires* or *intra vires*; that is an appeal from the judgment of the arbitrators on a matter within their jurisdiction.

Then mark the other limitations my learned friends make. There is nothing they are more anxious about than that the award should stand in those main elements. Nothing, we will say, they say, which shall attack the award, if it is going to impugn

the action as to the Common School Fund. Therefore it is only, if your Lordships hold that this particular of the dealing of the Common School Fund is separable from the rest, that we attack it at all. They earnestly implore your Lordships to note that they do not attack it, if your Lordships should conclude that you could not separate that from the rest. It is only a sort of conditional attack, because they feel the delicate and difficult ground on which they stand if once they open the award.

Now, is it possible to seriously contend—have my learned friends, with all the temerity of argument which in other respects they displayed, ventured seriously to contend—that this item is separable from the distribution by the parties of the Common School Fund? Grant to me this, that the arbitrators were of the opinion which they have expressed by their award, that it was a just and proper thing to carve out $124,000 and 25 per cent from the subsequent collections—is it possible to aver with a straight face before a court that that conception and view of theirs, acted upon by them, is not a part of their dealing with the Common School Fund, and that you can divide and eliminate that portion of their dealings and disposition of the $124,000 and the 25 per cent of the other collections. How? They have not disposed of it. Is an award good which leaves part of the subject undisposed of? Is that portion of it in which you destroy the award, as a portion of the whole subject, to be set aside and the remainder to stand. I cannot divine a case in which there is a greater intimacy of action between the part they attack and the part they desire to maintain. I find it difficult to comprehend how any man can seriously argue that the one can stand and the other fall as a nullity, and if it does what is to happen? As I have said, it is undisposed

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

of. They have not divided that. They have not dealt with it. Are you going to deal with it? We know that the failure to dispose of the subject matter referred is a fatal defect in an award. So that the very attack which my learned friends make, this sort of conditional and hypothetical attack which they make upon the award of 1870, makes that attack its failure. They cannot attack in that way. They must attack with a whole heart and with more fairness. They must strike with the knowledge of the consequence of their attack, and that is the ground which I took in my opening on the other appeal, and which I repeat now, that the Province of Quebec cannot attack this award without the whole of the subject of the Common School Fund being open, and we being free as well, if they are free.

Now, one word before I proceed to deal with the other matters which are relevant to this question. One word upon two isolated points. Your Lordships adverted to, and my learned friend Mr. Hogg adverted to, the attitude of the Dominion. And irrespective of the long course of dealing which was pursued by the Dominion, I called my learned friend's attention, and I called your Lordships' attention to a specific act with reference to this particular matter.

I refer to an Order in Council of October 15th, 1891, in which an allotment to Ontario was recommended in payment of principal owing to that province, which principal was included in this $124,000, so that you have a specific Act of the most cogent kind by the Dominion upon this theory, and while of course the representations of Mr. Mowat do not bind the Province of Quebec—I do not set them up as binding it—they are accepted by the Dominion, they represent the state of facts, and it was present to the minds of the

Dominion Government, and upon which the Dominion Government acted at that time.

I am going to deal with the course and conduct of Quebec in reference to the $124,000 by itself. I was about dealing with the isolated question, the question of the Dominion, and in the same sense and connection, and although I am affecting the part of Quebec, and affecting it expressly, I also refer to exhibit 56 A and exhibit 18 and exhibit X, each of which are accounts by the Dominion commencing in 1884, a triennial extension, in each of which the account of the Province of Ontario is credited with $124,000 in making the account. My learned friend proposes to neutralise the importance of those accounts by saying that the first of them proceeded upon a request from the treasurers of both provinces that the account should be prepared in this form, which request was headed without prejudice. And he says that those accounts are of no consequence because the treasurer of his own province asked that they should be prepared in that form. I should have said, that if there was a circumstance which gave them cogency and importance, it was that circumstance; but, so it is that they were prepared and continued, and they are in the official papers of the Dominion showing the Province of Ontario credited with $124,000.

Now then, another isolated point before I proceed with the main subject. Here is a very important paper. It is an extract from the account called Z, prepared by the Dominion accountant by direction of the board of arbitrators in August, 1893. This was a general account of affairs, and what is given? The subsidy' statement gives: To Ontario, increased deduction one year's interest; one half year's interest; half year's subsidy. Then come Trust Funds for Ontario; Common School Fund from 1st July, 1867, to 11th January,

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

1889, $1,520,595.29. Add on 11th January, 1889, $925,625.63. Add on 19th April, 1890, $11,103.70. Total $2,457,688.62.

It thus gives, not the apportioning of the capital as a divisible sum which was impossible to divide belonging to Ontario, but it gives the whole of that Common School Fund as they understood it, and then it proceeds to deal with that alone which they could deal with the interest upon the Ontario side, the proportion of interest payable semi-annually to Ontario calculated according to the award and population after the decennial census from 1st July, 1867, to 31st December, 1870, $21,169.14. From 1st January, 1871, to 31st December, 1880, $21,914.35. From 1st January, 1881, to 31st December, 1890, $22,280.04.

And on the accretion of $925,625.63, 11th January, 1889, to 31st December, 1890, $13,559.19, and so on. And the total to 31st December, 1892, $36,057.10.

Then it gives the Upper Canada Grammar School Fund, the Upper Canada Land Improvement Fund, capital $124,685.18, interest $3,117.13, giving a total of interest of $47,746.14.

Now, by the direction of the arbitrators, at this early stage, this statement is prepared for the guidance of the board according to those principles which they laid down, principles which deduct from the Common School Fund, the Land Improvement Fund, which makes a total of capital of the Common School Fund to be dealt with in the aggregate of 1867, less the $124,000, adding to that the two payments made by Ontario in the interval, which range according to the decennial censuses for each period, the interest payable to Ontario on that account, and which proceeds to give to Ontario the $124,000 of the Land Improvement Fund. And then for Quebec Common School Fund, the principal is the same as for Ontario, and the amounts pay-

able for interest are $16,000, and then according to the decennial censuses diminishing instead of increasing, because the proportion of the increment or population were different, and they find their total for Quebec.

Now, then, I hold that from the period of the award of 1870 which settled this matter, the effect was that the amount held by the Dominion Government for the Common School Fund was the $1,520,000. I hold that it had been conclusively adjudged upon the theory—that I am bound to assume—that it was a trust fund, it had been conclusively settled and adjudged at $1,520,000.

Now, I ask what the language of the reference is. The language of the reference is to ascertain what the amount now held by the Dominion Government on account of the Common School Fund is. And, if I have shown to your Lordships that the amount by the Dominion Government on the 30th June, 1867, or 31st July, when it existed, was $1,520,000, that is the first item in the accounts. What my learned friends want to do is to say that the arbitrators should find that the amount now held is composed of $1,733,000 plus the subsequent payments by Ontario. I say that the amount at that time held by the Dominion Government was the amount which the award had found was the true Common School Fund amount and that they did not hold the Upper Canada Land Improvement Fund as part of the Common School Fund at all, they held it as Upper Canada Land Improvement Fund for Ontario as they acknowledged by this Order in Council, to which I have referred, and by these accounts which were prepared by the treasurer. Therefore I say the reference is impossible of execution upon any other theory.

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

Now, my learned friend Mr. Béïque rather boldly stated that he would establish by the record, by the Acts and correspondence, that this was a matter in dispute, and that circumstance he deemed of vital importance to his case.

I undertake to prove from the documents that the course of Quebec has not been inconsistent since the period of award of 1870, or inconsistent at all. I admit, with my learned friends, that during the period of the arbitration of 1870, while Quebec was present, it contested the Land Improvement Fund, I admit with my learned friends that after that period and up to the period of the reference to the Privy Council, and its decision, it contested the Land Improvement Fund, but I aver that from the day on which that decision was reached up to the time at which this question was started in this arbitration., I find nothing at all to justify that aspersion, if it is to be called one, upon the Province of Quebec, which has been cast upon it by its counsel who sought to excuse it by changes of administration, and ignorance of political administrators. They have never contested, they accepted as just, the award of 1870 upon the Land Improvement Fund, they have always since the decision of the Privy Council admitted that there was an end of the question, that it had been forced upon them by circumstances over which they had no control. Admitted it in terms and admitted it by their action.

Now, I have to trouble your Lordships by running, as rapidly as I can, through the relevant correspondence. I shall not extract from the mass of this correspondence, three letters in the middle each of them susceptible, as I shall demonstrate to your Lordships, of an entirely different, and properly to be given an entirely different, interpretation from that

which has been given to them by my learned friends. I shall bring your Lordships to them in their proper sequence. I shall give you the whole correspondence for or against, and I rely with confidence upon bringing your Lordships irresistibly to the conclusion that the attitude of Quebec has been one and continuous in favour of the view that however much she might dislike it, she was bound by the award of 1870 to the extent to which that award proceeded, and the attitude, I agree, of stern resistance to any concession of any kind which might enable Ontario to gain any means of pressing her claim to the $101,000 to the Crown lands part of the Improvement Fund; there is the attitude. Unwilling assent to the fact that she is bound to the Common School portion of the fund.

Now on the 25th March, 1879, Harris, assistant treasurer of Ontario, writes on the Premier of Quebec, Mr. Joly, saying that he sends a statement showing Quebec's share of the Common School Fund as requested in his communication addressed to the Attorney General, and what is material in that is the enclosure.

"Memorandum.—Quebec's share of Common School Fund:

| | | |
|---|---|---|
| Collections on account of land sold between the 14th June, 1853, and 6th March, 1861.. | $673,834 42 | |
| Less 5 per cent cost of management ..... | $ 40,430 06 | |
| One fourth for Land Improvement Fund ..... | 165,958 60 | |
| | | $ 206,388 66 |
| | | $467,445 76 |

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

| | | |
|---|---|---|
| Collection on account of land sold since 6th March, 1861.. | $ 262,675 39 | |
| Less 6 per cent cost of management..... | 15,760 52 | |
| | | $ 246,914 87 |
| | | $714,360 63 |
| Quebec entitled to interest as provided by award and statute, on..... | | $ 302,652 68 |

Mark the distinction. Cut into two pieces. The portion of the lands sold during the continuance of the fund as found by the award of 1870, deduction made for the awarded share, the portion since without any such deduction, except the 6 per cent for the cost of management.

That was replied to on 31st March, 1879, accepting in terms the principle upon which the amount had been stated, and asking for further details in order to ascertain what interest was due to the Province of Quebec in respect of the moneys, which according to that principle were received by the Province of Ontario on joint account.

On 28th November, 1882, Mr. Wurtele, the Provincial Treasurer, wrote to the Treasurer of Ontario for payment.

And that was answered. On January 26th, 1883, Wurtele wrote to Wood, Provincial Treasurer, another request for money. Sessional Papers, Ontario, 1884, No. 43, page 2.

Now, your Lordships have referred to the Act of 1873. I want to show you its genesis. I read the letter. The provincial treasurer of Quebec introduced a bill, and he asks the Province of Ontario to consider it and say whether they think it is right, and he is willing to take into consideration any reasonable amendment, and that is the Act assented to on the 30th March, 1873. That is the genesis of it. That is

the spirit in which it was conceived, and the terms of it.

Now, what is the answer. It is found in the preamble to the Act, 46 Vict. ch. 22 (Que.) (Reads first recital.)

I have here the interpretation of the legislation of Quebec of the original right, I have a recital that that was true, that that was the state of the case, not unwillingly in this instance, but because it was correct, they state that as the true state of the facts.

(The learned counsel then read the other recitals in the preamble and the first five sections of the statute.)

The Act of the Province of Ontario passed in this connection was a short one. They had none of these matters to settle, but they did pass an Act, 46 Vict. ch. 3, reciting a proposal to try and settle the shares and giving authority to the Lieutenant-Governor-in-Council to enter into an agreement.

There followed some time after that a conference to which my learned friend Mr. Béïque has referred and which is reported to his Government by the Treasurer of the Province of Quebec, and Order-in-Council approving of that report. That conference indicates the memorandum without prejudice to which my learned friend Mr. Béïque referred, sets it out, under which the accounts were requested to be prepared by the Dominion arbitrator, and the Government of Quebec approved of the course taken in making that arrangement. And this was the genesis of these three triennial statements, roughly speaking, which I have referred to.

Then on the 27th April, is a letter from the assistant treasurer of Quebec on behalf of the treasurer to the treasurer of Ontario. Ontario Sess. Papers, 1884, No. 43, page 3.

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

Once again consecutive, no matter how many administrations change, or how much or how little they know of the affairs of the province, you still have the same recognition of this state of things continuing.

Then the answer given and the enclosure are to be found in Ontario Sess. Papers 1884, No. 43, page 4, shewing the amounts collected on account of Common School Lands for each year between the 1st July, 1867, and 31st December, 1882, shewing the amounts received on account of Land Improvement Fund (*i.e.* land sold between 14th June, 1853, and 6th March, 1861), and amounts collected on lands sold before 14th June, 1853, and since 6th March, 1861.

Next is the transmission by the Assistant Treasurer of Quebec on the 15th October, 1883, to be found in Ontario Sess. Papers, 1885, No. 45, page 3 of the memrandum asked by the Treasurer. That is the memorandum without prejudice which required a statement of the amount coming to each province under the award, for Library and Common School, and Crown Land Improvement Fund. A letter from the Deputy Minister of Finance of Canada to the Treasurer of Ontario on May 8th, 1884, shews that the Dominion then was recognising the fact, and acting upon it.

I next refer to the memorandum for executive council of interview with Minister of Finance, Ottawa, on October 21st, 1884, as to the settlement of the accounts between the Dominion of Canada and the Provinces of Ontario and Quebec.

At this conference Treasurer Robertson, of Quebec, gave a lot of extracts from his contention and pretention before the award of 1870 directed to the fight that he was then making, but the fight then was limited to that about which a fight alone might be made, viz., the $101,000.

In the Ontario Sess. Papers, 1886, No. 37, page 3, is a letter dated February 26th, 1885, from the Treasurer of Quebec to the Treasurer of Ontario.

On March 16th, 1886, the Treasurer of Quebec wrote to Treasurer of Ontario. Ontario Sess. Papers, 1887, No. 60, page 3.

It is *ad nauseam*. It is repeated over and over again.

All the correspondence shows the same thing. The inquiry for these particulars, useful only in order to make the deduction from the gross necessary to ascertain the net share of Quebec.

Then Machin again, 5th April, 1886, protests strongly "against the withholding of the amount of interest due on its share of the proceeds of the sales of Common School land, collected and retained by the Government of Ontario, and trusts that the Government of Ontario will reconsider its conclusion that it is advisable that no further payments on account of this fund be made until a settlement is arrived at between the Provinces and the Dominion, as such a determination would be a distinct violation of the conditions of the 9th section of the award, the acceptance of which was forced upon this Province by Ontario."

But they say they expected it, and they complain that Ontario is not paying the interest as they conceive according to it, and they say that the delays are not their fault. Of course everybody always throws the delay upon the other party.

Now we come to a letter of 18th March, 1887, from Treasurer Shehyn to Treasurer Ross in which he asks for a detailed statement of collections on Common School Lands.

It does not look very much like disputing at that time.

Again the Assistant Treasurer writes on the 19th January, 1888. Ontario Sess. Papers, 1888, No. 49, page 8.

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

On 3rd February, 1888, the statement asked for was furnished.

Then Prime Minister Mercier comes upon the scene. On April 14th, 1888, he writes to Mr. Mowat :—

"My dear Mr. Mowat,—I send you a copy of our statutes of 1883 in which at page 79, chapter 22, you will find an Act to provide for the final settlement of the Common School Fund."

He refers to the Act of 1883, and they make much of the repeal. I will show your Lordships the circumstances of the repeal. Now he says :—

"That law is still in force and has been passed by Mr. Wurtele as the result of an agreement with you at the time."

"Of course I understand the insufficiency of that law now, but could you suggest me a way to amend it in order to meet the case?"

There was then a desire to close up the whole matter by a division of the fund, and that the law was inadequate, because the law kept the fund perpetual, although the proportions were to be ascertained.

"You know that an amendment of an opponent's law is still better for that opponent than any wise new law."

"I suppose you are now quite ready to send me your case in this matter of the School Fund in order that we might agree to submit one at our session in May."

Your Lordships will observe that there is the suggestion on the part of Mr. Mercier to his friend the Prime Minister of Ontario that the statute was all wrong, that it had made admissions, that he wanted to raise new subjects of controversy. It is a friendly letter, wanting to know what suggestions the Prime Minister of Ontario could make in order that this further idea of getting hold of all by the provinces might be carried

out, and he wants to amend it. He does not want to repeal it. He would like to amend it, so as to amplify it a little, and make it all right.

Then Mr. Mowat, 25th April, 1888, on the same page, says:

"I send you our proposed Order in Council re appointment of arbitrators. Please return it to me with any changes which you would suggest, in order that the orders of the two Governments may be expressed in the same terms."

The proposed Order-in-Council provided for appointment of three arbitrators to settle questions between the two Provinces arising from the award of 1870.

"The questions which have arisen between the Governments of Ontario and Quebec are as follows:"

"Relating to the claim made by Ontario that on the 30th June, 1867, the Upper Canada Improvement Fund, which, by the 5th paragraph of the award, was declared to be the property of and to belong to the Province of Ontario for the purposes for which that fund was established and composed of the sum of $124,685.18 as procceds of the Common School lands and of the sum of $101,771.68 as proceeds of the Crown lands in respect of sales made between the 14th June, 1853, and the 6th March, 1861, and that this latter sum should be credited to Ontario by the Dominion Government together with interest thereon from 1st July, 1867, and the total added to the debt of the late Province of Canada."

There was the contention. My learned friends say that Mr. Mowat was acknowledging that there was in dispute the question of the $124,000, and your Lordships see perfectly well the question was whether there should be added to that the $101,000, which sum, not like the $124,000, would have to be added to the debt of the old Province of Canada. And the result

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

of adding to the debt would have been that Quebec would have had to bear its share. That was the objection of Quebec. That is the first question, and that first question, instead of being such as my learned friend contends, is a question naturally and reasonably raising the point still undisposed of by the award, the point as to the $101,000, and leaving the other where it was.

Then there is a second question about interest which I need not read, and a third question about interest upon part of the Upper Canada Building Fund, and that is one of the questions afterwards omitted.

Now, we are beginning to get at the genesis of the changes. You find two questions out of three. One, interest on building fund, one, the $101,000 and interest, and the third, interest allowed on Common School Fund; whether Ontario is liable, which of course had to be referred.

Then Mr. Mercier writes on October 24th, 1888, hoping that Mr. Mowat would be able to come to Ottawa to discuss the arbitration the next day, and ends:

"Under all these circumstances and with the view chiefly to agree on matters to be submitted to the Common School Fund arbitration, I hope you will come."

"I have prepared a draft for an Order-in-Council which is a little different with yours."

"Our two Treasurers have met the Minister of Finance and the Minister of Justice, and seem to be satisfied with the interview."

And then his draft is this, and it is important.

It recites that three arbitrators were appointed to effect the division and readjustment of the debts,

credits, liabilities, properties and assets of Upper Canada and Lower Canada, to wit:

"That the Government of the Dominion of Canada and the Government of the Province of Ontario acquiesce in the said decision or award of the arbitrators."

"That the said award divided the assets and liabilities of Upper and Lower Canada to the 30th day of June, 1867, leaving still to be divided between the provinces of Ontario and Quebec such sums as remained to be collected by the Government of Ontario from and after the said last mentioned date, the 30th of June, 1867, on account of the Common School Fund, upon the price of sale of the lands set apart for the said fund and sold before or since the said last mentioned date or which might be sold thereafter."

"Since the 30th June, 1867, the Government of Ontario has collected various sums of money being the proceeds of the sale of the said land, and which under the provisions of the said award should have been paid into the hands of the Dominion Government and the revenue whereof divided between Ontario and Quebec."

"That there still remain due divers other sums of money on the sale of the land set apart for the said fund."

"That there are certain lands set apart for the Common School Fund which still remain in the possession of the Government of Ontario, and which have not been sold."

"That the Government of the Province of Ontario consents to purchase and the Government of the Province of Quebec consents to sell at such price as may be determined by award of arbitrators the share of the Province of Quebec in the lands set apart for the Common School Fund which have not yet been sold as well as its share in the amounts which remain to

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

be collected on the price of sale of the lands set apart for the said fund sold since the establishment of the fund. That by the Act passed at the last session of the legislature of Quebec entitled, an Act to provide for the settlement of certain questions in dispute between the Provinces of Quebec and Ontario by the means of arbitration, it is enacted that for the final and conclusive determination of certain questions still pending between the Province of Quebec and the Province of Ontario, the Lieutenant Governor in Council may unite with the Government of Ontario in the appointment of these arbitrators to whom shall be referred such of these questions which the Governments of both provinces shall mutually agree to submit."

"1. What is the capital amount collected by the Government of Ontario since the 30th June, 1867, on the sale of lands set apart for the Common School Fund, and which is the share belonging to the Province of Quebec on such amount ?"

"2. Does the Province of Ontario owe any interest on the balance of the moneys which it has collected on the sale of lands set apart for the Common School Fund after deducting 6 per cent on moneys collected by it, for the sale and management of the lands set apart for the Common School Fund, and also one-fourth of the balance of the proceeds of the said lands sold between the 14th day of June, 1853, and the 6th day of March, 1861, for the Upper Canada Improvement Fund ?"

And my learned friend actually has cited this Order-in-Council as proving that the question was in dispute.

"3 If Ontario owes any interest, from what date and at what rate should the same be calculated ? Should such interest be simple or compound ? Should it be added to the capital yearly or half-yearly ?"

"4. What is the extent and what is the value of the land set apart for the Common School Fund and still unsold?"

"5. What should be the share of the Province of Quebec in the value of such lands?"

"6. What is the amount and what is the value of the sums of money remaining unpaid on the price or sale of the lands set apart for the Common School Fund?"

Well, of course all this was abortive, but I am bringing your Lordships straight along through the whole negotiations to find one consecutive, continuous course of recognition of this by the Province of Quebec.

Then, on December 6th, Mr. Mercier writes to the Hon. Mr. Mowat:

"I have your letter of the 30th ultimo, to which I could not answer sooner for reasons that I need not explain here. The first remark of your letter is in these words: 'Your letter of the 22nd instant makes no reference to my letter of the 7th with regard to the arbitrations embracing all questions in difference, and not merely those relating to the school lands. I also spoke in that letter of the technical difficulty of taking the other questions before the court without the consent of both parties, though there must be some way of doing so.'"

"In my letter of 22nd November last I said:

'Of course I understand that if we do not insist on the arbitration on these two points, your and Mr. Ross's other objections are not insisted upon, and our draft of Order in Council will be accepted, these two items being struck off.'"

The letter of Mr. Mowat's, to which this letter of Mr. Mercier's is a reply, is dated 7th November, 1888. It says:

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

"I understand the principal questions—besides those relating to the school lands—to be as follows:

"The Land Improvement Fund, that is the right of claim of certain of our municipalities in respect of Crown lands sold between the 14th June, 1853, and the 6th March, 1861.

"Whether interest on the $600,000 payable to Upper Canada under the Seignorial Acts should be 5 per cent or 6 per cent.

"Possibly there may be some other minor matters between the two provinces which may not be agreed to in settling the accounts."

"I have already mentioned to you that Mr. Treasurer Ross is strongly of opinion that the arbitration should embrace all the questions or none. One, though not the only reason for this, is that any sums found to be owing by your province should be set off against what may be payable to you by this province in respect of these school lands. Before the Treasurer had mentioned his view to me I thought we might go on with the arbitration which you desired, and have the other matters disposed of by the courts, but on looking into this matter I have not found any authority for a province being sued without its own consent. The Ontario Legislature passed an Act, now R. S. O., 1887, ch. 42, consenting that the Supreme Court of Canada and the Exchequer Court should have jurisdiction amongst other things in controversies between this and the other province, but I believe no such Act was passed in Quebec."

"You suggested in our interview that the old award decided against Ontario the question of the Land Improvement Fund, but this Government and the municipalities concerned have always taken a different view, and after an arbitration had been verbally agreed to at our interview here, the treasurer communicated

to these municipalties and the public that such an arbitration would include this question, and the municipalities have since employed counsel of their own to see to their interests before the arbitrators, as, whatever comes to the province under this head belongs to these municipalities and is to be paid over to them."

Then as I have said, we have the reply in which Mr. Mercier says:

"I understand your treasurer wants to strike off the items 4, 5, 6 and 7 and if he insists we must consent, although I may repeat here my remarks made in my letter of the 22nd November last. * * *

"I must, I suppose, understand that Mr. Ross persists in his objection, and that the only way to settle the difficulty on these two items is a meeting of our two treasurers. The only objection now to arbitration is therefore your desire not to limit the questions submitted to the School Lands Fund, but to include in it:"

"The Land Improvement Fund—that is the right or claim of certain of our municipalities in respect of Crown Lands sold between the 14th June, 1853, and the 6th March, 1861."

"2. Whether interest on the $600,000 payable to Upper Canada under the Seignorial Act should be 5 per cent or 6 per cent."

"3. Some other minor matters between the two provinces which may not be agreed to in settling the accounts."

"I put these three questions in the terms you do it in your letter of the 7th November, 1889. You agreed with me that according to the declarations officially made in our house by the treasurer and myself, we must limit as far as Quebec is concerned the arbitration to the first five questions mentioned in our draft of Order in Council, and you suggest to settle this

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

difficulty by submitting the other questions before the court, and as we have no laws similar to yours, to allow our province to be sued in cases as the one mentioned by you, to have such law passed at the next session."

"I am very sorry indeed to have to inform you that this is not practicable for the following reasons:—"

"1. The arbitration between Ontario and Quebec took place by virtue of section 142 of the British North America Act."

"2. We understand in Quebec that the award has been very unjust to us, but being unfortunately bound by it, we cannot consent to re-open any question outside of the School Lands Fund, being afraid that our interests might still be endangered."

"3. The only questions that may be arbitrated now, we understand, are those mentioned in our draft of Order in Council as deriving from the disposition of section 9 of the award, which having left this question open, makes a necessity of a new arbitration on that point."

He wants to make the consequential arrangements, which from the necessity of the case the arbitrators of 1870 could not settle, because they had to do with undetermined amounts, assets of collections which were not yet got in. And, your Lordships will see he does not want to go outside of that.—

"4. All the other questions pending between the two provinces have been settled, although against us, we believe by said award, the first section of which divides the amount by which the debt of the late Province of Canada exceeded on the 30th day of June, 1867, $62,500,000 and the 15th section of which states:—

'That the several sums awarded to be paid and the several matters and things awarded and directed to be done by or with regard to the parties to this refer-

ence respectively as aforesaid shall respectively be paid, received, done, accepted and be taken as a final end and determination of the several matters aforesaid.'

And he cites the French version as being still more clear.

And then he goes on to deal with the Upper Canada Building Fund item of Mr. Mowat's proposed reference:—

"5. We do not find any record of Ontario having ever claimed the one per cent additional on the $600,000 from May 5th, 1869, before the arbitrators' award was made. It is not included in the revised statement of debts admitted by Ontario on the 11th day of December, 1869, which contains the addition of the Upper Canada Improvement Fund, this last one being specially mentioned at page 17 of the arbitration pamphlet.

"6. As regards the last item we claim that it having been specially demanded before the arbitrators and they having thought proper not to grant it, it must be considered as having been legally refused."

"7. In your letter dated Toronto, 24th September, 1873, and addressed to the Hon. Mr. Ouimet, then Prime Minister of the Province of Quebec, you stated:

'I have already intimated that we are prepared to recognize the interests of Quebec in the Common School Fund and in the school lands yet undisposed of, and I may now add that we are ready to purchase this interest at a fair price as part of a final settlement of all questions between the provinces."

"8. Your declaration made in the name of your Government was contained in a letter in which you claimed that the award was just, legal and equitable, and to render it complete you were ready to settle the Common School Fund; all the other difficulties between the two provinces were to be regarded as settled."

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

"Under all these circumstances we don't think we would be justified to consent to re-open any question outside of that Common School Fund, because,

"1. It would put in danger the interests of the province on matters that we considered settled; and

"2. It would give our opponents the chance of making a very strong argument against us."

"You close your letter of the 30th November last by the words, 'and I fear that the result must be that the whole subject of a settlement between us will have to stand over for further friendly negotiations. In that case Sir William Ritchie and Judge Senkler should be notified, as they will be making or perhaps may have made arrangements upon the assumption of the arbitration proceeding about the middle of next month.'

"I quite agree with you on these remarks, but I would be sorry indeed if your Government refused the arbitration on the first three questions mentioned on our draft of Order in Council; of course if you come to that decision we cannot help it and must submit to such refusal."

"In conclusion allow me to draw your attention to the very important fact that your Government has in its possession moneys that should have been placed long ago into the hands of the Federal Government for the common use of both provinces according to the award of 1870, and that you will see the injustice to continue this state of things, only because the Province of Quebec is not ready to re-open questions considered by its Government as having been settled by the award of 1870."

Now, there is a very clear and plain statement of his attitude. Sir Oliver Mowat wanted to bring forward two subjects, the Upper Canada Building Fund and the Crown Lands Improvement Fund. He says

of both of them, he considers them practically settled, either by inaction, or otherwise, by the award of 1870. He says "we do not agree with the justice of the award of 1870, but it has settled everything, and we are forced to abide by it, and there is an end of it. We deal with these questions which grow out of that award, and which it is necessary to determine in order that that award may be implemented, and that is all with which we will deal, we re-open nothing further."

Is it conceived as possible under these conditions, without any proposition or suggestion, that matters which were settled by the award in favour of Ontario should be opened by the Province of Quebec, that a document capable of another interpretation is to be interpreted as practically opening those questions and abandoning the position of the award?

Then on 15th December, 1888, Mr. Mowat replying to Mr. Mercier says:

"I observe that your objection is that submitting to arbitration the questions relating to this fund would be a re-opening of the questions already decided by the award, but this is not so. We do not propose to re-open any question that the award has decided, or that the arbitrators or courts may hold that the award has decided. Our proposition is to ascertain what the award gives. The award did not settle or state the amount of this fund or other funds awarded to the one province or the other. Section 5 of the award names the funds which are to go to this province and declares that the moneys thereby payable, including the several investments in respect of the same due on them, are to be the property of Ontario."

That is our proposition as to the terms of the award, because they are consequential.

Then he proceeds to argue that the award did not settle the $101,000, and he proceeds to argue about the

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

investment fund and to try to get Mr. Mercier to agree notwithstanding the joint definition of objects, that these things should become the subject of a reference. He says:

"In the same way the award alloted to Ontario the Upper Canada Improvement Fund, whatever that should consist of. The award mentions no amount. Ontario claims that the $101,000 arising from Crown lands was and is a part of the fund as much as was the $124,000 on school lands, and was intended to be given and is given by the award to Ontario. We do not propose to open up the award or claim anything not provided by the award. We only suggest, as a difference of opinion between Quebec and Ontario exists as to the effect and interpretation of the award on certain points, that a friendly arbitration should take place as to what is the true interpretation of it."

"Then in regard to the unsold school lands and the amounts still uncollected in respect of school lands, the matter seems to my colleagues and myself a proper subject for negotiation rather than for arbitration, though if the arbitration were to settle all matters, this might be included."

Then by a letter from Ross to Shehyn, January, 11th, 1889, Ontario Sess. Papers, 1889, No. 46, page 26, the Dominion is asked to transfer the sum of $925,625.63, the total collections to 31st December, 1888, to the said Common School Fund.

Then Mr. Ross deals with Mr. Shehyn's applications for a remittance on the account of interest and he points out that Ontario has always considered that great injustice was done by the award in giving Quebec any claim on this amount, every acre of which was in Ontario. Ontario has good grounds for contending that interest should not run against the province until after the confirmation of the award by the Privy Council (26th

March, 1878). Quebec disputed the award and carried an appeal to the Privy Council and until the final judgment of that tribunal was given Ontario had no authority to pay the collections into the Dominion or any authority to recognise Quebec as having any interest at all in this fund.

Then by Order-in-Council of January, 15th, 1889, the Dominion Government is asked by Ontario to carry out the transfer of $925,625.63 to the credit of the Common School Fund.

The next letter is that of 24th January, 1889, from Mr. Shehyn to the Treasurer of Ontario expressing satisfaction with said transfer " as Quebec will now receive its share of the interest on these collections every six months."

In the letter to which this is a reply the Treasurer of Ontario had stated that the award was unjust to Ontario in that it had given the entire land to the two provinces. And, Mr. Shehyn proceeds to answer that observation.

" The injustice that was done by the award in this matter was done to Quebec by giving to Ontario a certain portion of the proceeds of these lands in excess of the amount which by statute belonged to the Common School Fund for Ontario, under the plea that it belonged to the Upper Canada Improvement Fund. It would be useless however, for me to enter into this question in the present letter."

So that he repels the charge of injustice to Ontario by alleging injustice done and accomplished in Quebec. Land was given, or proceeds of land, which ought not to have been given.

And then comes the letter, upon which my learned friend so strongly relied, of Mr. Shehyn and which requires a little analysis, because it is perfectly plain that the situation was consistent throughout. That

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

is the letter of the 4th July, 1889, to Mr. Courtney, Deputy Minister of Finance.

The letter of Mr. Courtney was one in which he submitted to the Government of Quebec for their consideration, a case which had been proposed to be submitted to this court at the instance of the Government of Ontario by the Dominion Government, and that case had reference to the $101,000 of the Land Improvement Fund. I have the case before me which Mr. Shehyn was answering, the suggestion being made that Quebec should assent to the submission of the case.

Of course it is important in reading a man's letter to know what he was writing about, what is the application made to which he was responding. My only purpose in referring to this case is to show your Lordships, it being a case submitted or proposed to be submitted at the instance of the Province of Ontario, that it had regard to that which the Province of Ontario had this long time been trying to get decided the question of the $101,000. It proceeds to state the facts, and it states that it " was represented by the Province of Ontario before the arbitrators, that in dealing with the Common School Fund, and determining how it should be disposed of to comply with the Consolidated Statutes of Canada ch. 26, before any division of it could be made between Ontario and Quebec under section 5 of that Act, the proportion of it derived from sales between the 14th of June, 1853, and the 7th of March, 1861, and appropriated by the Act of 1853 to the Improvement Fund, should be added to such fund and so applied."

" The arbitrators acceded to this claim and directed (section 7 of the award) that from the Common School Fund as held on the 30th of June, 1867, by the Dominion of Canada, amounting to $1,733,224.47, the

sum of $124,685.18 should be and the same was thereby taken and deducted and placed to the credit of the Upper Canada Improvement Fund, the said sum of $124,685.18 being one-fourth part of the moneys received by the late Province of Canada between the 6th of March, 1861, and the 1st July, 1867, on account of Common School Lands sold between the 14th of June, 1853, and the 6th of March, 1861."

"It is contended by the Province of Ontario on behalf of the municipalities that the principle adopted by the arbitrators must be applied to the proceeds of similar sales of Crown Lands, and the province, for the benefit of the municipalities concerned, claims the aggregate sum of $101,771.68 as the one-fifth of the proceeds of the same sales of Crown Lands, which had been withheld by the late Province of Canada in the same manner as they had withheld the proceeds of the school lands."

"They claim, therefore, that the Upper Canada Improvement Fund on the 30th of June, 1867, was composed of these two sums, $124,685.18 and $101,771.68, the proceeds of Common School and Crown lands respectively, and that this latter sum should be declared to have always been part of the fund, and should be credited to Ontario by the Dominion Government, with interest from the 1st of July, 1867, for distribution among the said municipalities according to their respective rights and interests therein; and that the total amount of principal and interest aforesaid should be added to the debt of the late Province of Canada; that the accounts between Canada and Ontario and between Ontario and Quebec under the B. N. A. Act are not settled and have remained open, and that this claim is one of the unsettled cases, and has been, with other questions, one of negotiation ever since Confederation."

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

"Ontario and Quebec being conjointly liable to the Dominion for the amount by which the debt of the late Province of Canada exceeds the sum fixed; and there being an excess over this sum, the effect of allowing this claim will be to increase *pro tanto* that excess, and thus to add to the liability of the Province of Quebec to the Dominion."

"That province objects to the allowance claimed and insists that the said claim was submitted to the arbitration, and has been, and must be deemed to have been, disposed of and concluded by the award."

"The question for the opinion of the court is whether such claim should be allowed by the Dominion or not."

"In addition to the documents in the case mentioned, there is also submitted an Appendix of Statutes and papers bearing upon the question."

Now, I have shown what that case was, that the Province of Ontario having tried in every way to obtain some solution of the question of the $101,000, at last, at the instance of the ministers who were present, adopted this view, they appealed to the Dominion Government to state a case and the Dominion Government very properly, having got the case and having verified as they thought its accuracy as a just statement of facts, with all the important documents, sent it down to Mr. Shehyn, and Mr. Shehyn answered, and that is the answer which my learned friend says shows that $124,000 was in dispute, and I say the subject as to which he was replying was the $101,000. What did he say? :

"I beg to say that in the statement of the debt of the late Province of Canada as agreed to and sanctioned by the Honourable the Privy Council in 1870, the Upper Canada Improvement Fund is stated at an amount of $5,119.08; that previous to the sanctioning

of this statement by the Privy Council, Ontario claimed that the Improvement Fund should be increased by $226,456.86, which amount should be added to the debt of the late Province of Canada; that on the 22nd January, 1870, the Honourable J. G. Robertson, then Treasurer of the Province of Quebec, protested against this pretention of Ontario, saying that the introducing of such pretentions, not alluded to in the conference at Montreal, would involve the re-opening of the whole question as respects the surplus debt."

"The views of Mr. Robertson were evidently accepted as correct by the Privy Council, as the Improvement Fund remained in the statement confirmed by them at the sum of $5,119.08 as originally prepared by the auditor of the late Province of Canada."

"The arbitrators appointed by Ontario and the Dominion—the arbitrator of the Province of Quebec having resigned—awarded the Upper Canada Improvement Fund to the Province of Ontario and with reference to the disposition of it the Government of this province has nothing whatever to do."

That is to say, they have nothing to do with whether it goes to the municipalities, or what is to be done.

"If it is proposed in submitting this question to the Supreme Court of Canada to re-open the question raised by Ontario respecting this fund and disposed of by the then Privy Council of the Dominion, the Government of this province protests against the Government of the Dominion sanctioning the submission of such a case to any court."

"The claim of the municipalities for one-fourth of the amount of the sales of school land and one-fifth of the amount of sales of Crown Lands made between the 14th June, 1853 and the 6th March, 1861, was twice decided against by the Government of the late Province of Canada."

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

Then a considerable amount of statement is made of events which had taken place before Confederation borrowed from the proceedings before the arbitrators. And, the conclusion is this:—

"It should be borne in mind that the arbitrators had no power whatever to change in any way the statement of the debts and assets of the late Province of Canada as sanctioned by the honourable the Privy Council after the conference held on the subject between the Dominion and the two provinces."

Which they do not do, as your Lordships know, by their dealing with the Common School Fund; they merely altered the distribution; they did not increase the debt.

*Mr. Béique*:—Will you read the preceding paragraph?

*Mr. Blake*;—Certainly:

"The arbitrators appointed by Ontario and the Dominion—the arbitrators of the Province of Quebec having retired—treated the Common School Fund as an asset that they had power to divide and apportion in such manner as seemed to them right. They transferred to the Province of Ontario as belonging to Upper Canada Improvement Fund the amount of the sales of the Common School Land made between the 14th June, 1853 and the 6th March, 1861, including $124,685.18 stated to have been received on account of these sales between the 6th March, 1861, and the 30th June, 1867. The Province of Quebec has already contended that the transfer of any portion of this asset to Ontario, excepting the amount to which Ontario was entitled in proportion to population, was unwarranted and unfair."

"It should be borne in mind that the arbitrators had no power whatever to change in any way the statement of the debts and assets of the late Province of

Canada as sanctioned by the Honourable the Privy Council after the conference held on the subject between the Dominion and the two provinces."

"Therefore in the award that they made while they unfairly, as Quebec contends, gave to Ontario a portion of the Common School Fund under the plea of transferring it to the Upper Canada Improvement Fund, they really had no power to increase the indebtedness of the late Province of Canada to the Upper Canada Improvement Fund, a fact which their silence on the subject of the claim of Ontario respecting the one-fifth of the Crown lands sold as above mentioned, shows that they themselves recognised."

"The Government of this province therefore declines to join in any way in the proposed litigation or to make any changes or suggestions respecting the proposed case which was submitted."

So that the interpretation of the letter upon which my learned friend mainly relies is against him when you read it, and when you look at it, it is confined to the $101,000.

Now, the next thing that happened is a most important document as bearing upon the present contention of Quebec. It is an Order-in-Council of the Dominion:

"On a report dated 5th December, 1890, from the Minister of Finance stating that an interview held at Toronto on the 28th November, 1890, between the Minister of Justice and the Deputy Minister of Finance on behalf of the Dominion Government, Mr. Francois Langelier and the Assistant Treasurer of Quebec on behalf of the Government of Quebec, and the Attorney General of Ontario and other members of the Executive Council of that province on behalf of the Government of Ontario, among the matters discussed was the unsettled condition of the accounts of the old Province

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

of Canada, and all present agreed to recommend to their respective Governments the following proposals:—

1. All questions relating or incident to the accounts between the Dominion and the two Provinces of Ontario and Quebec, and to accounts between the two Provinces of Ontario and Quebec to be referred to a board of arbitrators consisting of three of the judges to be chosen as hereinafter mentioned.

2. The accounts are understood to include the following particulars:—"

"(*e*) The arbitrators to apportion the amount which should go to each of the provinces in the event of the principal of the Common School Fund being paid over to the two provinces."

"(*h*) The outstanding question as to the Upper Canada Land Improvement Fund not to form part of the reference unless the Quebec Government hereafter assent to include the same."

Now, is there any doubt what was meant by that? Nobody can contend that what was meant by that was not in express terms this question as to the $101,000. My learned friend, I do not think, will venture to contend it, or if he alleges it, he will be utterly unable with all his skill and ability, to give a single argument which will lead to any other conclusion; it is indisputable that the outstanding question there mentioned in the Order in Council and the subject of agreement was the $101,000 only.

Then the Acts under which the settlement should take place are passed. Those settlements leave the particular subject to be disposed of by agreement between the Governments, and then we come down to the agreement of submission under which this arbitration is held, and now I associate that Order-in-Council of the 12th December with this particular

agreement of submission by its own language. That first agreement of submission provides:

"Whereas certain questions have arisen in relation to the settlement of the accounts between the Government of the Dominion of Canada, the Governmentof the Provinces of Ontario and Quebec, both jointly and severally, and also as between the two provinces. * * * ° * *

"Now, therefore, it is agreed by and between the said several Governments, parties hereto, that the following questions, as mentioned in the Order of the Governor General in Council, of the 12th day of December, 1890, be and they are hereby referred to the said arbitrators for their determination and award, in accordance with the said statutes, namely:"

So that the very submission which we now have adverts to and enables me to ask your Lordships to look at that Order in Council as throwing light upon this question, if it be a question of doubt, and then you find, 5:

"It is further agreed by and between the parties hereto that the questions respecting the Upper Canada Building Fund and the Upper Canada Improvement Fund are not at at present to form any part of this reference; but this agreement is subject to the reservation by Ontario of any of its rights to maintain and recover its claims, if any, in respect of the said funds, as it may be advised."

Now, who can doubt that this statement, tedious though it has been, has at any rate this advantage, that it has as I have said, demonstrated what the meaning of that is. You have found by the former correspondence that there was one question about the Land Improvement Fund, namely, as to the Crown Lands, you have also found that there was a question which had dropped out of sight by the time the Order-

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AN LANDS.

in-Council of the 12th December, 1870, was passed, but which had been in dispute, which Mr. Mercier had refused to allow to be included, namely, the question of the Upper Canada Building Fund. Upon further consideration they looked and they say that that question which Mr. Mercier insisted should not be included had not been put in, and they put in that question too, and to allege that that means all questions respecting the Land Improvement Fund is absolutely refuted by this statement. Even if it was, I say there was no question as to the Common School Fund. I have demonstrated to your Lordships that from the period of the decision in 1870 the Province of Quebec never raised the question; that every word, every act, every proceeding, every claim that it took was otherwise.

I have therefore shown to your Lordships clearly and plainly, that upon this record to which my learned friend himself appealed, the three papers from which he read, it is indisputable, that the question relating to the Improvement Fund and to the Building Fund means the question as to the $101,000 as to the Improvement Fund, and that question as to interest as to the Building Fund.

I say the major order to this arbitration was to find out what the amount of the Common School fund was. I say my learned friend's construction of this submission is a construction which renders it impossible that they should do that thing. It is quite easy to take out the Improvement fund because it has nothing to do with the Common School fund I admit, my Lords, that it does not pass the wit of man to devise words which would have abstracted this question from the jurisdiction of the arbitrators, but it would be the wit of the most foolish man in the world which would have tried to devise such words, and unless the words

were so plain and clear that they could not be got over, your Lordships would not give such a limited and impotent conclusion to this affair as would be by that.

I say that there is a sense in which it is excluded from the consideration of this arbitration; it is excluded because it was not in dispute; because it was a settled thing; It is excluded because as I have demonstrated to your Lordships if the award is to be taken as valid, if this thing cannot be separated, if it was within the jurisdiction of the arbitrators, the Common School Fund did not at the time which this submission was made, consist of $1,733,000.00, it consisted of $1,500,000.00 odd, it was excluded therefore from consideration because there was no intention that these arbitrators should pass upon it at all; it is excluded because the common concurrent sense of both the powers which were parties to this action, ever since the action of the Privy Council, thought that it was a settled question.

Practically the claim of Ontario if it be a good one is lost, and the power to assert that claim does not exist, although to-day for the purposes of this argument your Lordships are told that what the arbitrators should do, and what your Lordships are asked to do, is to declare that the Common School Fund is such and such an amount subject to any claim that Ontario may have, and thus to leave undeclared what the Common School Fund is. I conjecture and I ask your Lordships to conjecture, as soon as that standing ground is reached, why of course it would be said, well we must act upon the Common School Fund as a whole, and leave you to whistle for the $124,000 and your $224,000. That would be the next stage in this proceeding, a stage which I am sure would be unwelcomed by all who value the reputation of the country. Therefore, I hold that it is possible and certainly just, that which

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

has been the common mind of both parties with reference to the $224,000, should be recognised. and that that which is true, namely, that the Common School Fund did consist on the 30th June, 1867, as conclusively settled by the award of the $1,500,000 should also be recognized, and that this thing which is done by these arbitrators, that that also should be recognised.

I may be allowed to say that nine and twenty years ago I asserted this claim in the Provincial Legislature for these settlers, and that the report of the select committee on the Land Improvement Fund gives your Lordships what the merits are.

It was a claim then prosecuted, since maintained, always acted upon by the Province of Ontario, not as a claim for a fund which that province was entitled to devote for general purposes, it was a claim asserted on behalf of those who went into these waste places of the earth and dwelt, upon a stipulation announced to them by the Crown Lands agents from whom they bought the property, that one-fourth and one-fifth of their prices, according as they were Crown or school lands, should be devoted to the primeval interests of a new country, the making of roads and bridges and different local improvements of the country. They said to the Government, this was to be done through you the central authority, but we had our individual rights in it; we bought our land at ten shillings an acre upon the agreement that fifty cents of that should be devoted to the things which were necessary to our clearing land and making an existence. As one of the learned judges has said—as the Chancellor has well said—the Common School Fund had the advantage of it. These lands could not have been sold; this fund could not have been realised.

They had the benefit of it in the sales that were made, and we have not claimed that it was not com-

petent without a breach of good faith, for the Government to change its policy, and with reference to new sales to say we will no longer make that allowance; something might be said in favour of that view, but it has never been said—what has been claimed and what is claimed, is that in the highest view of equity, honour and good faith, in the discharge of what would be a fundamental moral duty between man and man, aye, a question or matter of contract between man and man, it was impossible by an arbitrary act of the executive to destroy the vested rights and interests of the settlers, to suggest another use for that portion of his purchase money than the making of these public improvements, in which he was interested, as had been contracted for by him at the time they were sold. That was the claim made on behalf of the settlers. That was the claim which the arbitrators of 1870 thought was a just and reasonable claim. That was a claim which they recognised and insisted on, and I nave no doubt, that at this day, after thirty years, it is not a claim which this court will reject.

*Béique Q.C.* in reply:

I must say that I have expressed my full views in opening the case on the position that I took, and the few words that I will address to your Lordships will be confined to calling attention to one or two references given by my learned friend.

Let me say at once that with the last consideration, as an equitable consideration, we think this court has nothing to do. It may be a consideration which goes to this effect, that the Governor in Council of the Province of Canada should have created the Improvement Fund, or it may go to the effect that the Governor in Council should not have abolished it. It seems to me it is a matter altogether foreign to the present appeal, and I will not dwell any further upon it.

1897

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

My learned friend has referred to the accounts which he calls the accounts between the Dominion and the Province of Ontario. I say that these accounts, I have stated why, I have given the reference as my authority, were speculative accounts; they were prepared in a speculative way for a certain purpose, and with these accounts we have nothing to do.

I have called your Lordships' attention to the fact that in the public accounts of the Dominion of 1892 the Common School Fund stands intact without any deduction of the $124,000.

Another reference to which my learned friend has called your attention is that letter of Mr. Shehyn. I need not read the letter. I submit, that Mr. Shehyn took the ground that it was unwarranted, and that it was unjustified, and that he had not to go any further; that he was unwilling to go with the reference any further than it had gone.

I do not claim, and I have never pretended, that Ontario ever intended to submit to the present arbitrators, the question as to whether the award of 1870 was valid or not. That is not my contention. But I say that the position of the parties was settled or not by that first award. It does not appear that either party was demanding from the present arbitration a new judgment on that question. If the question has been settled, as is contended, I do not see what is the interest of Ontario in provoking a new judgment upon a question, if Ontario had already won the judgment.

Now, the only point to which I should call your Lordships' attention is to the wording of the reservation.

It has not escaped your Lordships' attention in the draft of submission referred to as prepared by the Dominion Government, that the word is "the

question," and I admit there that the question in that submission had reference merely, as my learned friend has stated, to the Crown Lands, not to the Common School Lands; there the word was "question," but here we have the "questions," and we have in the reservation "in respect of the said funds," therefore, in respect of both the Common School Fund and of the Crown Lands and of the School Lands.

Now, I have rested my contention on the wording that the questions respecting this, in a general way, were not intended to be submitted; and I have rested it on the contention that it had been disputed before the Privy Council, and I have rested it on the contention that it has been disputed, and I still claim that there is enough to justify my pretention in the letter of Mr. Shehyn, and I have not heard a word in reply to that, on the interpretation of Ontario in their own factum and on the opinion of the learned Chancellor Boyd.

One further word, as far as the other branch of the case is concerned. We have admitted all along that the question of this Improvement Fund was limited to this, as to whether it could be dealt with independently, as a separate part of the award. And my contention has been, and I repeat it that the question should be approached merely in this light:—Suppose that the arbitrators of 1870 had awarded that sum or had deducted from the Common School Fund, which was acknowledged to be the property of the two provinces, $124,000 for a corporation that had no existence whatever, what would have taken place as a result of any award of that kind? Would that sum have been lost? Would it not have been open to the two provinces to go back behind this award and say the corporation is extinct, there is nobody to claim the amount, and therefore it must fall back into the fund as forming

1898

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

The Chief Justice.

part of the fund from which it was taken. We take no other position than that.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This appeal is from certain parts of the award of the arbitrators appointed under statutes of the Dominion of Canada and of the Provinces of Ontario and Quebec (Canada 54 & 55 Vict., ch. 6; Ontario 54 & 55 Vict., ch. 2; Quebec 54 Vict., ch. 4), respecting the settlement by arbitration of accounts between the Dominion of Canada and the Provinces, and between the two provinces.

The agreement of submission of the 10th of April, 1893, under which the arbitrators proceeded, contained amongst others the following references and provisions adopted by Order in Council of the Dominion and the Provinces:

(3) It is further agreed that the following matters shall be referred to the said arbitrators for their determination and award in accordance with the provisions of the said statutes, namely:

(*h*) The ascertainment and determination of the principal of the Common School Fund, the rate of interest which would be allowed on such fund and the method of computing such interest.

(*i*) In the ascertainment of the amount of the principal of the said Common School Fund, the arbitrators are to take into consideration not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable and also the value of the school lands which have not yet been sold.

(5) It is further agreed by and between the parties hereto that the questions respecting the Upper Canada Building Fund and the Upper Canada Improvement Fund are not at present to form any part of this reference; but this agreement is subject to the reservation by Ontario of any of its rights to maintain and recover its claims, if any, in respect of the said funds as it may be advised.

In exercise of the power to make a partial award conferred by the statutes under which the arbitration took place, the arbitrators on the 6th of February, 1896, awarded as follows respecting the subjects of reference before mentioned:

(1) That the sum held by the Government of the Dominion of Canada on the tenth day of April, 1893, as part of the principal of the said Common School Fund, amounted to two million four hundred and fifty-seven thousand six hundred and eighty-eight dollars and sixty-two cents ($2,457,688.62), made up of the following sums, that is to say: First the sum of one million five hundred and twenty thousand nine hundred and fifty-nine dollars and twenty-nine cents ($1,520,959.29) that at the union of the provinces came into the hands of the Government of Canada, and upon which interest has from time to time in the accounts referred to us been credited to the said provinces: Secondly, the sum of nine hundred and twenty-five thousand six hundred and twenty-five dollars and sixty-three cents ($925,625.63). for which, in 1889, the Government of Ontario accounted to the Government of the Dominion; and thirdly, the sum of eleven thousand one hundred and three dollars and seventy cents ($11,103.70) for which the Government of Ontario accounted to the Government of the Dominion in the following year (1890).

From this finding Sir Louis Napoleon Casault dissents, he being of opinion that the sum then held by the Dominion Government as part of the principal of the said Common School Fund was greater than has been stated by an amount of one hundred and twenty-four thousand six hundred and eighty-five dollars and eighteen cents ($124,685.18), which sum in the said accounts has been deducted from the said fund and credited to the Upper Canada Improvement Fund.

2. That the Province of Ontario is not liable out of the proceeds arising from the sale of the Crown Lands of the Province, other than the million acres of Common School Lands set apart in aid of the Common Schools of the late Province of Canada, to contribute anything to the said Common School Fund.

Mr. Chancellor Boyd dissents from so much of this finding as may imply that Ontario is under any liability in respect to the Common School Fund or lands.

3. That subject to certain deductions, the Province of Ontario is liable for the moneys received by the said province since the first day of July, 1867, or to be received from or on account of the Common School Lands set apart in aid of the Common Schools of the late Proeince of Canada.

1898

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

The Chief Justice.

Mr. Chancellor Boyd dissents from this finding as to liability.

4. That from the moneys received from the Province of Ontario since the first day of July, 1867, from or on account of the Common School Lands set apart in aid of the Common Schools of the late Province of Canada, the Province of Ontario is entitled to deduct and retain the following sums as provided by the award of the 3rd of September, 1870, that is to say :

First. In respect of all such moneys, six per centum on the amount thereof for the sale and management of such lands.

Secondly. In respect of moneys arising from the sales of such lands made between the fourteenth day of June, 1853, and the sixth day of March, 1861, twenty-five per centum of the balance remaining after the deduction of six per centum for the sale and management of such lands.

Chief Justice Sir Louis Napoleon Casault dissents from so much of this finding as relates to the deduction in the cases mentioned of the twenty-five per centum on such balance.

5. That in respect of the matters mentioned in the four preceding paragraphs we the said arbitrators have proceeded upon our view of disputed questions of law.

From these findings the provinces have both appealed. The Province of Ontario as follows:

First. As to paragraph 2 of the said award which states "That the Province of Ontario is not liable out of the proceeds arising from the sale of the Crown Lands of the province other than the million acres of Common School Lands set apart in aid of the Common Schools of the late Province of Canada to contribute anything to the said Common School Fund."

Ontario appeals against so much of the finding in the said paragraph 2 as implies that Ontario is under any liability in respect to the Common School Fund or lands.

Second. As to paragraph 3 of the said award, which states "That subject to certain deductions the Province of Ontario is liable for the moneys received by the said province since the first day of July, 1867, or to be received from or or on account of the Common School Lands set apart in aid of the Common Schools of the late Province of Canada"

Ontario appeals against the finding in the said paragraph 3 of liability of Ontario as thereby decided.

And Ontario asks that the Supreme Court of Canada declare that Ontario is not liable in respect of the matters set out in paragraphs 2 and 3 of the said award, whereby Ontario is declared liable and that there is and has been no liability on the part of Ontario in respect of lands in Ontario known as the Common School Lands, or in respect of moneys received or to be received by Ontario from or on account of Common School Lands.

The Province of Quebec limits its appeal as follows, namely:

In so far as such award permits or allows any deduction from the amount of the principal of said Common School Fund for the Upper Canada Land Improvement or Upper Canada Improvement Fund.

And in this respect the Province of Quebec will contend that under the provisions of paragraph 1 of the award, the principal of the fund should be augmented by the sum of one hundred and twenty-four thousand six hundred and eighty-five dollars and eighteen cents ($124,685.18), and that under paragraph four of the said award, the amount of twenty-five per centum referred to in the paragraph mentioned secondly, should not be deducted.

And the Province of Quebec will ask that the said award be varied accordingly, and amended so as to not permit of any deductions from the principal of the said Common School Fund for any sums for the said Upper Canada Land Improvement Fund, or Upper Canada Improvement Fund.

Each of the learned arbitrators has appended to the award an opinion embodying the reasons for the conclusion arrived at by him. Chancellor Boyd and Chief Justice Casault have respectively set forth the arguments which they consider to establish the correctness of their dissenting findings, and Mr. Justice Burbidge whose opinion prevailed has stated the reasons for his non-concurrence in either of the dissenting conclusions.

The Province of Quebec moved to quash the appeal upon the ground that this court had no jurisdiction to entertain it, but we are all of opinion that this objection entirely fails and that the jurisdiction conferred by the statutes upon this court has been properly invoked as regards all that portion of the award

1898

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS

The Chief Justice.

tained in the four first paragraphs in which the arbitrators have declared that they proceeded upon their view of disputed questions of law.

I now proceed to give as concisely as possible a history of the legislation of the former Province of Canada which is material to be considered.

By the statute of Canada, 12 Vict. ch. 200, it was enacted

> That all moneys which shall arise from the sale of any of the public lands of the province shall be set apart for the purpose of creating capital which shall be sufficient to produce a clear sum of £100,000 per annum which said capital and the income to be derived therefrom shall form a public fund to be called "The Common School Fund."

By the second section after making provision for the investment of the fund thus formed, it is declared that the

> Said fund and the income thereof shall be and remain a perpetual fund for the support of Common Schools and the establishment of Township and Parish Libraries.

By the third section it was enacted:

> That the Commissioner of Crown Lands under the direction of the Governor-in-Council, shall set apart and appropriate one million of acres of such public lands, in such part or parts of the province as he may deem expedient, and dispose thereof on such terms and conditions as may by the Governor-in-Council be approved, and the money arising from the sale thereof shall be invested and applied towards creating the said Common School Fund; Provided always that before any appropriation of the moneys arising from the sale of such lands shall be made, all charges thereon for the management or sale thereof, together with all Indian annuities charged upon and payable thereout, shall be first paid and satisfied.

The fourth and remaining clause of the Act is as follows:

> So soon as a net annual income of fifty thousand pounds shall be realized from the said School Fund, the public grant of money paid out of the Provincial Revenue for Common Schools, shall forever cease to be made a charge on such revenue; Provided always, nevertheless, that in the meantime the interest arising from the said School

Fund so to be created as aforesaid, shall be annually paid over to the Receiver General and applied towards the payment of the yearly grant of fifty thousand pounds now appropriated for the support of the Common Schools; Provided further, that after the said annual sum of fifty thousand pounds shall have been taken off the Consolidated Revenue, if the income arising from the said School Fund shall from any cause whatever fall short of the annual sum of fifty thousand pounds, then it shall and may be lawful for the Receiver General of the Province to pay out of the said Consolidated Revenue such sum or sums of money as may from time to time be required to make up such deficiency, the same to be repaid as soon as the said income of the said School Fund shall exceed the said sum of fifty thousand pounds.

Under this Act an order-in-council dated the 5th November, 1850, was passed whereby one million acres of the public lands were set apart and appropriated for the purposes of the Common School Fund. These lands were all situated in that part of the Province of Canada now forming the Province of Ontario.

This Act was subsequently, upon the revision of the statute law of the Province of Canada in 1859, embodied in the Consolidated Statutes of Canada, chapter 26.

Another Statutory Fund which is of great importance in the consideration of this appeal is the Upper Canada Improvement Fund.

This Fund was created for the purpose of opening roads and making other improvements required to render the lands set apart to form the School Fund which were situated in a large tract of wild and unreclaimed land known as the "Huron Tract," available for settlement or to meet the necessary requirements of the original settlers.

It was created by the fourteenth section of the Statute of Canada, 16 Vict. ch.159, which received the royal assent (for which it had been reserved by the Governor) and became law on the 14th June, 1853. The fourteenth section is in these terms:

1898

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

The Chief Justice.

It shall be lawful for the Governor-in-Council to reserve out of the proceeds of the School Lands in any county a sum not exceeding one fourth of such proceeds as a fund for public improvements within the county, to be expended under the direction of the Governor-in Council, and also to reserve out of the proceeds of unappropriated Crown Lands in any county a sum not exceeding one-fifth as a fund for public improvements within the county to be also expended under the direction of the Governor-in-Council. Provided always, that the particulars of all such sums, and the expenditure thereof shall be laid before Parliament within the first ten days of each session. Provided always, that not exceeding six per cent on the amount collected, including surveys, shall be charged for the sale and management of lands forming the Common School Fund, arising out of the one million acres of land set apart in the Huron Tract.

It is to be observed that this section authorized for the purpose of an Improvement Fund not only a reservation of one-fourth of the proceeds of the school lands, but also a reservation of one-fifth of the proceeds of the unappropriated Crown Lands not set apart for school purposes. With these Crown Lands and the reservation out of them we are not directly concerned in this appeal, but as will be seen hereafter the reservation of the one fifth of Crown Lands sales becomes incidentally of much importance.

The 14th section of the Act of 1853 is in its terms permissive, and in order to the constitution of the Lands Improvement Fund an order of the Governor-in-Council was requisite. Such an Order-in-Council was accordingly passed on the 7th December, 1855. It is to be remarked of this Order-in-Council that it is informally and loosely worded, but it has always been recognized as having created the Lands Improvement Fund. Further, it has been treated as having had a retroactive effect carrying back the right to deduct the one-fourth from the proceeds of School Lands to the date of the statute itself (14th of June, 1853.) These observations are made merely to shew that the peculiar form of the Order-in-Council has not escaped

attention, for no point has been made of this either upon the argument of the appeal or before the arbitrators. It seems to have been conceded on all hands that the Lands Improvement Fund so far as it was made up of contributions from School Lands consisted of one-fourth of the moneys produced by the sales of those lands in the interval between the fourteenth of June, 1853, and the sixth of March, 1861, when by an Order-in-Council of the latter date (6th March, 1861), the Order-in-Council of the 7th December, 1855, was absolutely rescinded.

Therefore, in 1867, when the confederation of the Provinces took place and the Province of Canada was divided into the two new Provinces of Ontario and Quebec, there existed two funds, the School Fund and the Upper Canada Improvement Fund.

These funds therefore were subject to be dealt with by the arbitrators whose appointment was provided for by section 142 of the British North America Act, for it cannot be and never has been pretended that the 113th section of that Act was exhaustive or that the assets enumerated in the fourth schedule to the Act included all the assets belonging to Ontario and Quebec conjointly, which these arbitrators were empowered to deal with; nor can it be pretended that these funds, the Common School Fund and the Lands Improvement Fund, were included under any of the heads of "stocks, cash, bankers' balances and securities" which the 107th section of the Act transferred to the Dominion. It need scarcely be said that the Provinces other than Ontario or Quebec were not entitled to share in these funds arising from lands in the former Province of Canada, and devoted, the one to Common Schools in that Province, and the other to local improvements designed to facilitate the sale and settle-

1898

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

The Chief Justice.

ment of the million acres in Upper Canada set apart for Common School purposes.

The funds must therefore necessarily have been assets belonging to Ontario and Quebec jointly.

The arbitrators appointed under section 142 therefore treated these funds as such joint assets and dealt with them accordingly.

As regards the Upper Canada Improvement Fund, the award of this statutory tribunal constituted by the 142nd section which was made on the third September, 1870, adjudged (by the 5th section) as follows:

> The following special or trust funds and the monies thereby payable including the several investments in respect of the same, or any of them, shall be and the same are hereby declared to be the property of and belonging to the Province of Ontario for the purposes for which they were established, viz.:
>
> (6) Upper Canada Improvement Fund:

Then in the 7th, 8th, 9th and 10th sections of the same award, both the Common School Fund and the Upper Canada Improvement Fund are further dealt with in these terms:

> VII. From the Common School Fund as held on the thirtieth day of June, one thousand eight hundred and sixty-seven, by the Dominion of Canada, amounting to one million seven hundred and thirty-three thousand two hundred and twenty-four dollars and forty-seven cents (of which fifty-eight thousand dollars is invested in the bonds or debentures of the Quebec Turnpike Trust, the said sum of fifty-eight thousand dollars, being an asset mentioned in the fourth schedule to the British North America Act, 1867, as the Quebec Turnpike Trust) the sum of one hundred and twenty-four thousand six hundred and eighty-five dollars and eighteen cents shall be, and the same is hereby taken and deducted and placed to the credit of the Upper Canada Improvement Fund, the said sum of one hundred and twenty-four thousand six hundred and eighty-five dollars and eighteen cents being one-fourth part of moneys received by the late Province of Canada, between the sixth day of March, one thousand eight hundred and sixty one, and the first day of July, one thousand eight hundred and sixty-seven, on account of Common School Lands, sold between the fourteenth day of June, one thousand eight hundred and fifty-three,

and the said sixth day of March, one thousand eight hundred and sixty-one.

VIII. That the residue of the said Common School Fund, with the investments belonging thereto, as aforesaid, shall continue to be held by the Dominion of Canada, and the income realized therefrom, from the thirtieth day of June, one thousand eight hundred and sixty-seven, and which shall hereafter be realized therefrom, shall be apportioned between and paid over to the respective Provinces of Ontario and Quebec as directed by the fifth section, chapter twenty-six of the Consolidated Statutes of Canada, with regard to the sum of two hundred thousand dollars in the said section mentioned.

IX. That the moneys received by the said Province of Ontario since the thirtieth day of June, one thousand eight hundred and sixty-seven, or which shall hereafter be received by the said province from, or on account of, the Common School Lands set apart in aid of the Common Schools of the late Province of Canada, shall be paid to the Dominion of Canada to be invested as provided by section three of said chapter twenty-six of the Consolidated Statutes of Canada. and the income derived therefrom shall be divided, apportioned and paid between and to the said Provinces of Ontario and Quebec respectively as provided in the said fifth section, chapter twenty-six of the Consolidated Statutes of Canada, with regard to the sum of two hundred thousand dollars in the said section mentioned.

X. That the Province of Ontario shall be entitled to retain out of such moneys six per cent for the sale and management of the said lands, and that one-fourth of the proceeds of the said lands, sold between the fourteenth day of June, one thousand eight hundred and fifty-three, and the said sixth day of March, one thousand eight hundred and sixty-one, received since the thirtieth day of June, one thousand eight hundred and sixty-seven, or which may hereafter be received after deducting the expenses of such management as aforesaid shall be taken and retained by the said Province of Ontario for the Upper Canada Improvement Fund.

It is to be borne in mind that the office of the present arbitrators under the agreement of reference of the 10th of April, 1893, already set forth, is limited to the ascertainment of the principal of the Common School Fund and the arbitrators are directed to take into consideration not only the sum held by the Dominion at the date of the present reference, but also the amount for which Ontario is liable and also the

1889

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

The Chief Justice.

value of the unsold School Lands. And it was by the same agreement provided that:

> The questions respecting the Upper Canada Building Fund and the Upper Canada Improvement Fund were not then to form any part of the reference, but that the agreement was subject to the reservation by Ontario of any of its rights to maintain and recover its claims, if any, in respect of the said funds as it might be advised.

Then proceeding to take up the objections now made to the award under appeal in the order in which they are to be found on the face of the award in the dissents there recorded, we find first the objection of Chief Justice Casault that the deduction of $124,685.18 from the amount of the Common School Fund credited by the award of 1870 to the Upper Canada Improvement Fund was wrong. The grounds of this objection may be included under two heads. First, it is said that it is beyond the scope of the authority of the present arbitrators to deal with the Upper Canada Improvement Fund. Secondly, that it was *ultra vires* of the arbitrators of 1870 to allot the last mentioned fund to the Province of Ontario and to deduct its amount from the Common School Fund.

No doubt there is to be found in the agreement of reference an exclusion in terms of questions respecting the Upper Canada Improvement Fund. We find, however, as is well demonstrated in the opinion of Mr. Justice Burbidge, that effect could not be given to the express terms of the submission which impose upon the arbitrators the duty of determining and awarding upon

> (*a*) & (*c*) The accounts as rendered by the Dominion to the two provinces up to January, 1889,

if this exclusion was to apply to the $124,685.18, inasmuch as this was one of the items in the accounts which had been rendered by the Dominion. Further, the arbitrators were expressly required not only to

ascertain and determine the amount of the Common School Fund, but also the amount for which Ontario is liable. Then how could these requirements of the submission be complied with if the arbitrators were not to pass upon the right of Ontario to deduct one fourth of the moneys derived from School Lands sold between 14th June, 1853, and 6th March, 1861? It appears therefore that, according to the construction put upon the reservation in question by the learned Chief Justice, the agreement of submission would upon its face contain clauses which were repugnant to each other.

Mr. Justice Burbidge has, I think, found a solution of this difficulty which we may well adopt. That portion of the learned judge's opinion in which he sets forth the argument on this head appears to me to be unanswerable. I refer particularly to the full and clear explanation of it which he has given. It may, however, be summarized by saying that the terms of the submission may be reconciled by the explanation that there were two questions respecting the Upper Canada Improvement Fund—one which had been passed upon by the arbitrators of 1870, as to the right of Ontario to that fund as it existed, and to make further deduction from the sale of School Lands to be carried to the credit of the Improvement Fund to the amount of the one-fourth of the collection from sales made in the interval between the 14th June, 1853, and the 6th March, 1861, the other as to the right of Ontario to have credited to the fund the one-fifth of sales, not of School Lands, but of ordinary Crown Lands sold subsequent to the Act of the 14th June, 1853, up to the date of the rescission of the Order-in-Council establishing the fund. The first question had been adjudicated upon by the arbitrators of 1870, the latter question was wholly untouched.

1898

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

The Chief Justice.

Apart from this it is extremely improbable that the Province of Ontario ever could have intended to have abandoned any rights which had been assured to it by the award which for the present purpose I assume to have been *intra vires*, a conclusion which I shall presently attempt to demonstrate when I come to the second head of the Chief Justice's argument.

Further, there is nothing in the statutes under which the present arbitration has been had warranting the inference of an intention to derogate from the Imperial Act, even if parliament and the two Provincial Legislatures could do away with rights so assured, and there would clearly have been such a derogation if the arbitrators of 1870 were within their powers in awarding the Improvement Fund to Ontario, for in that case the right of Ontario to that fund is to be considered to be established just as it would have been if the 142nd section of the British North America Act instead of delegating the apportionment and adjustment to arbitrators had embodied in terms the same distribution of these funds as that which was made by the award of 1870.

The learned Chief Justice, however, goes furthe than this, for he insists that the award of 1870 was *ultra vires* of the arbitrators.

The arbitration, or (as it is called in the statute itself) the "arbitrament" of 1870 was a statutory proceeding not subject to the general rules of law applicable to private arbitrations. The persons to whom the authority to exercise the power conferred by section 142 was given were designated as arbitrators merely by way of convenience in expression. No such objection as that of want of finality could apply to their decision. When the award of 1870 was before the Judicial Committee in 1878, on a reference from

the Crown upon an application made through the Secretary of State, the Lord Chancellor says:

> These gentlemen were executing a parliamentary power. It is not as if it was a private arbitration under a private instrument. Either this was within their power or it was not. If it was not within their parliamentary power it goes for nothing. * * * * * * There is a certain thing to be done under a certain Act of Parliament by particular individuals named. If they do anything more than they are authorized to do it cannot have any possible effect.

The learned Chief Justice founds his opinion that the award of 1870 was *ultra vires* as regards the deduction of the Upper Canada Improvement Fund upon the ground that the arbitrators did not pursue their statutory authority which according to the 142nd section was to "divide" and "adjust," when they directed the principal of the Common School Fund to be retained in the hands of the Dominion who were to pay over the income only to the provinces and that this not being authorized the direction that Ontario should be entitled to the Lands Improvement Fund was *ultra vires*. Now in the first place it is to be remarked that the arbitrators under the present reference have not to make any disposition of the Common School Fund or to inquire if any proper disposition of it has already been made. Their functions are limited to the ascertainment of its amount. I have already shewn that both the Common School Fund and the Improvement Fund were assets of the old Province of Canada when that province ceased to exist upon Confederation; that they were not conclusively disposed of by the Act itself; and that consequently their disposition fell within the 142nd section which provided a parliamentary mode of dealing with such assets. For the present purpose it would seem to be sufficient to say that even if there was no ultimate "division and adjustment" such as the statute requires, yet so far as the ascertainment of the amounts of the two funds

1898

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

The Chief Justice.

went, and the allotment of the whole of the Improvement Fund in the only way in which it could reasonably be disposed of, namely, to Ontario, the arbitrators of 1870 were clearly within their powers. Such an ascertainment was a necessary preliminary to any "division and adjustment" under the statute. Therefore without going further it seems to me that the whole argument of *ultra vires* fails.

I do however go further, for it appears to me impossible to hold that the disposition they made of the fund was not covered by the direction "to divide and adjust."

There existed in 1870 difficulties in the way of an absolute division of the Common School Fund which made a division of the capital at that time almost impossible. The lands had not all been sold. The amount of the fund depended on future collections of the purchase money derived from sales already made within the dates before given of the statute and the Order-in-Council. The arbitrators or commissioners then did not see their way to dividing the capital, the amount of which, however, so far as it was then realized they ascertained and fixed, and they directed the fund to be vested in the Crown in the right of the Dominion in trust for the Provinces to which the interest was to be paid. I cannot agree that this was not within their powers. It was a division of the beneficial interest in the fund, and a fair adjustment of the rights of the Provinces in this fund which by the statute creating it was declared to be a perpetual fund the capital of which was to remain intact in perpetuity and the income of which alone was given to the Province of Canada. The arbitrators may therefore well have considered, as they appear to have done, that the asset they were dealing with which belonged to the Provinces jointly was only the income which they ap-

portioned placing the capital itself *in medio* in the hands of the Dominion, which might perhaps, but did not, object to be burthened with its management. This mode of proceeding certainly seems to have been consistent with the terms of the Act 12 Vict. ch. 200. If this is so the argument of *ultra vires* entirely fails.

The learned Chancellor based his dissent from the award on a totally different ground. In his opinion the fund realized from the sale of these lands, and the monies to arise from sales theretofore made, but in respect of which the purchase monies had not been paid, as well as the unsold lands remaining at the date of Confederation, all reverted on that event happening to the Province of Ontario.

This view proceeds upon the theory that the original trust of the one million acres of part of the domain of the Province of Canada was one for Common Schools of Canada which ceased to exist at Confederation; and the trust failing the unsold lands reverted under section 109 of the British North America Act as public lands, not subject to any trust, to the new province within whose limits they were situated. Further, that the monies constituting the Common School Fund also so re-vested in the same province as having been derived from lands locally situated in that division of the old province.

I am unable to agree in this conclusion. I do not think that the trust necessarily failed on division of the old province by the British North America Act. I see no reason why the Common School Fund and the unsold lands should not have continued to be impressed with a trust in favour of the Common Schools of the new Provinces of Ontario and Quebec. Had it been supposed that any difficulty could have arisen on this head no doubt some provision would have been

1898

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

The Chief Justice.

made for the case. But even supposing that the original beneficiaries ceased to exist, the funds and lands were still assets belonging to Ontario and Quebec. The lands were impressed with a trust in the loose general sense in which that word is used in section 109, and the money of which the fund consisted also was bound by a trust which prevented it from vesting in the Dominion as "stock, cash, bankers' balances or securities for money" under section 107. The word "trust" as used in section 109 is not to be interpreted literally and technically. This is apparent from the consideration that it relates to lands which were as regards the legal estate vested in the Crown which cannot strictly speaking be bound by a trust. It must therefore receive a secondary and more general interpretation which authorizes us in applying it to lands held and set apart for some special purpose. If this is so then both lands and funds were assets to be dealt with by the arbitrators under section 142. I have already given the reasons for the conclusion that the arbitrators of 1870 were not without jurisdiction in making the disposition of both the funds here in question—the Common School Fund and the Upper Canada Improvement Fund—as well as of the lands. I need not therefore repeat them. The arbitrators were sovereign judges of all questions of law and fact in all matters within the scope of the authority given them by the statute, and I think they have well exercised their powers in dividing the income as they have done. In other words it appears to me that their award was final. If they were within their powers the mode in which they have exercised them cannot now be questioned. No right of appeal from them is conferred on any court of judicature. The proceeding in the Privy Council of 1878 was not an appeal but a reference by the Crown sought by the

Provinces and the Dominion principally to ascertain if the award had been properly executed by two out of the three arbitrators, and if one of the arbitrators was properly qualified to act.

It has remained unimpeached as regards the question now raised for nearly twenty-eight years, and during that time has been acted upon, and it could not now be set aside without deranging the whole scheme upon which it proceeded and thereby doing great injustice to one or other of the Provinces.

The arbitrators finding these assets which they had to deal with to be the joint property of the two new Provinces treated them impliedly as impressed with a trust which as the final judges of both law and fact it was within their power to do, and they executed this trust by directing the division of the income between the beneficiaries in accordance with the intention indicated in the Act of the Legislature which originated the fund. But even if they did not go so far as they might and ought to have done by dividing the capital itself, and apportioning the unsold lands, I am unable to see that their proceedings were wholly void or that their award can be impeached like a private award for want of finality.

But so far as the present reference is concerned all we are concerned with is the ascertainment of the amount of the fund and as regards this purpose it is immaterial whether the arbitrators properly executed their power to divide and adjust or not. The very object of this reference may be to establish a basis for further legislation, and I do not think that any object of this kind should be frustrated by holding that although there is in fact a Common School Fund the amount of which it is desirable to ascertain, yet as such a fund does not exist *de jure*, the arbitrators should

1898

THE PROVINCE OF ONTARIO AND THE PROVINCE OF QUEBEC v. THE DOMINION OF CANADA.

*In re* COMMON SCHOOL FUND AND LANDS.

The Chief Justice.

decline to exercise the jurisdiction conferred upon them.

The learned Chancellor, if there is such an existing fund as a Common School Fund, does not object in that case, in which the majority is against him, to the deduction from it of the amount of the Improvement Fund as it has been found in the award of 1870 and in the accounts rendered by the Dominion, but in this view of the case he agrees with Mr. Justice Burbidge.

The "new aspect" as it was termed before the arbitrators by which Quebec sought to have the fund augmented beyond the one million acres to an amount sufficient to produce an income of £100,000 per annum, is conclusively shown to be an erroneous view in the opinion of Chief Justice Casault, and it has not been raised in this appeal and is not before us. A question relating to an investment in some Quebec Turnpike Trust Debentures is also not before us, inasmuch as the arbitrators do not state that their finding in that respect proceeded on a disputed question of law.

On the whole we are all of opinion that the award so far as it is controverted by these appeals is correct and ought to be confirmed. The appeals of both the Provinces are therefore dismissed.

# INDEX.